

THE CIRCUIT COURT OF SOUTH CAROLINA
FIFTH JUDICIAL CIRCUIT
1701 Main Street, Richland County Judicial Center
Columbia, South Carolina 29201

L. Casey Manning
Resident Judge
(803) 576-1773
(803) 576-1744 Fax

Reply to :
P.O. Box 192
Columbia, S.C. 29202



July 28, 2014

RECEIVED

JUL 29 2014

S.C. SUPREME COURT

Debbie Hopkins
S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Sammie Stokes v. State, Appellate Case No. 2013-000635

Dear Ms. Hopkins:

Judge Manning asked that I forward to you the enclosed documents (Order, Applicant's Exhibit 2, and Applicant's Exhibit 3) that should conclude the remand in this case. The original documents are being filed with the Orangeburg Clerk of Court's Office.

Please let me know if you need anything further from this office.

Sincerely,

A handwritten signature in cursive script, reading "Eve S. Goodstein".

Eve S. Goodstein
Law Clerk to the Honorable L. Casey Manning

Enclosures



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

JUL 29 2014

July 16, 2014

VIA HAND DELIVERY

Honorable L. Casey Manning
1701 Main Street, Room 214
Columbia, SC 29202

S.C. SUPREME COURT

Re: Sammie Stokes v. State, Appellate Case No. 2013-000635

Dear Judge Manning:

Your law clerk requested that I draft a proposed order for you concluding this remand since it has now been stipulated that copies of the two original exhibits (Applicant's exhibits 2 & 3) that were lost by the Clerk of Court's Office in this case are complete and accurate copies.

Enclosed is the proposed order for your review and consideration. Please let me know what, if any, changes you deem necessary and they will be made immediately.

Thank you for your assistance, and I look forward to hearing from you soon with regard to the proposed order.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf

cc: Donald J. Zelenka, Esquire (w/enclosure)

Enclosure

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ORANGEBURG	)	
	)	
SAMMIE LOUIS STOKES,	)	CIVIL ACTION NO. 01-CP-38-1240
	)	APPELLATE CASE NO. 2013-000635
Applicant,	)	
	)	
v.	)	ORDER
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

This matter came before me by an Order of the Supreme Court dated March 9, 2014 remanding this capital post-conviction case to reconstruct the record. See China v. Parrott, 251 S.C. 329, 333-334, 162 S.E.2d 276, 278 (1968). Specifically, this Court was asked to reconstruct the contents of two post-conviction exhibits introduced by the applicant during the August 5, 2009 hearing before this Court that were apparently later lost by the Clerk of Court's Office in Orangeburg County. The missing exhibits are Applicant's Exhibits 2 and 3. The parties agreed these two exhibits were trial counsel Thomas Sims' pre-trial research documents.

1. Petitioner, Sammy Louis Stokes, was indicted by the Orangeburg County Grand Jury on May 17, 1999 for the offenses of murder, kidnapping, first degree sexual conduct and criminal conspiracy in the death of Connie Lee Snipes. The state sought the death penalty. Petitioner was represented by Thomas Sims and Virgin Johnson.

2. A jury trial was held between October 25, 1999 and October 31, 1999 before the Honorable Paul M. Burch. Petitioner Stokes was found guilty on all counts. Following the sentencing phase, the jury sentenced petitioner to death, and Judge Burch imposed that sentence.

Judge Burch also sentenced Petitioner to thirty years imprisonment for criminal sexual conduct in the first degree and five years for conspiracy.

3. Petitioner's convictions and death sentence were affirmed in State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001). Rehearing was denied on July 2, 2001.

4. Petitioner filed an initial application for post-conviction relief on October 17, 2001. Court-appointed counsel Keir Weyble and Robert Lominack later filed an amended application. After post-conviction relief hearings, this Court ultimately denied the application for post-conviction relief, and denied petitioner's Rule 59 (e), SCRCP motion. A timely notice of intent was filed.

5. Appellate counsel Robert M. Dudek discovered that several documents that were filed by petitioner's PCR attorneys with the Office of the Clerk of Court for Orangeburg County before and during the post-conviction relief hearings could not be located by that office. Counsel Dudek moved the Supreme Court for a transportation order mandating that those missing exhibits be located by the Clerk of Court and transported to the Supreme Court. In the alternative, counsel requested that the Supreme Court remand this case to this Court for reconstruction of the missing documents. The Supreme Court issued an order granting a remand for a reconstruction hearing limited to reconstructing the contents of Applicant's PCR exhibits 2 & 3 (the pre-trial research documents of trial counsel Sims). The Court ruled that the remainder of the documents that petitioner's attorneys filed and that were lost by the Clerk of Court's Office were in the possession of the Attorney General's Office, and would be sufficient for purposes of the appeal.

6. The trial level PCR attorneys involved in this case, Keir Weyble and Robert Lominack for Petitioner Stokes and Donald J. Zelenka for the Office of the Attorney General,

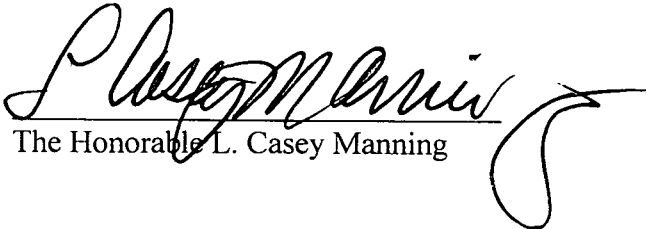
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have entered into a Stipulation agreeing that the documents scanned by PCR counsel Lominack, prior to the post-conviction relief hearing, to the best of their memory, are the same documents introduced during the post-conviction relief hearing as Applicant's Exhibits 2 and 3 (the research documents of Thomas Sims). That Stipulation is attached as Exhibit A to this Order.

7. Copies of the documents stipulated to by the parties are attached to this order as Exhibit B. This Court accepts the Stipulation of the attorneys for petitioner and the attorney for the state to resolve this matter pursuant to the March 19, 2014 Order of the South Carolina Supreme Court.

WHEREFORE, this Court accepts the Stipulation of PCR Counsel, Keir Weyble and Robert Lominack for petitioner, and Donald J. Zelenka, of the Attorney General's Office for the state, and adopts it as the order of this Court satisfying the remand order of the Supreme Court.

IT IS SO ORDERED.


The Honorable L. Casey Manning

Columbia, South Carolina

July 18, 2014

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EXHIBIT A



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Post Office Box 11589
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

July 2, 2014

Honorable L. Casey Manning
1701 Main Street, Room 214
Columbia, SC 29202

Re: Sammie Stokes v. State, Appellate Case No. 2013-000635

Dear Judge Manning:

Enclosed is the signed stipulation we discussed concluding the Supreme Court remand for a reconstruction hearing in the above-captioned case. Please advise if you want me to write a proposed order for you concluding this remand with the enclosed stipulation.

Thank you for your assistance, and I look forward to hearing from you soon with regard to the proposed order.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf

cc: Donald J. Zelenka, Esquire

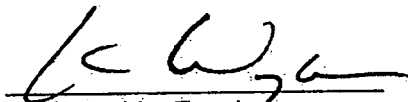
Enclosure

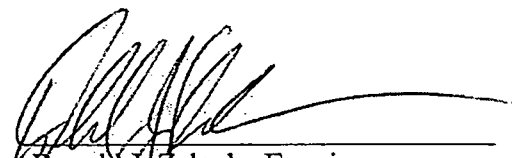
STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
)
SAMMIE STOKES,)
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Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA)
)
Respondent.)
_____)

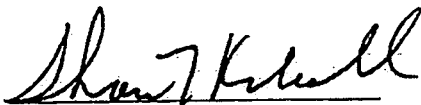
IN THE COURT OF GENERAL SESSIONS
C/A NO. 01-CP-38-1240

STIPULATION

It is stipulated by each of the attorneys signed below, that to the best of memory of each of them, the attached scanned document they have reviewed, and which is being introduced as Defendant's Exhibit 1 at the reconstruction hearing ordered by the South Carolina Supreme Court, constitutes a full and complete copy of Applicant's Exhibits 2 and 3 (the research notebooks of Thomas Sims) that were introduced by the Applicant during the August 5, 2009 post-conviction hearing.


Keir Weyble, Esquire


Donald J. Zelenka Esquire


Witness for Mr. Weyble

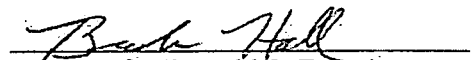

Witness for Donald J. Zelenka

EXHIBIT B

STATE VS SAMMIE STOKES

RESEARCH

Vol. I

STATE v. WARREN, 330 S.C. 584 (Ct.App. 1998)
500 S.E.2d 128

The State, Respondent, v. James Barney Warren, Appellant.

Opinion No. 2827

Court of Appeals

Heard September 10, 1997.

Decided April 13, 1998.

Rehearing Denied May 21, 1998.

*Review Bad Acts
Case*

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Appeal from Dorchester County, Luke N. Brown, Jr., Special Circuit Court Judge.

Affirmed in part, reversed in part, and remanded.
Page 586

[EDITORS' NOTE: THIS PAGE CONTAINED HEADNOTES AND HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
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Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, Columbia; and Francis X. McCann, Charleston, for appellant.

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General G. Robert DeLoach, III, Columbia; and Solicitor Walter M. Bailey, Jr., Summerville, for respondent.
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CONNOR, Judge:

James Barney Warren appeals his conviction for second-degree criminal sexual conduct with a minor. We affirm in part, reverse in part, and remand.

FACTS

In January 1994, fourteen-year-old Christy Chenault lived with her aunt and uncle, Mary and Raymond Garrison. Christy had been placed in relative custody foster care pursuant to a family court restraining order, which prohibited unsupervised contact between Christy and her mother and stepfather. The restraining order was put in effect after Christy's older sister, Brandy Nettles, alleged Warren had sexually abused her. [fn1] Warren is Christy and Brandy's stepfather. Warren and Christy's mother, Cheryl Warren, lived down the street from the Garrisons.

On January 15, 1994, Christy called her parents to ask for permission to attend a friend's birthday party. Christy and several other witnesses who attended the party testified Christy's mother, stepfather, and stepbrother picked her up at the Garrisons' house and drove her to the party.

Christy testified Warren called her friend's house around 9:00 p.m. and told her he was coming to pick her up. Christy and several other witnesses who attended the party testified Warren arrived alone at the house around 9:30 or 10:00 p.m. Warren then drove Christy to the house where he and Christy's mother were living.

Christy said Warren started touching her that night while they were watching television. Warren then told her to stand up and undress in front of him. After Warren undressed, he had oral sex and sexual intercourse with her.

On May 10, 1994, Christy told her friend Christian Beasley about what had happened with Warren. The same day,
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Christy called her aunt in Pennsylvania and then called Brandy. Christy's aunt called Marilyn Lassiter, a guardian ad litem, who instructed her to contact Christy's school guidance counselor and the police. Christy then spoke with Donna Hernandez, her guidance counselor, and told her what had happened with Warren. Hernandez reported the incident to the Dorchester County Department of Social Services (D.S.S.).

Christy was placed in foster care and eventually went to live with her aunt in Pennsylvania. She lived there until January 13, 1995, when she returned to South Carolina. Christy testified that while she was living in Pennsylvania, Warren called her and told her he still loved her and would not do it again.

In the early part of January 1995, while she was still living in Pennsylvania, Christy sent letters to D.S.S., the foster care review board, and family court Judge Watson. In each of these letters, Christy recanted her allegations of sexual abuse. Christy testified her parents told her where to send the letters. When Christy returned to South Carolina, she called Raymond Garrison. In the telephone conversation, which was taped by Garrison, Christy stated the allegations against Warren were false.

Zan Dickerson, an investigator with D.S.S., verified Christy had recanted her allegations of sexual abuse. Christy returned to her original allegations on May 18, 1995, just prior to attending a family court hearing. Christy stated she changed her story because she wanted to return home to be with her mother.

Warren testified he gave Christy permission to attend the party. However, Christy told him she would find a ride. He denied taking Christy to the party or picking her up. He claimed he spent the whole day and night of January 15, 1994, repairing a clothes dryer at home. He stated his wife left for work around 7:15 or 7:30 p.m. in her charcoal gray Honda Accord.[fn2] He denied ever sexually molesting Christy or his other stepdaughter, Brandy.
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Christy's mother stated she arrived at work on January 15, 1994, at 7:38 p.m. in her Honda Accord. She denied telling Christy to write the letters in which Christy recanted her allegations of sexual abuse. Although Christy asked her to tell D.S.S. the allegations were false, she refused to do so. Instead, she told Christy she would have to contact D.S.S. on her own. Christy's mother claimed her mother's husband had actually molested Christy and Brandy.

Brandy testified she had made false allegations that Warren had raped her. She did this because she wanted the freedom to do what other teenagers were allowed to do. In a signed statement to the solicitor's office, dated June 23, 1994, Brandy stated she wanted to dismiss the charges she had made against Warren.

On June 6, 1994, D.S.S. filed a rule to show cause against the Warrens and the Garrisons for failure to comply with the family court order in effect. As to Warren, D.S.S. alleged he failed to comply with the order by sexually abusing Christy on January 15, 1994.

After a hearing, the family court judge found Warren in contempt. He sentenced Warren to one year imprisonment and ordered him to pay a fine of \$1,500.

South Carolina Case Law

Subsequently, Warren was tried and convicted of second-degree criminal sexual conduct with a minor, based on the January 15, 1994 incident involving Christy.

DISCUSSION

I. Double Jeopardy

Warren argues his trial and conviction for second-degree criminal sexual conduct with a minor constituted double jeopardy. He contends he had already been punished for the same offense in family court when he was found in contempt.

At the conclusion of the family court contempt hearing, the judge orally ruled D.S.S. had proven by the preponderance of the evidence that Christy had been sexually abused by Warren. The judge separately addressed the issue of contempt. On this issue, the judge orally ruled as follows:
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We do have the issue of contempt of court against Mr. Warren and against Mrs. Warren. Both of whom have been ruled into court for contempt for failing to comply with prior Restraining Orders that would not allow Mr. Warren to have unsupervised contact with this young lady. . . .

I do find the burden of proof in a rule to show [cause] for violating the Restraining Order requires proof beyond a reasonable doubt because it is a criminal action. I do find that certainly the Department of Social Services has met the burden of proof and that certainly there is no reasonable doubt, and I find that Mr. Warren did violate that Restraining Order, that he and Mrs. Warren did go to the birthday party of Amanda with Christy and let her off. The Garrisons weren't present to supervise this contact, and that in of itself would have been pretty innocent type behavior.

However, Mr. Warren came back to the, birthday party, alone, not accompanied by Mrs. Warren or the Garrisons, and picked Christy up and took Christy back to the home and sexually abused Christy. He certainly violated the Restraining Order. . . . The purpose of the initial Restraining Order against Mr. Warren was to protect the children, Christy and Brandy from any further abuse or abusive conduct by Mr. Warren. That was the whole reason for the Restraining Order for Mr. Warren not to have any unsupervised contact with this young lady here. He violated it, as a result, the young lady was sexually abused. . . .

By written order dated June 9, 1995, the judge made the following findings of fact:

2. That the Plaintiff Agency met its burden of proof by more than a preponderance of the evidence that Defendant, James Warren, sexually abused the minor child, Kimberly Christy Chenault, ...

4. That the Plaintiff Agency has met its burden of proof beyond a reasonable doubt the Defendant, James Warren, violated this Court's prior restraining order which prohibited him from having any contact

with the minor child, Kimberly Christy Chenault, unless under supervision of Raymond Garrison.

5. That the purpose of this Court's prior restraining order was to protect the minor child, Kimberly Christy Chenault,

Page 592

from possible sexual abuse, and the Defendant, James Warren's conduct in sexually abusing the minor child was in direct violation of this order.

6. That the Defendant, James Warren, is found to be in contempt of this court's order and should be confined to public works of Dorchester County or placed in other appropriate correctional facility for one (1) year and, upon release shall pay a fine of one thousand five hundred dollars (\$1,500.00).

At trial, Warren moved to quash the indictment for criminal sexual conduct with a minor based on double jeopardy. Warren alleged he had already been punished and held in contempt of family court on the same charge. The trial judge denied the motion, finding the order was ambiguous. He noted the family court did not punish Warren for having sexual relations with Christy, but for violating the restraining order.

The Double Jeopardy Clause provides that "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb" U.S. CONST. amend. V. The Fifth Amendment protects against a second prosecution for the same offense after conviction or acquittal, and against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

In *Blockburger v. United States*, 284 U.S. 299, 304 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), the United States Supreme Court stated:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

In *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the United States Supreme Court expanded the *Blockburger* analysis, holding even if two successive prosecutions were not barred by the Blockburger test, "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been

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prosecuted." *Id.* at 510, 110 S.Ct. at 2087. In *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 128 L.Ed.2d 556 (1993), the Supreme Court overruled the *Grady* same-conduct test, and returned to the original *Blockburger* test.

Recently, our Supreme Court addressed the impact of the United States Supreme Court's decision in *Dixon* on double jeopardy analysis under Article I, § 12 of the South Carolina Constitution. [fn3] *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997). The Court concluded *Blockburger* is the only remaining test for determining a double jeopardy violation in both multiple punishment and successive prosecution cases. *Id.* at 132, 489 S.E.2d at 623.

Turning to the instant case, we are guided by a factually similar case, *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). In *Dixon*, the United States Supreme Court considered the consolidated appeals of Alvin Dixon and Michael Foster. Dixon was arrested for second-degree murder and was released on bond. Pursuant to Dixon's release form, he was not to commit "any criminal offense" and any violation of the conditions of release would subject him "to revocation of release, an order of detention, and prosecution for contempt of court." While awaiting trial, Dixon was arrested and indicted for possession of cocaine with intent to distribute. Following a rule to show cause hearing, the court found the Government had established beyond a reasonable doubt that Dixon was in possession of drugs with intent to distribute. The court found Dixon guilty of criminal contempt and sentenced him to 180 days in jail. At trial, Dixon moved to dismiss the cocaine indictment on the grounds of double jeopardy. The trial court granted the motion.

In *Foster v. U.S.*, 598 A.2d 724 (1991), after allegedly attacking his estranged wife, a civil protection order (CPO) was put into effect, which required that Foster not "molest, assault, or in any manner threaten or physically abuse" his wife. A hearing was held after Foster's wife filed several motions to have Foster held in contempt for numerous violations of the CPO. The court found Foster guilty beyond a reasonable doubt of four counts of criminal contempt and

Page 594

acquitted him on other counts. Foster was sentenced to 600 days imprisonment. Subsequently, Foster was indicted for simple assault, threatening to injure another, and assault with intent to kill. The charges were based on the events for which Foster had been held in contempt. Foster filed a motion to dismiss on the grounds of double jeopardy and collateral estoppel. The trial court denied the double jeopardy claim and did not rule on the collateral estoppel claim.

The District of Columbia Court of Appeals consolidated the two cases and held both subsequent prosecutions were barred by the Double Jeopardy Clause.

On appeal, the United States Supreme Court considered whether the Double Jeopardy Clause barred prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously had been held in criminal contempt of court. *Dixon*, 509 U.S. at 694, 113 S.Ct. at 2854-55.

As a threshold matter, the Court held the protection of the Double Jeopardy Clause applies to nonsummary criminal contempt prosecutions as it does in other criminal prosecutions. *Id.* at 696, 113 S.Ct. at 2855-56. Justice Scalia, writing for the Court in a 5-4 decision, went on to overrule the *Grady* same-conduct test. *Id.* at 704, 113 S.Ct. at 2860. Ultimately, the Court found Dixon's subsequent prosecution violated the Double Jeopardy Clause because Dixon's drug offense did not include any element not contained in his previous contempt offense. *Id.* at 700, 113 S.Ct. at 2858. For the same reason, the Court also found the indictment against Foster charging him with assault based on the same event that was the subject of the prior contempt conviction was barred by the Double Jeopardy Clause. *Id.* The Court found the remaining counts against Foster, assault with intent to kill and threats to injure or kidnap, were not barred under *Blockburger* because the crimes were different offenses. *Id.* at 700-03, 113 S.Ct. at 2858-60.

Because of the factual similarity with the instant case, the *Dixon* opinion appears to be controlling and directly on point.

However, when one looks carefully at the individual Justices' opinions, the decision becomes less clear.
Page 595

Justice Scalia was joined by Justice Kennedy in overruling Grady and in finding Dixon's subsequent drug conviction and Foster's subsequent assault conviction were barred by Double Jeopardy. These two votes combined with the votes of Justices White, Stevens, and Souter, who were against overruling Grady, and, as a result concluded the subsequent prosecutions of Dixon and Foster were impermissible as to all counts, formed the majority opinion reversing the two convictions. Foster's remaining prosecutions were not barred because Justice Scalia's and Kennedy's votes were combined with the votes of Chief Justice Rehnquist, and Justices O'Connor and Thomas, who agreed to overrule Grady, but concluded none of the prosecutions were barred under a traditional application of *Blockburger*. Justice Blackmun joined this majority. However, Blackmun was against overruling Grady and would not apply the Double Jeopardy Clause to any contempt proceeding.

In light of these factions, *Dixon* has been analyzed as follows:

The net effect of *Dixon* is that Grady has been overruled, leaving *Blockburger* as the sole test of same offense for successive prosecutions, as well as for multiple punishments in a single prosecution. How *Blockburger's* same-elements test is to be applied in successive prosecution cases, however, appears to be far from settled. To what extent must the facts and elements of the crime charged in the earlier prosecutions be considered? Grady's same-conduct test had afforded some guidance here; the split opinions in *Dixon* do not.

William Shepard McAninch, *Double Jeopardy: The Basics for Practitioners* (pt. 1), 2 Crim.Prac.L.Rep. 113, 120 (Apr. 1994). Because of the split decision, it is necessary to carefully examine the reasoning of the Justices who agreed to overrule Grady.

Justice Scalia, joined by Justice Kennedy, framed the initial issue to be addressed as "whether *Blockburger* analysis permits subsequent prosecution in this new criminal contempt context, where judicial order has prohibited criminal act." *Dixon*, 509 U.S. at 697, 113 S.Ct. at 2856. In *Dixon's* case, Scalia pointed out that the general contempt statute by itself
Page 596

did not involve a specific criminal offense. *Id.* Scalia noted that Dixon could not commit an offense under the contempt statute until Dixon's release order was issued. *Id.* at 697-98, 113 S.Ct. at 2856-57. As a condition of this order, Dixon was not to commit "any criminal offense." As such, Scalia reasoned that because the order incorporated the entire criminal code, the "crime" of violating a condition of release could not be abstracted from the "element" of the violated condition. *Id.* at 698, 113 S.Ct. at 2857. Scalia found the underlying substantive criminal offense was "a species of lesser-included offense." *Id.* Thus, he concluded Dixon's drug prosecution violated the Double Jeopardy Clause because the offense did not include any element not contained in his previous contempt offense. *Id.* at 700, 113 S.Ct. at 2858.

Scalia applied the same analysis to Foster's case. Scalia found the simple assault charge was barred because the CPO, which ordered Foster not to "molest, assault, or in any manner threaten or physically abuse" his wife, expressly incorporated the

statutory assault offense. *Id.* at 700, 113 S.Ct. at 2858. Therefore, Foster's assault offense did not include any element not contained in his contempt offense. *Id.* As to Foster's remaining charges, Scalia determined there was no double jeopardy violation for the assault with intent to kill prosecution because it required proof of a specific intent to kill, while the contempt offense required proof of knowledge of the CPO. *Id.* at 700-01, 113 S.Ct. at 2858-59. Similarly, Scalia found Foster's three counts for violation of a statute forbidding anyone to threaten to kidnap any person or to physically damage their property were not barred because the offense contained a separate element than the contempt offense. *Id.* at 702-03, 113 S.Ct. at 2858-60. Specifically, Scalia reasoned a conviction of the contempt offense required a willful violation of the CPO, whereas the statutory offense did not. *Id.* at 702, 113 S.Ct. at 2859. Moreover, he noted the statutory crime required a specific threat, while the CPO prohibited threatening 'in any manner.' *Id.* Therefore, each offense contained a separate element, and the *Blockburger* test for double jeopardy was not met. *Id.* at 703, 113 S.Ct. at 2859-60.

Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, who had joined with Scalia and Kennedy to overrule
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Grady, found that none of the criminal prosecutions were barred under *Blockburger*. *Id.* at 713, 113 S.Ct. at 2865. In reaching this decision, Rehnquist disagreed with Scalia's application of *Blockburger*. *Id.* at 714, 113 S.Ct. at 2865-66. Rehnquist stated '*Blockburger*'s same-elements test requires us to focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense.' *Id.* Rehnquist further stated, "Our double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue - an indictment being the closest analogue to the court orders in this case." *Id.* at 716-17, 113 S.Ct. at 2866. Applying a traditional *Blockburger* analysis, Rehnquist concluded, "Because the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under *Blockburger*." *Id.* at 714, 113 S.Ct. at 2865.

In reaching his decision, Rehnquist criticized, Scalia's analysis in several respects. Primarily, Rehnquist asserted Scalia's decision "rejects the traditional view - shared by every Federal Court of Appeals and State Supreme Court that addressed the issue prior to *Grady* - that, as a general matter, double jeopardy does not bar a subsequent prosecution based on conduct for which a defendant has been held in criminal contempt." *Id.* at 714, 113 S.Ct. at 2865. He also disagreed with Scalia's lesser included offense analysis. He found none of Dixon's and Foster's crimes were barred because they could not be viewed as greater and lesser included offenses, but rather as separate and distinct offenses for double jeopardy purposes.[fn4] *Id.* at 719, 113 S.Ct. at 2868. Additionally, he stated:
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By focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of the crime of contempt of court, Justice Scalia's double-jeopardy analysis bears a striking resemblance to that found in *Grady* - not what one would expect in an opinion that overrules *Grady*.

Id. at 717, 113 S.Ct. at 2867.

A review of post-Dixon decisions in this state reveals Rehnquist's analysis is consistent with our Supreme Court's application of *Blockburger*. See, e.g., *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997) (defendant's convictions for felony DUI causing death and reckless homicide arising from same vehicular accident were not barred by double jeopardy because the two offenses do not meet *Blockburger*'s same-elements test; defendant's convictions for felony DUI causing great bodily injury and ABHAN arising from same vehicular accident did not violate double jeopardy under *Blockburger* analysis given elements of offenses were separate and distinct).

This Court has also consistently applied a traditional *Blockburger* test in that we have strictly compared the elements of the challenged offenses. See, e.g., *State v. Moyd*, 321 S.C. 256, 468 S.E.2d 7 (Ct.App. 1996) (prosecution for driving under suspension and driving while under a declaration that defendant was an habitual traffic offender did not violate double jeopardy because the two offenses do not have identical statutory elements, and one is not a lesser included offense of the other); *id.* (*Dixon* represents a narrowing of double jeopardy analysis, and returns the inquiry to the *Blockburger* test as the lone test for determining whether a prosecution violates the Double Jeopardy Clause); *State v. Lewis*, 321 S.C. 146, 467 S.E.2d 265 (Ct.App. 1996) (double jeopardy did not bar subsequent prosecution of defendant who was convicted in municipal court for failure to stop on police command based on same conduct which gave rise to charge of assault while resisting arrest because the two offenses do not have identical statutory elements, and neither is a lesser included offense of the other).
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Applying the traditional *Blockburger* test, as explained by Justice Rehnquist, it is clear the elements of the contempt offense are different from the elements of the charge of second-degree criminal sexual conduct with a minor. Contempt results from the willful disobedience of a court order. *Brasington v. Shannon*, 288 S.C. 183, 341 S.E.2d 130 (1986). In comparison, the elements of second-degree criminal sexual conduct with a minor are as follows: (1) the actor engages in sexual battery, (2) with a victim who is at least fourteen years of age, but who is less than sixteen years of age, and (3) the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. S.C. Code Ann. § 16-3-655(3) (1985). Clearly, the offenses are separate and distinct, and prosecution for both does not violate the Double Jeopardy Clause.

Even applying Scalia's analysis, Warren's subsequent prosecution would not be barred. Unlike Dixon's release order and Foster's CPO, the restraining order in this case did not expressly incorporate a specific criminal offense. Instead, the order merely prohibited "unsupervised contact" between Warren and Christy. A finding of contempt, therefore, only required a willful violation of the restraining order through Warren's unsupervised contact with Christy. Although the family court described the contact in finding that "James Warren's conduct in sexually abusing the minor child was in direct violation of [the] order," the judge need not have made this additional finding. This finding, however, did not prohibit Warren's subsequent prosecution. Clearly, each offense contained a separate element, in that the contempt conviction required general "unsupervised contact," which prohibited sexual abuse, as well as any other contact. On the other hand, a conviction for second-degree criminal sexual conduct with a minor was more specific than the contempt conviction in that it is expressly limited to a sexual battery.

indictment must be raised before the jury is sworn. S.C. Code Ann. § 17-19-90 (1985); *State v. Lewis*, 321 S.C. 146, 149 n.1, 467 S.E.2d 265, 267 n.1 (Ct.App. 1996). However, issues related to subject matter jurisdiction may be raised at any time. *Browning v. State*, 320 S.C. 366, 465 S.E.2d 358 (1995).

An indictment is sufficient if it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he or she must be prepared to meet. *Browning*, 320 S.C. at 368, 465 S.E.2d at 359. Amendments to an indictment are permissible if: 1) they do not change the nature of the offense; 2) the charge is a lesser included offense of the crime charged on the indictment; or 3) the defendant waives presentment to the grand jury and pleads guilty. *State v. Myers*, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993).

S.C. Code Ann. § 16-3-655 (3) (1985) provides:

A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

The amendments to the indictment changed the caption of the indictment, the name of the offense within the body of the indictment, and the age of the victim. Because the caption of the indictment is not part of the finding of the grand jury, it could be corrected and amended at any time by the court. *Wilson v. State*, 327 S.C. 45, 488 S.E.2d 322 (1997). Furthermore, the remaining amendments did not change the substantive nature of the offense. Like the original indictment, the amended indictment set forth all of the statutory elements for second-degree criminal sexual conduct with a minor. The amendment to the victim's age did not change the nature of the offense because a conviction under § 16-3-655 (3)

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requires the victim to be between the ages of fourteen and sixteen years old. Accordingly, the trial judge did not err in amending the indictment.

III. Limiting Instruction

Warren argues the trial judge erred in refusing to give a jury charge which limited the effect of the prior bad acts alleged during the trial.

During Christy's cross-examination, defense counsel asked Christy about the restraining order that prohibited contact with her parents. Christy responded her parents violated the order by taking her to her friend's party. On re-direct examination, the solicitor asked Christy why her parents were under a restraining order. Christy responded, "I guess because the sexual abuse against my sister that was alleged." The solicitor then asked Christy whether she was "the first person in [her] family to say [Warren] had sex with them when they were under age." When defense counsel objected, the trial judge discussed the objection with the attorneys out of the presence of the jury.

During this discussion, defense counsel argued the allegations of sexual abuse involving Brandy were prejudicial, particularly because the charges against Warren had been dismissed. Because the solicitor had already asked the question in front of the jury, defense counsel asked the judge to cure the error by

"[s]topping the State in regards to that line of questioning." The judge then asked defense counsel if they were planning to bring out in their case the fact the two sisters had alleged Warren sexually abused them and one of them had dropped the charges. Defense counsel responded, "Your Honor, that was not my plan to do that. This is Christy's case . . . My intention was not to bring Brandy in this case. She is here to testify; however, she's not here to testify in regards to her allegations not at all."

The judge asked Warren's counsel what he should tell the jury to cure the error. Counsel responded, "The basic thing - Oh God, they already heard it, disregard." The judge instructed the jury as follows:

Now, Mr. Foreman, members of the jury, there was some exchange of involving a sister of this defendant, of this

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young lady. That doesn't have anything to do with this case so just disregard that. I don't know anything about it, and I'm not going to try anything else even if there is anything else.

Even though the trial judge gave this curative instruction, the sexual abuse allegations involving Brandy were brought up several other times during the trial. First, during cross-examination of Dr. Elizabeth Ralston, an expert witness on child sexual abuse, defense counsel asked whether Christy had reported any sexual abuse on November 17, 1992. Dr. Ralston stated she saw Christy at the request of D.S.S. because of allegations that Warren had sexually abused Brandy.

Moreover, Donna Hernandez, Christy's school guidance counselor, testified Christy told her she was in foster care with the Garrisons because of allegations that Warren had sexually abused Brandy. Hernandez further testified Christy told her Warren had also sexually abused her.

Furthermore, on direct-examination of Marilyn Lassiter, the guardian ad litem, the solicitor asked when the restraining order was put into effect against Warren and his wife. Defense counsel objected to the question on the grounds it was not relevant to the case. The judge permitted the witness to testify concerning the restraining order. Lassiter testified the restraining order was "based on another case of allegations and a finding of sexual abuse against him."

Investigator Ivan D. Johnson, employed with the Dorchester County Sheriff's Department, testified his first contact with Warren was on October 4, 1992, when Brandy alleged Warren had sexually assaulted her. On cross-examination, defense counsel again brought up Investigator Johnson's involvement with Brandy's allegations.

Finally, on direct-examination, Robin Joseph, a counselor, testified about her counseling sessions with Christy. Joseph had been seeing Brandy because of allegations that Warren had sexually abused her. Defense counsel objected to the testimony on the ground it was not responsive to the question. The trial judge sustained the objection and instructed the jury to disregard Joseph's response.

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Defense counsel then requested the judge instruct Joseph concerning her response to the solicitor's questions. Out of the

presence of the jury, the judge instructed Joseph that "we are trying a case in which this defendant is accused of sexually molesting this child, Christy, okay." The judge informed Joseph she could testify to the findings she made by talking with those involved in the case. He cautioned her about testifying to what someone had told her.

The solicitor continued to question Joseph out of the presence of the jury. Joseph testified she had met Cheryl Warren when she was reunited with Brandy. The solicitor instructed Joseph not to talk about Brandy. The judge allowed Joseph to testify she had met Christy's mother when she was involved with Brandy's case. Defense counsel objected to this testimony on the grounds it was not responsive to the question. The judge responded he had already instructed the witness and the solicitor knew what questions were proper.

When the jury returned to the courtroom, the solicitor continued her direct-examination of Joseph. Joseph testified Cheryl Warren had not been supportive of Christy. The solicitor asked Joseph what was the basis of her opinion. Joseph responded she first met Cheryl Warren when she was counseling Brandy. Joseph stated the mother did not support Brandy during this time. She further testified after the mother was reunited with Christy, she then became supportive of Brandy. She stated Cheryl Warren had told her that she had "kicked her husband out." Defense counsel objected on the grounds the testimony constituted hearsay, was not responsive to the question, and dealt with Brandy. The judge sustained counsel's objection.

The solicitor instructed Joseph to only talk about Christy. In her next response, Joseph again referred to Brandy. Defense counsel again objected to Joseph's reference to Brandy's case. The trial judge sustained the objection. The solicitor again instructed Joseph not to refer to Brandy.

Defense counsel asked Warren whether he had sexually molested Brandy. Warren responded he had not. He denied ever telling Michelle O'Quinn, one of Brandy's friends, he had sexual intercourse with Brandy.

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On cross-examination, the solicitor questioned Christy's mother concerning Brandy's allegations against Warren. She admitted Brandy made accusations that Warren had sexually molested her.

The defense called Brandy as a witness. On direct-examination, Brandy denied Warren sexually abused her. She stated she made the allegations to have freedom from the rules placed on her. On cross-examination, the solicitor asked Brandy to read to the jury her statement to the police in which she made the allegations of sexual abuse.

Dr. Benjamin Saunders, a clinical social worker and an expert on child sexual abuse, testified for the defense. Saunders testified he met with Warren, his wife, Brandy, Christy, and Ryan when they were referred to him by D.S.S. based on Brandy's allegations of sexual abuse. Several months later, he met with Christy after she alleged Warren had sexually abused her.

In reply, the solicitor called Michelle O'Quinn. O'Quinn testified Warren told her he had been having sexual intercourse with Brandy since she was nine years old.

At the close of the evidence, Warren's counsel requested the trial judge charge the following:

The mere inference or suggestion of a prior bad act is never proof that the crime with which a defendant is charged actually happened. You must weigh all the evidence presented as it pertains to the crime for which the defendant is charged. What did or did not happen in the past, as it relates to other persons and the defendant, is not evidence as to whether the defendant is guilty of this charge. Alleged prior bad acts, as presented in this case, should not be considered as any proof that this crime was committed by the defendant.

Possible instruction on Prior Bad Act.

Defense counsel argued the charge was directed at Brandy's statement which was read to the jury, as well as the reply. He asserted the charge was applicable because the statement and reply testimony dealt with a prior bad act of the same type for which Warren had been indicted. The trial judge declined to charge the request, reasoning it was inapplicable because Warren had not been convicted of any prior bad acts.

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As part of his charge, the trial judge instructed the jury on issues of moral turpitude and evidence of Warren's good character and reputation. Defense counsel again objected to the omission of a charge concerning prior bad acts.

~~When evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit its consideration of this evidence for the particular purpose for which it is offered. State v. Steadman, 216 S.C. 579, 340 S.E.2d 168 (1950), cert. denied, 340 U.S. 850, 71 S.Ct. 78, 13 L.Ed.2d 623 (1950); see, e.g., State v. Brown, 296 S.C. 191, 341 S.E.2d 523 (1988) (trial judge's failure to give a limiting instruction was reversible error where evidence of defendant's prior convictions was offered for impeachment purposes); State v. Haley, 294 S.C. 451, 365 S.E.2d 729 (1988) (trial judge's refusal to limit defendant's submitted charge limiting use of evidence of his prior convictions solely for impeachment purposes constituted reversible error; failure to charge was especially damaging given defendant was on trial for the same offense for which he had been previously convicted); State v. Peterson, 287 S.C. 244, 345 S.E.2d 800 (1985), overruled on other grounds by, State v. Florence, 305 S.C. 45, 406 S.E.2d 315 (1991) (trial judge's failure to instruct jury that defendant's prior convictions could not be used as evidence of defendant's guilt, but solely for impeachment purpose constituted error).~~

Required that Judge instruct jury

Our Court has recognized an exception to this general rule. State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct.App. 1986). In that case, co-defendants Quarles and Nix, were tried and convicted of armed robbery, kidnapping, and first-degree criminal sexual conduct. At trial, evidence was admitted that Nix and Quarles had stolen a vehicle two hours before committing the charged crimes. Attorneys for Nix and Quarles requested the trial judge instruct the jury limiting consideration of this evidence only if the jury found a common scheme, design or plan connecting the car theft to the offenses charged. The trial judge denied the request to charge.

On appeal, ~~we found the car theft evidence was admissible because that evidence and the attendant circumstances and facts are so related to the charged crimes that they constituted evidence of a common scheme or plan between the crimes. Id. at 496, 343 S.E.2d at 629. We found no error in~~

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the trial judge's refusal to give a limiting instruction. *Id.* at 498, 343 S.E.2d at 630. We held a limiting charge is "unnecessary where evidence of the other crime is admissible on the main issue or where the evidence admitted to show motive or intent is of acts which may well be supposed to have been done in furtherance or (sic) such motive or intent." *Id.*

In a subsequent case, our Supreme Court recognized another exception to the general rule concerning limiting instructions. *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992). In that case, Johnson was tried and convicted of the murder of a state highway trooper. At trial, the State introduced evidence of another murder involving Johnson which occurred earlier the same day as the trooper's murder. On appeal, Johnson argued the trial judge erred in admitting this evidence and in failing to instruct the jury as to the limited use of the evidence of the earlier murder. The Supreme Court found the evidence established Johnson's motive and intent for murdering the trooper. *Id.* at 125, 410 S.E.2d at 551. ~~The Court held the failure to give a limiting instruction did not constitute reversible error because evidence of the murder was directly related to the commission of the trooper's murder and thus a formed part of the res gestae.~~ *Id.* at 127, 410 S.E.2d at 552.

Recently, our Supreme Court addressed the question of when a limiting instruction regarding Lyle⁵ is required. *State v. Timmons*, 327 S.C. 48, 488 S.E.2d 323 (1997). In *Timmons*, the defendant was implicated in two crime sprees, one on February 27, 1993, and another on April 9, 1993. Timmons was tried on the February 27th crimes. He admitted he had participated in the events of April 9th, but denied his involvement in the events of February 27th. The State sought to introduce evidence of the April 9th crime spree to prove common scheme or plan under Lyle. Although Timmons objected, the trial judge admitted the evidence. Timmons requested a limiting instruction regarding the bad acts admitted under Lyle.⁶ The trial judge denied the request. Page 608

~~The Supreme Court found there was insufficient similarity between the two crime sprees to prove a common scheme or plan under Lyle. Timmons, 327 S.C. at 53, 488 S.E.2d at 326. The Court went on to address Timmons's second argument in which he contended the trial judge erred in refusing to give the jury a limiting instruction regarding the Lyle evidence. The Court agreed to address this issue "because of the confusion surrounding when a limiting instruction regarding Lyle is required." Id. at 54, 488 S.E.2d at 326.~~

① The Supreme Court held it was reversible error to refuse to give a requested limiting instruction where evidence of other crimes was introduced to prove only a common scheme or plan. Id. at 55, 488 S.E.2d at 327. In reaching its decision, the Court distinguished Nix and Johnson. The Court reasoned in both Nix and Johnson the prior bad act evidence was being admitted as part of res gestae of the offense for which the defendant was charged. Id.

Only exceptio

In the instant case, like Timmons, the alleged prior bad act was admitted only to prove a common scheme or plan. Accordingly, as will more fully be discussed, the trial judge erred in failing to give a limiting instruction.

As a threshold matter, we find Warren cannot challenge the admission of the alleged prior bad act evidence on appeal because his trial counsel did not object to the admission of certain evidence. See *State v. Johnson*, 324 S.C. 38, 476 S.E.2d 681

1996) (a contemporaneous objection is required at trial to reserve an issue for appellate review); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (an issue must be raised to and ruled on by the trial judge to preserve for appellate review); *State v. Black*, 319 S.C. 515, 462 S.E.2d 311 (Ct.App. 1995) (failure to object when evidence is offered constitutes a waiver of the right to object); *State v. Hoffman*, 312 S.C. 386, 40 S.E.2d 869 (1994) (an issue which is not properly preserved cannot be raised for the first time on appeal).

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However, counsel's conduct did not preclude Warren from receiving a limiting instruction. ~~South Supreme Court has held a trial court's refusal to give a requested instruction limiting testimony concerning a defendant's prior convictions for impeachment purposes constituted reversible error even though the testimony of prior convictions was brought out by the defendant's attorney during direct examination of the defendant.~~ *State v. Smalls*, 260 S.C. 44, 194 S.E.2d 188 (1973). In *Smalls*, the Court rejected the State's argument Smalls was not entitled to a limiting instruction since Smalls first testified concerning his prior convictions. The Court reasoned:

It is readily apparent that such testimony was first elicited from appellant by his counsel solely to anticipate its later introduction by the prosecution and to thereby avoid the possible inference that appellant was trying to conceal it. There is nothing to indicate that the present testimony was introduced by appellant for any purpose other than to gain such favorable reaction as might arise from a frank disclosure of damaging testimony, which the prosecution had the right to later introduce.

Id. at 47, 194 S.E.2d at 189.

In the instant case, defense counsel was placed in a similar situation. Initially, counsel objected to the admission of allegations that Warren had sexually abused Brandy. However, once the jury heard this evidence, even though the judge gave a curative instruction, defense counsel apparently concluded as a matter of trial strategy that Warren had to introduce testimony denying the allegations. This is evident because Warren's lawyers indicated, prior to the initial curative instruction, they did not intend to have Brandy testify concerning her allegations against Warren. However, after repeated references to Brandy's case, it became necessary for defense counsel to cross-examine witnesses on these allegations and to refute the testimony by calling Brandy as a witness.

The dissent asserts the trial judge's curative instruction was sufficient to cure any prejudice. This initial curative instruction, however, was given during Christy's testimony. Christy was the State's first witness. Because the trial judge only instructed the jury to disregard what Christy

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had testified to, the instruction could not have cured the subsequent references to sexual abuse allegations involving Brandy. Moreover, the dissent's reliance on cases requiring a defendant to object to the sufficiency of a curative instruction or to move for a mistrial is misplaced. Warren was not seeking a mistrial, and this decision did not constitute a waiver of the right to receive a limiting instruction. After defense counsel's repeated objections were sustained and the tactical decision to refute the allegations was made, counsel sought to limit the jury's consideration of this testimony. Under the analysis in *Smalls*,

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there is no requirement that counsel continually object to the testimony or request a curative instruction throughout the trial in order to receive a limiting instruction during the trial judge's charge to the jury. Once the evidence was admitted, Warren was entitled to receive a limiting instruction. See *Smalls*, 260 S.C. at 46-47, 194 S.E.2d at 189 (When evidence of other crimes or offenses is admitted and the party requests a limiting instruction, the evidence should be limited and guarded carefully by instructions to the jury.).

Because the admissibility of Warren's alleged prior bad act is not challenged on appeal, we need not address that issue. It could only have been admitted under the common scheme or plan exception to *Lyle*.^[fn7] See *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989) (in prosecution of defendant for sexual abuse of a foster child, evidence of alleged sexual abuse of other foster children admissible to show common scheme or plan); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984)

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(testimony of defendant's daughters concerning defendant's prior sexual misconduct was admissible as evidence of common scheme or plan in defendant's trial for second-degree criminal sexual conduct against his youngest daughter where experiences of each daughter paralleled that of her sisters); *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct.App. 1994) (evidence of prior acts of sexual abuse involving defendant and other victims was sufficiently similar and, therefore, admissible to show common scheme or plan by defendant on trial for first-degree criminal sexual conduct with a minor).

Applying *Timmons*, it was reversible error for the trial judge to refuse to give a limiting instruction where evidence of Warren's alleged prior bad act involving Brandy was introduced to prove only a common scheme or plan.

Based on the clear directive in *Timmons*, this type of error is not subject to harmless error analysis. Cf. *State v. Bryant*, 307 S.C. 458, 415 S.E.2d 806 (1992) (trial court's failure to give a charge limiting testimony of defendant's prior criminal record solely for impeachment purposes constituted reversible error and could not be considered harmless).

Moreover, it is improbable this type of error was not prejudicial. The trial judge's failure to give a limiting instruction was especially damaging given that Warren was being tried for the same type of sexual misconduct as that alleged by Brandy. Cf. *State v. Johnson*, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991) ~~the reasoning behind [the general rule concerning limiting instructions] is to protect against a jury convicting a defendant just because he has committed other crimes, because it has been proven that he is guilty of the crime for which he is charged~~; *State v. Staley*, 294 S.C. 451, 365 S.E.2d 729 (1988) (trial judge's refusal of defendant's submitted charge limiting use of evidence of his prior convictions solely for impeachment purposes constituted reversible error; failure to charge was especially damaging given defendant was on trial for the same offense for which he had been previously convicted).

Even if Warren were entitled to a limiting instruction, the State asserts 1) Warren did not ask for an instruction limiting consideration of the prior bad acts to the *Lyle* exceptions; 2) the proposed instruction improperly commented on

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the facts; and 3) the proposed instruction was an incorrect statement of the law concerning prior bad acts. Thus, the trial judge properly refused to charge Warren's proposed instruction.

Although we agree Warren's proposed instruction was an incorrect statement of the law concerning prior bad acts, Warren's counsel informed the court during the charge conference it was not "married to [his requested] instruction, just some instruction about what happened not being evidence that this happened, what they alleged happened." In comparison, the Supreme Court in *Timmons* rejected the State's argument that *Timmons*'s issue regarding the jury instruction was not preserved because *Timmons*'s counsel had not submitted a written proposed instruction and had not distinctly stated what instruction he wanted. *Timmons*, 327 S.C. at 54, 488 S.C. at 326. The Court stated "[i]t is clear appellant wanted an instruction limiting the use of the *Lyle* evidence." *Id.* In the same respect, Warren's counsel's failure to provide a proper instruction would not have precluded him from receiving one. Therefore, the trial judge erred in refusing to give a limiting instruction.

Accordingly, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CURETON, J., concurs and GOOLSBY, J., concurs and dissents in separate opinion.

[fn1] On November 18, 1993, the family court held a hearing to review whether the children should remain in foster care. By order dated January 5, 1994, the family court judge found the children, Christy, Brandy, and Christopher Warren, should remain in foster care because of the threat of sexual abuse. Pursuant to the order, Warren and his wife were prohibited from having any unsupervised contact with Christy and Christopher, and any contact with Brandy.

[fn2] Several witnesses testified Warren dropped Christy off and picked her up in a dark colored compact car.

[fn3] S.C. Const. art. I, § 12 provides in part, "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty. . . ."

[fn4] Specifically, Rehnquist disagreed with Scalia's reliance on *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), a case in which the Court held a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony-murder based on the same underlying felony. Rehnquist believed *Harris* was distinguishable in that the felony-murder statute in *Harris* did not require proof of armed robbery, but did incorporate the statutory elements of various felonies upon which a felony-murder conviction could rest. *Dixon*, 509 U.S. at 717, 113 S.Ct. at 2867. In contrast, Rehnquist found, "[t]he criminal contempt provision involved [in *Dixon* and *Foster*'s case] . . . contains no such generic reference which by definition incorporates the statutory elements of assault or drug distribution." *Id.*

[fn5] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

[fn6] The appellate record in *Timmons* reveals counsel addressed the court as follows:

Secondly, your Honor, we will ask that the court would charge a *Lyle* charge, your Honor, based on the fact that there may be some confusion in the mind of the jury stating the fact of the April 9th

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robberies versus the February 27th, 1993 robberies, your Honor. We feel there should be some charges, one in which that would allow the jury not to confuse the fact that the defendant is being charged for those crimes for the April 9th.

[fn7] Generally, evidence of prior crimes is not admissible to prove the crime for which the defendant is charged. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Evidence of other crimes is admissible when that evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. *Id.* at 416, 118 S.E. at 807; see Rule 404 (b), SCRE (Evidence of other crimes, wrongs, or acts may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent). If not the subject of a conviction, indictment, or arrest, proof of prior bad acts must be clear and convincing. *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989); *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct.App. 1994).

GOOLSBY, Judge (concurring and dissenting):

I concur with Parts I and II of the majority opinion. I disagree with the holding set forth in Part III and, therefore, respectfully dissent. I would affirm the defendant James Warren's conviction.

Warren argues an ongoing Lyle error resulted from the admission of evidence of allegations of prior sexual abuse made by Christy's sister Brandy. The evidence of which Warren complains was admitted at least ten times without objection, sometimes elicited by the defendant himself. [fn1]
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When the State attempted on other occasions to admit the same evidence, the effort was met with an objection. Each time defense counsel objected on the ground that the testimony constituted inadmissible prior-bad-act evidence, the court sustained the objection. Further, when counsel requested a curative instruction, the trial court instructed the jury to disregard the testimony. [fn2]

At the close of trial, Warren's counsel requested the following jury charge:

The mere inference or suggestion of a prior bad act is never proof that the crime with which a defendant is charged actually happened. You must weigh all the evidence presented as it pertains to the crime for which the defendant is charged. What did or did not happen in the past, as it relates to other persons and the defendant, is not evidence as to whether the defendant is guilty of this charge. Alleged prior bad acts, as presented in this case, should not be considered as any proof that this crime was committed by the defendant.

Defense counsel explained to the court that the charge addressed Brandy's cross-examination and introduction of her pre-trial statement (to which defense counsel did not object). The trial court refused to give the requested charge but added charges on moral turpitude and good character of the defendant.

I would hold the trial court did not abuse its discretion in

Lyle Case

IF State does not show common scheme or plan then they should not be allowed to introduce Lyle type material

- Mother wanted those people dead act
- Evidence State was involved in common scheme

failing to give a limiting instruction because (1) the court gave a sufficient curative instruction when an appropriate objection was raised to the challenged evidence and when a curative instruction was contemporaneously requested and (2) the challenged evidence, when met with no objection, came in without limitation.

Regarding the first reason why the trial court did not abuse its discretion, the requested charge was simply an instruction to disregard evidence of alleged prior bad acts, and the court

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had already given a charge of the kind requested upon sustaining an objection based on that ground.

The majority misinterprets my analysis on this point. When Christy testified regarding Brandy's allegations, the trial court sustained Warren's objection and gave a curative instruction. Because Warren did not object to the curative instruction or move for a mistrial, the error is deemed cured and no later curative charge is necessary. See *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."), cert. denied, ___ U.S. ___, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). As a matter of law, then, when Warren failed to object to the curative instruction or move for a mistrial, we agreed that any error, and thus any prejudice, was cured.

I agree with the majority that the curative instruction that the trial court gave could not have cured subsequent references to Brandy's allegations; however, because the trial court apparently agreed that allegations made by Brandy had no place in the trial of Christy's abuse, it never would have been "necessary for defense counsel to cross-examine witnesses on these allegations and to impeach the testimony by calling Brandy as a witness," as the majority asserts, if Warren had raised appropriate objections to the repeated references to Brandy's case."

Warren's failure to object to evidence regarding Brandy's allegations allowed the trial court to admit the evidence and to do so without limitation. This made a curative instruction at the end of the trial totally unnecessary. The trial court must instruct the jury to limit its consideration of evidence to the particular purpose for which it is offered. *State v. Steadman*, 216 S.C. 579, 37 S.E.2d 168 (1950). The challenged evidence was admitted at least ten times without objection and without limitation; therefore, it was not offered for a particular purpose.

Moreover, a failure to make a proper contemporaneous objection to the admission of evidence cannot, as Warren attempts to do here, be cured by a subsequent request for a limiting instruction. See *State v. Vaughn*, 124 Idaho 576, 861 P.2d 1241 (1993) (holding refusal to charge requested limiting instruction not error when defendant neither objected to evidence nor requested limiting instruction when the evidence was offered); *People v. Herr*, 203 A.D.2d 927, 611 N.Y.S.2d 389 (1994) (holding failure to charge instruction on voluntariness of defendant's statement not error when defendant failed to object to admission of the statement), *aff'd*, 86 N.Y.Ed 638, 635 N.Y.S.2d 159, 58 N.E.2d 1032 (1995); cf. *State v. Moultrie*, 316 S.C. 547, 451 S.E.2d 34 (Ct.App. 1994) (finding a failure to make a proper contemporaneous objection to the admission of evidence cannot be

bootstrapped later by a motion for mistrial).

I disagree with the majority's application of *State v. Smalls*, 260 S.C. 44, 194 S.E.2d 188 (1973), to the facts of this case. In particular, I do not agree with the majority's contention that Warren's counsel was placed in a situation similar to defense counsel in that case. In *Smalls*, the defendant testified on direct about his prior convictions to avoid an inference that he was trying to conceal them because the prosecution would likely offer them as impeachment evidence.

First, *Smalls* and the other cases cited by the majority^[fn3] are distinguishable because the evidence in those cases related to impeachment of the defendant; the evidence here was neither offered by the State to impeach Warren nor offered by Warren to anticipate impeachment. Further, in the cases cited by the majority, the defendant's first opportunity to raise the issue of limiting the jury's consideration of evidence was when jury charges were submitted to the court. Here, Warren could have objected and asked for instructions as necessary.

More important, the majority incorrectly assumes that "once the jury heard th[e] evidence [of prior sexual abuse of Page 616 Brandy], even though the judge gave a curative instruction, defense counsel apparently concluded as a matter of trial strategy that Warren had to introduce testimony denying the allegations." The record before us reveals that after the jury heard the challenged evidence but before the court instructed the jury to disregard it, Warren's counsel informed the court that she did not intend to use Brandy's allegations at all. The following exchange occurred between Warren's counsel, Ms. Hardee, and the court:

THE COURT: Well, think, now. Because if you tell me you are not going to bring it up, I might think about not letting the solicitor ask that question.

MR. LEIENDECKER (co-defense counsel): She's already asked the question in front of the jury.

THE COURT: Well, I realize - well, then, you object to it? How do you want me to cure it?

MS. HARDEE: Stopping the State in regards to that line of questioning.

THE COURT: All right. Now, if I stop her, are you not going to bring out in your defense the fact that both of them brought it against him and one of them was dropped?

MS. HARDEE: Sir, to tell you that, that was not my plan to -

THE COURT: Do you want to argue it? I don't mind you arguing.

MS. HARDEE: Your Honor, that was not my plan to do that. This is Christy's case.

THE COURT: Are you telling me if I keep it out now you're not going to bring it in. Is that what you're telling me?

MS. HARDEE: No sir. I mean, yes, I'm not going to bring it in. My intention was not to bring Brandy in

this case. She is here to testify; however, she's not here to testify in regards to her allegations, not at all.

THE COURT: Do you want me to try to correct this for the jury?

MS. HARDEE: Yes, sir.

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THE COURT: And [what] would you like for me to tell the jury?

MS. HARDEE: The basic thing - Oh God, they already hear[d] it, disregard.

[Emphasis added.]

The court then charged the following:

Now, Mr. Foreman, members of the jury, there was some exchange of involving a sister of this defendant, of this young lady. That doesn't have anything to do with this case so just disregard that. I don't know anything about it, and I'm not going to try anything else even if there is anything else.

Warren's counsel then responded, "All right."

I would affirm.[fn4]

[fn1] The majority opinion sets out the instances in which the questioned evidence was admitted without objection.

[fn2] Defense counsel also objected to other attempts by the State to admit the same evidence but did not argue that the evidence was inadmissible as a prior bad act. The trial court overruled these objections and allowed the testimony without limitation. These objections form no basis for Warren's appeal.

[fn3] Namely, *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Staley*, 294 S.C. 451, 365 S.E.2d 729 (1988); and *State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950).

[fn4] It is unnecessary to address, as the State urges this court to do, whether the trial court properly denied the requested charge because it was an improper comment on the facts and a misstatement of the law.

South Carolina Case Law

STATE v. NELSON, 331 S.C. 1 (1998)
501 S.E.2d 716

The State of South Carolina, Respondent v. Larry Don Nelson, Petitioner.
Opinion No. 24778

Supreme Court

Heard October 22, 1997

Decided April 6, 1998

Rehearing Denied May 18, 1998

~~Character Evidence~~

✓ 27 Lyle Evidence

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County, Julius H. Baggett, Judge.
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[EDITORS' NOTE: THIS PAGE CONTAINED HEADNOTES AND HEADNOTES ARE NOT AN
OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT
DISPLAYED.]

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Jack B. Swerling, Columbia, for petitioner.

Charles Molony Condon, Attorney General, John W. McIntosh,
Deputy Attorney General, Donald J. Zelenka, Assistant Deputy
Attorney General, William Edgar Salter, III, Senior Assistant
Attorney General, Columbia; and Donald V. Myers, Solicitor,
Eleventh Judicial Circuit, Lexington, for respondent.

WALLER, Justice:

Petitioner Larry Don Nelson was convicted of four counts of
first degree criminal sexual conduct ("CSC") with a minor, and
four counts of lewd act on a minor. The victim was a three year
old child. The offenses allegedly occurred between December 1991
and June 1992, when the victim would accompany her father to
Petitioner's home (to visit Petitioner's brother, with whom
Petitioner lived). All of the offenses allegedly occurred in
Petitioner's bedroom.

Petitioner was sentenced to thirty years imprisonment for each
count of CSC, and to ten years imprisonment for each count of
lewd act. The sentences were ordered to run consecutively. The
Court of Appeals affirmed Petitioner's conviction. *State v.*
Nelson, 322 S.C. 377, 471 S.E.2d 767 (Ct. App. 1996). This Court
granted certiorari to consider whether certain evidence was
properly admitted at trial. We find it was not, reverse
Petitioner's convictions, and remand for a new trial.

ISSUES

- I. Did the trial court err in admitting certain physical evidence
found in Petitioner's bedroom?
- II. Did the trial court err in admitting details of post-arrest
statements Petitioner made to police?

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DISCUSSION

I. Physical Evidence

At trial, the State introduced the following evidence,
consisting of exhibits or testimony about exhibits seized from
Petitioner's bedroom after his arrest[fn1]:

- (1) Two stuffed animals, "Cookie Monster" and "Oscar
the Grouch."

- (2) Testimony about some fifty-eight homemade videotapes containing various segments taped from television programs, including a school district's schedule of events, "Mr. Knozit" shows, children's aerobics, cartoons, children's game shows, young girls' Olympic gymnastic events, and a "just say no"-type show teaching children about molestation.
- (3) Excerpts from *Grimm's Complete Fairy Tales*, specifically "The Fitcher's Bird Tale," a story about a wizard who takes young girls from their homes (parts of which had been underlined). Attached to the front page was a laminated picture of a young, three to four year-old white child with long brown hair.[fn2] Inserted in the book elsewhere were pictures of "Save the Children" advertisements about young female children with brown hair. On the back of one of these advertisements was an article entitled "Modern Day Monsters," the subject of which was child molestation.
- (4) A photo album containing a collage of magazine pictures of young girls dressed variously in gymnastic clothes, underwear, bathing suits, and full clothing.
- (5) Petitioner's wallet, containing his driver's license (showing his DOB as 1/4/50), a "punch-out-label" containing Punky Brewster's name, and Petitioner's membership card to the official Punky Brewster fan club.[fn3]
- (6) A picture frame containing a commercial picture of a young white female with long brown hair, dressed in gymnastic clothing.
- (7) A laminated picture of a young white female with shoulder-length brown hair, lying on a couch.
- (8) A laminated picture on a card of a young white female with long brown hair, wearing night clothing, apparently cut from a magazine advertising circular.
- (9) A picture frame containing two laminated pictures of the same young white girl, apparently cut from a magazine advertisement, with long brown hair.
- (10) One of six offered pictures of Punky Brewster.[fn4]

Petitioner argued the evidence was improper character evidence and should be excluded.

While initially, during a motion *in limine* hearing, the judge thought the offer of evidence was "ludicrous," he changed his mind after the State put up the testimony of an expert on sexual trauma and abuse of children. In part, this witness testified about general characteristics of pedophiles.[fn5] She testified pedophiles often have fantasies about taking children away from other adults. She also testified pedophiles often "have a pretty good stash" of childlike items, including videotapes, children's books, children's clothing, children's toys, photographs,

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drawings, and pictures, in part used for sexual gratification. When the State then moved to introduce the physical evidence later in the trial, the judge overruled Petitioner's argument it was improper character evidence, finding it was probative not of a "character issue" but of a "personality characteristic."

The Court of Appeals affirmed the admission of evidence, holding that "[w]hether or not the evidence in question incidentally

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reflected poorly on [Petitioner's] character, it was relevant to show [Petitioner's] motive to commit the crimes for which he was charged." 322 S.C. at 381, 471 S.E.2d at 769. It then found the probative value of the evidence outweighed any danger of unfair prejudice from its admission. *Id.* at 382, 471 S.E.2d at 770. Petitioner argues error in this holding. We agree. [fn6]

~~In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue.~~ *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989)

(per curiam). In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). [fn7] Both rules are grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

Rule for Character

We find the evidence clearly inadmissible under these standards. As the trial judge himself recognized, its only relevance is as it reflects on an aspect of Petitioner's character,

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i.e. that he is a pedophile. [fn8] We find the distinction between "character" and "personality characteristic" misplaced. "The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness. Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a 'propensity.'" *State v. Smith*, 617 N.E.2d 1160, 1169 (Ohio Ct. App. 1992), cert. denied, 612 N.E.2d 1244 (Ohio 1993) (internal quotation omitted) (finding testimony regarding pedophile characteristics probative of the issue of character). See also Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence* § 4.11 (1995) (as used in federal rules, "character" means "a person's disposition or propensity to engage or not engage in various forms of conduct"). Such evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted. See, e.g., *Underwood v. State*, 309 S.C. 560, 563-64, 425 S.E.2d 20, 23 (1992) (expert testimony regarding "common profile" of people who sexually abuse children admissible because it was offered to explain physical injuries of victim as opposed to "personality or character traits which petitioner possessed in order to identify him as the offender").

Several states have rejected testimony or evidence showing a defendant is a pedophile for this exact reason. See, e.g., *Turtle v. State*, 600 So.2d 1214, 1221 (Fla. Dist. Ct. App. 1992) (error in admitting expert testimony about characteristics of pedophile

because it was asking "the jury to convict because the defendant fit a pedophile profile"); *Francis v. State*, 512 So.2d 280, 282 (Fla. Dist. Ct. App. 1987) (error in admitting expert testimony that defendant has a "personality characteristic of being attracted to children"); *State v. Hester*, 114 Idaho

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588, 760 P.2d 27 (1988) (error in admitting expert testimony that defendant had character traits consistent with those of known child abusers); *People v. Bagarozzy*, 522 N.Y.S.2d 848, 853 (N.Y. App. Div. 1987) (error in admitting evidence seized from defendant's apartment including NAMBLA[fn9] newsletters, photographs, and films because "the true purpose behind the introduction of this evidence was to expose defendant's sexual preferences and attitudes in order to demonstrate a propensity to commit the crimes charged"); *Smith*, 517 N.E.2d at 1160 (error in admitting expert testimony on general pedophile characteristics); *Brewington v. State*, 802 S.W.2d 691, 692 (Tex. Crim. App. 1991) (en banc) (reversing conviction because "it is clear from the record that the prosecutor sought to introduce testimony that appellant was a fixated pedophile solely to prove appellant's propensity to molest children and that he acted in conformity therewith when he committed the charged offense").

In *Dyer*, the Supreme Court of Kentucky addressed a factual scenario very similar to the case *sub judice*. 816 S.W.2d 647. The defendant was on trial for sodomizing a child under the age of twelve. The state introduced evidence seized from the defendant's apartment, including old posters of former teenage idols, nude pictures and articles from pornographic magazines, a pamphlet about homosexual activity, pictures of boys cut from newspapers, and other publications. The police officer describing the seized evidence was allowed to testify about general pedophile characteristics, and to state that in the search of defendant's house he was looking for any evidence that would "relate to, ah, possible characteristics of a pedophile." *Id.* at 650. In reversing defendant's conviction, the court stated:

It is obvious the real purpose, the sole purpose, of this evidence was, in general, to prove the appellant was a sexual pervert, and, in particular, to prove that his perversion was pedophilia, and to do so on the basis of reading material found in his possession some of which would offend a substantial number of jurors, prejudicing them against the appellant without regard to whether it proved anything

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against him. The various pornographic pictures and articles and the nondescript photographs and memorabilia were devoid of meaning except that provided by the investigating police officer's testimony and the prosecutor's argument labeling the material seized proof that the appellant was a pedophile.

We declare, unqualifiedly, that citizens and residents of Kentucky are not subject to criminal conviction based upon the contents of their bookcase unless and until there is evidence linking it to the crime charged. . . . If this material is supposed to provide a picture of the appellant as a pedophile, such profile evidence is inadmissible in criminal cases to prove either guilt or innocence.

Id. at 652. [fn10]

The State argues the evidence was not offered to show Petitioner's character, but was instead admissible under *Lyle* to

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show motive, intent, and a common scheme or plan. We disagree, finding little to no probative value regarding any of these theories.[fn11] Furthermore, the very apparent prejudicial

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impact such evidence would have upon a jury outweighs what probative value, if any, it may have. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991) (even relevant and otherwise admissible evidence may be excluded for undue prejudice).

The Court of Appeals agreed with the State's argument regarding motive, primarily relying on our decisions in *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990), and *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993 (1992). Both cases are distinguishable from the instant case.

In *Bell*, we held tape recordings in which Bell discussed the details of sexual experiences he had with a prior murder victim were properly admitted as demonstrating a possible sexual motive for kidnaping the current victim.[fn12] Bell was not on trial for a sex crime, and the evidence showed a possible motive for a crime that could have been committed for any number of reasons. The evidence also involved Bell's admitting he kidnaped and murdered the first victim (the implication being he was similarly sexually motivated in committing that crime).

Here, Petitioner was on trial for sexual offenses; there is little doubt the motivation for such offenses is, at least in part,

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sexual gratification. In *Smith*, the Ohio Court of Appeals rejected a similar argument that evidence of other sexual misconduct was admissible to show motive in committing the charged sex crime:

[T]he motive for the alleged crimes involved in the present case [is] apparent. A person commits or attempts to commit [a sexual offense] for the obvious motive of sexual gratification. Since motive can not be deemed to have been a material issue at [defendant's] trial, "other acts" testimony was not admissible to prove this matter.

. . . While the acts of which the defendant was accused would certainly be viewed as perverted and depraved according to most views, the motive and intent of the alleged action remain, nevertheless, those of sexual gratification. That fact is apparent from the charges and is not a material issue. Evidence of other crimes, wrongs, or acts may not be introduced to prove his motive or intent in committing the operative acts of the offenses alleged.

617 N.E.2d at 1172-73 (internal citations omitted).[fn13]

Somewhat similar reasoning has been applied regarding the issue of intent. "In the trial of sex offenses, extrinsic evidence of intent is admissible only in those cases where there is no challenge to the occurrence of the physical contact itself, but the intent of the actor is at issue because the nature of the contact is subject to varying interpretations." *Bagarozzy*, 522 N.Y.S.2d at 854 (finding intent not an issue in case where defendant consistently denied any sexual contact with accusers). See also *State v. Tizard*, 897 S.W.2d 732, 744 (Tenn. Crim. App. 1994) (evidence of sexually explicit videotapes and booklet, found in defendant's home, not probative of intent: "[T]o the extent that the ultimate inference sought to be drawn by the

State, i.e., the defendant's intent to commit a sexual battery upon the victim, must be derived from initial Page 12

inferences about the defendant's character traits circumstantially drawn from the questioned evidence, such evidence's probative value on the ultimate inference is greatly attenuated"). Cf. *State v. Millar*, 871 P.2d 482 (Ore. 1994) (evidence defendant possessed pornographic magazine of young girls probative of intent where defendant admitted placing hand down victim's pants but claimed his intent was to retrieve a toy, not sexual contact).

Here, Petitioner denied any sexual contact with the victim, making it highly questionable whether the element of intent was a material issue in the case. We find the State's argument this evidence was relevant to show motive or intent is merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses. See *Stokes*, 279 S.C. at 193, 304 S.E.2d at 815 (judge's instruction that evidence was being admitted to show the "inclination of the defendant to do that" was erroneous because "the rationale for excluding evidence of prior 'bad acts' is to prevent the jury from considering an accused's inclinations rather than his actual conduct in the incident before the court").[fn14]

Equally unpersuasive is the State's argument the evidence was admissible as part of the *res gestae*. See *State v. Hough*, 325 S.C. 88, 480 S.E.2d 77 (1997) ("One of the accepted bases for the admissibility of evidence of other crimes arises

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~~when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case.~~ *Id.* evidence was not necessary to provide a complete picture of the crime or the context in which it occurred. See *State v. Lachterman*, 812 S.W.2d 759, 767 (Mo. Ct. App. 1991), overruled on other grounds, *State v. Bernard*, 849 S.W.2d 10 (Mo. 1993) ("complete picture" exception "seldom has application in child sexual abuse cases").

In *State v. Melcher*, 678 A.2d 146 (N.H. 1996), the defendant challenged the admission of evidence of prior bad acts he allegedly committed with the victim. The New Hampshire Supreme Court noted that in analyzing whether evidence is relevant under Rule 404(b),[fn15] it "must tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity. In other words, no link in the chain of inferences justifying relevance can be derived from the prior conduct's tendency to show character or disposition." *Id.* at 149 (internal citations omitted) (emphasis supplied).

Melcher first rejected the argument the evidence was relevant to show a common scheme or plan, stating, "For prior sexual misconduct to be relevant to show that the defendant had a plan, the mutual dependence between the prior conduct and the charged act still must be divorced from any actual or implicit reliance on the defendant's character." *Id.* at 150. It then rejected the argument the evidence was relevant to show the context in which the crime occurred (i.e. "*res gestae*"), finding the term "context" to be "merely a synonym for propensity."

To infer from this [evidence] . . . an understanding of how the charged act could have occurred, we must necessarily assume that the defendant acted on the occasion of the charged act in conformity with his prior conduct; this "assumption is the inescapable link between the charged and uncharged crimes." When,

in this manner, an assumption based upon the defendant's propensity toward certain

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action is the essential connection in the inferential chain supporting relevance, the evidence is inadmissible. . . .

Id. (internal citations omitted). We find this reasoning applicable here: the evidence is only relevant to show the "context" of the crime when the assumption is made that Petitioner was acting in conformity with the character trait of being a pedophile. Again, this argument is but another cleverly disguised way of getting impermissible character evidence before the jury.[fn16]

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"A necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *Melcher*, 678 A.2d at 151. We hold the evidence in this case was inadmissible as improper character evidence.

II. Police Statements

Petitioner argues post-arrest statements he made to police were erroneously admitted into evidence. We agree.[fn17]

At trial, Sergeant Belk testified when he and Detective Frazier went to interview Petitioner, he requested that Sergeant Belk come back another time without Detective Frazier because he was uncomfortable around adult women. When Belk came back later alone, Petitioner told him he had fantasies about children. Detective Frazier testified to essentially the same thing. No written statement was admitted into evidence. The trial judge overruled Petitioner's objection to any testimony "concerning any fantasies or likes or dislikes of females."

Generally, only those parts of a confession or statement made to police which are relevant and material to the crime charged should be received into evidence. *State v. Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966), overruled on other grounds, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). For the same reasons as discussed *supra* in Issue I,

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we find Petitioner's general sexual attitudes were not relevant or material to the crime charged because they were admitted to show character. See, e.g., *Stevens v. State*, 748 P.2d 771, 774 (Alaska Ct. App. 1988) (error, in trial for attempted sexual abuse of a minor, in admitting defendant's statements to police regarding his sexual fantasies about homosexuality and children because it was "relevant, if at all, only to show [defendant's] propensity to commit a sex crime"); *Erickson v. State*, 565 So.2d 328, 330-31 (Fla. Dist. Ct. App. 1990), cert. denied, 576 So.2d 286 (Fla. 1991) (error in admitting defendant's statements to psychiatrist regarding sexual fantasies about female children). Therefore, the judge committed error in allowing the jury to hear these statements.

For the foregoing reasons, we find it was error to admit the above evidence and testimony.[fn18] The opinion of the Court of Appeals affirming Petitioner's conviction is therefore reversed and the case is hereby remanded for a new trial.

REVERSED AND REMANDED.

BURNETT, A.J., Acting Associate Justices George T. Gregory Jr., and Thomas W. Cooper Jr., concur. MOORE, A.C.J., dissenting in

separate opinion.

[fn1] Petitioner gave police written consent to search his residence.

[fn2] Testimony was introduced that this and other photos resembled the victim.

[fn3] Punky Brewster is a child celebrity, a young white female with long brown hair.

[fn4] The Court of Appeals recited a slightly different list of evidence than this. See *Nelson*, 322 S.C. at 380, 471 S.E.2d at 769. Apparently, that Court made its list from what the State contended it would introduce at the motion in limine hearing, not what was actually introduced at trial.

[fn5] The expert testified pedophile means "love of children." Pedophilia has been defined as "sexual perversion in which children are the preferred sex object." *Dyer v. Commonwealth*, 16 S.W.2d 647, 650 n.1 (Ky. 1991) (quoting Webster's Ninth New Collegiate Dictionary (1983 ed.)).

[fn6] Considering that the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court, we reject the State's argument that consideration of this issue is procedurally barred under the facts of this case. Cf. *State v. Ross*, 272 S.C. 56, 249 S.E.2d 159 (1978) (once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat the objection after each question).

[fn7] The substance of these common law rules has now been codified in SCRE 404 (not in effect at the time of Petitioner's trial):

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: [exceptions not pertinent here].

(b) **Other crimes, wrongs, or acts.** 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.

[fn8] In admitting the evidence, the judge stated:

I don't think it has anything to do with impugning his character at all. It's not a character issue. It's a personality characteristic that is consistent with perhaps the testimony of the [expert witness] as to the profile of what is referred to as a pedophile, which appears to be consistent with the charges and the facts here.

[fn9] North American Man-Boy Love Association, which advocates sexual activity between adults and boys.

[fn10] We have found no cases in South Carolina directly addressing the issue involved here. Most cases even remotely similar concern the admission of a defendant's prior sexual

offenses or misconduct, as opposed to physical evidence showing sexual preferences or tendencies, usually analyzed under the "common scheme or plan" exception in *Lyle*. See, e.g., *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364, cert. denied, 498 U.S. 881 (1990); *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987), overruled on other grounds, *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993); *Stokes*, 279 S.C. 191, 304 S.E.2d 814; *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); *State v. Atkins*, 309 S.C. 542, 424 S.E.2d 554 (Ct. App. 1992).

[fn11] For the purposes of this discussion, we are assuming without so deciding that this evidence invokes the *Lyle* analysis. *Lyle* is generally thought of as involving evidence of a prior crime or bad act. While the evidence introduced here connotes bad character, it is questionable whether it is evidence of a prior "bad act." It certainly is not evidence of a prior crime. This Court has applied *Lyle* to evidence not outwardly showing a crime or bad act, but which connotes bad character. See, e.g., *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (applying *Lyle* rules to testimony defendant was a Mafia member, as well as evidence found in defendant's residence implying she was a devil worshiper, but which in itself was innocuous: wax candles of little devils, devil figurines, surveillance cameras); *State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983) (applying *Lyle* to evidence defendant offered victim money to "meet him at the railroad tracks"). Other cases have described *Lyle* without referring to "bad acts." See, e.g., *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987) ("Evidence of prior acts is generally not admissible. . . ."); *State v. Bright*, 323 S.C. 221, 473 S.E.2d 851 (Ct. App. 1996) ("conviction must be based on proof of the offense for which [defendant] is accused, rather than prior immoral acts").

In any event, even if *Lyle* were inapplicable, the evidence would still fall under the more general rule against attacking a defendant's character. See, e.g., *Mitchell*, 298 S.C. at 186, 379 S.E.2d at 123; *State v. McElveen*, 280 S.C. 325, 313 S.E.2d 298 (1984). Because we find the evidence would be inadmissible under either standard, the issue of whether this is evidence of a prior bad act or merely reflects on his character is largely academic. A more interesting issue would be whether the same exceptions noted in *Lyle* would apply to the general character rule, and thus allow into admission evidence attacking a person's character (but not evidence of a prior crime or bad act) if the State can show it is not being offered as propensity evidence but as probative to some other issue. Again, we need not reach this issue here because we find this evidence inadmissible under the exceptions advanced by the State.

[fn12] We also found the evidence probative of a common scheme or plan.

[fn13] *Johnson* is even more readily distinguishable. That case also involved the admission of evidence of a prior murder. We held evidence the defendant had murdered someone and hidden the body in the vehicle he was driving tended to establish his motive for killing a state trooper who stopped him for a driving violation. 306 S.C. at 125, 410 S.E.2d at 551. The evidence was not admitted to show that because the defendant had killed before, he was a "killer" and in shooting the state trooper was merely acting in conformity with this characteristic.

[fn14] We find the common scheme or plan argument patently without merit. There was absolutely no allegation Petitioner molested another person. We also find unpersuasive the State's

argument the evidence was admissible because it corroborated the expert witness's testimony regarding pedophile characteristics. While both the expert testimony and the evidence tended to prove the State's theory Petitioner was a pedophile, the latter did not corroborate the former. "Corroborate" is defined as "[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." "Corroborating evidence" is defined as "[e]vidence supplementary to that already given and tending to strengthen or confirm it. Additional evidence of a different character to the same point." Black's Law Dictionary 844 (6th ed. 1990) (emphasis added).

The expert's testimony was limited to describing general pedophile characteristics. The contested evidence went to whether Petitioner was a pedophile, a point never addressed by the expert. The contested evidence would not have corroborated the expert's testimony unless the expert testified she thought Petitioner was a pedophile.

[fn15] Rule 404(b) of the New Hampshire Rules of Evidence is substantially similar to SCRE 404(b), see *supra* note 7, and contains the same general exceptions enunciated in *Lyle*.

[fn16] In spite of the ban on character or propensity evidence, some states have nonetheless admitted evidence of collateral sexual crimes or sexual bad acts in sex offense cases, carving out specific exceptions they variously term "lustful disposition," "depraved sexual instinct," or the like. See, e.g., *State v. Roscoe*, 910 P.2d 635 (Ariz.) (en banc), cert. denied, U.S. ___, 117 S.Ct. 150 (1996) (recognizing specific exception to general rule disallowing evidence of other bad acts to show bad character when acts involve "sexual aberration" to show propensity to commit a similar crime); *Caldwell v. State*, 436 S.E.2d 488, 492 (Ga. 1993) (allowing admission of four adult movies found in defendant's apartment because it showed defendant's "bent of mind toward the sexual activity with which he [is] charged and his lustful disposition," regardless of whether it also incidentally reflected on character); *State v. Chapman*, 683 So.2d 1236, 1240 (La. Ct. App. 1996), cert. denied, 700 So.2d 505 (La. 1997) (pornographic pictures of teenagers admissible to demonstrate defendant's "unnatural interest in young females"); *Mitchell v. State*, 539 So.2d 1366 (Miss. 1989) (evidence of other sexual relations between defendant and victim admissible to show lustful, lascivious disposition toward that particular victim); *Findley v. State*, 577 P.2d 867, 868 (Nev. 1978) (admitting evidence showing possession of "specific emotional propensity for sexual aberration"); *State v. Reeder*, 413 S.E.2d 580 (N.C. Ct. App.), cert. denied, 417 S.E.2d 68 (N.C. 1992) (evidence of prior sexual offenses admissible to show defendant's "unnatural lust, intent or state of mind"); *State v. Edward Charles L.*, 398 S.E.2d 123 (W. Va. 1990) (evidence of collateral acts or crimes admissible in child sexual abuse cases to show perpetrator had a lustful disposition).

South Carolina has not recognized such an exception, nor are we inclined to do so. Other states have similarly resisted this urge to make exception for one class of crimes. "Given the emotionally charged nature of the crime, there exists a natural temptation to regard Rule 404(b) differently when a defendant has been indicted for sexual assault. . . . But the fairness and due process concerns underlying Rule 404(b) are no less pertinent in sexual assault cases. . . ." *Melcher*, 678 A.2d at 149. See also *Tizard*, 897 S.W.2d at 744 (noting Tennessee's refusal to adopt a sex crime or acts exception); *State v. Bernard*, 849 S.W.2d 10 (Mo. 1993) (en banc) (refusing to adopt a "depraved sexual instincts" exception).

In *Lannan v. State*, the Supreme Court of Indiana decided to abandon its "depraved sexual instinct" exception in favor of a more general analysis under FRE 404(b). 600 N.E.2d 1334 (Ind. 1992) (noting approximately twenty other states have or have had such exceptions). In doing so, it noted the traditional rationale for this type of exception is twofold: (1) that "acts showing a perverted sexual instinct are circumstances which . . . may have a tendency to connect an accused with a crime of that character;" and (2) the need to bolster victim testimony "which describe[s] acts which would otherwise seem improbable standing alone." *Id.* at 1335. While assuming recidivism among sexual offenders may be high, it pointed out that equally high was recidivism among, for example, drug offenders. Yet no exception for character evidence was carved out for drug offenses. Further, it found the need to bolster victim testimony not as great because of our current, "more jaded" society's willingness to believe sexual offenses occur. Thus, it held evidence of prior sexual misconduct would only be admissible if it fit into one of the "Lyle"-type exceptions under the general rule prohibiting such evidence.

[fn17] The Court of Appeals did not rule on this issue, although it was raised to them and Appellant argued it in his petition for rehearing.

[fn18] Under the circumstances of this case, we cannot find these errors harmless beyond a reasonable doubt, as would be required in order to affirm Petitioner's conviction. Whether the admission of this evidence subsequently affected defendant's trial strategy and/or testimony is not for this Court to opine. See, e.g., *State v. Smith*, 309 S.C. 48, 419 S.E.2d 816 (1992); *State v. Singleton*, 303 S.C. 313, 400 S.E.2d 487 (1991) (refusing to find error harmless where there was not overwhelming evidence of guilt).

MOORE, A.C.J.:

I respectfully dissent. I would affirm petitioner's convictions.

Unlike the majority, I would not summarily reject the State's argument that consideration of the admission of the evidence is procedurally barred. I would hold petitioner did not preserve his objections to the items introduced into evidence. The majority relies upon *State v. Ross*, 272 S.C. 56, 249 S.E.2d 159 (1978), which holds an objection to a line of

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questioning is sufficient to object to a particular question. In my opinion, the separate and distinct introduction of several items is entirely different.

During trial, petitioner objected to the introduction of the homemade videotapes described in the majority opinion and the trial judge overruled petitioner's objection by stating he was "going to allow the subject of these tapes to be mentioned without introducing the tapes." Petitioner also objected to a photo album containing pictures from magazines of young girls, some dressed in bathing suits, underwear, and gymnastic clothes. Further, petitioner objected to the statements which he made to the police. [fn1]

Petitioner, however, did not object to the introduction of his wallet containing his Punky Brewster fan club membership, a photograph of Punky Brewster which had been displayed in his room, and numerous photographs of young girls found in his room. A police officer also testified, without objection, that numerous

Other items of the same type were seized which were not introduced into evidence.

Here, the challenged evidence goes to the same issue regarding petitioner's character as the evidence admitted without objection. *State v. Sebasky*, 547 N.W.2d 93 (Minn. 1996) (although bulletins from organization advocating sexual relationships between men and boys should not have been admitted, defendant was not prejudiced when other sexually related evidence - e.g. homosexual magazines; dildos; and four sexually explicit videos of homosexuals - was introduced). Accordingly, I would hold the admission of the videotapes, photo album, and his statements was harmless because they are merely cumulative to other evidence admitted without objection. *State v. Rochester*, 301 S.C. 196, 391 S.E.2d 244 (1990).

Further, petitioner's own testimony is much more damning than the evidence introduced by the State. "Pedophile" is

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defined in the majority opinion as someone who has a "sexual perversion in which children are the preferred sex object." Petitioner's own testimony establishes he is a pedophile.

Petitioner testified on direct examination he had told the police officers he likes young girls. He further stated, "My intention was to say that I like young girls and, yes, Amber could possibly be one of those. I didn't mention that Amber was one of those. I said - I told him when I was telling him about where my tapes and these pictures were, I was telling him that I do like young girls. That's my problem. . . ." Referring to the videotapes which he possessed, petitioner stated that the subject of the tapes were young girls ranging in age from about 8 or 9 up to 22 or 23. He further stated he did not like 18 year-old-girls because he considered that grownup.

On direct examination, he also testified that "when you get down to around four or five, three years old, you kind of have to force yourself to fantasize about them. So, you don't even fantasize about them often. . . ." When asked on direct examination if he had any thoughts of doing anything to Amber, he replied: "No. I tried one time. I started one time. A thought come into my mind and I was going to let it go like I do any other time, but the first thing that came into my mind was her mother's face, and there was no more to it. . . ."

On cross-examination, the solicitor asked petitioner about a videotape he had introduced of his bedroom. Petitioner stated his pictures of "the little girls" and Punky Brewster were missing. He then elaborated and stated one picture of a young girl was not displayed in the tape and he used it for "sexual purposes" and his "sexual desire for [her]." Later, during cross-examination he admitted that the album was for sexual fantasies. In fact, he admitted "almost 99 percent of everything besides [Punky Brewster] as far as theses pictures and things, that is sexual." He stated only the *Grimm's Complete Fairy Tales* book and the "Save the Children" advertisement were accidental or coincidental.

I also note petitioner never objected to the expert witness's testimony regarding the general characteristics of a pedophile. Further, there was additional evidence about petitioner's behavior introduced, without objection, which when looked at

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along with the expert's testimony implied petitioner was a pedophile. Amber's mother testified without objection that petitioner gave Amber numerous gifts, including candy, an

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, umbrella, a lunch box, a nightgown, stuffed animals, and cartoon tapes.

Accordingly, I would affirm.

[fn1] Petitioner objected to the introduction of the *Grimm's Complete Fairy Tales* without stating any ground. Thus, this objection is not preserved. "A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review." *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (trial judge commits no error in overruling general objection).

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"nearly exclusive control" over Asher and Parker. Instead, it posits that Cutro did not have "exclusive control" over the children and that this view of the evidence does not support the conclusion that she was "the sole person who could have inflicted the injuries" on them. The majority does not cite any authority for the proposition that in order to meet a clear and convincing standard of proof, the State must establish that the defendant had "exclusive control" over the victims. It appears that the majority is elevating the proof requirement to unprecedented, and unrealistic, levels. If "exclusive control" had to be established every time a Lyle issue arose, it would be difficult to imagine a circumstance where any evidence of prior bad acts would be admissible.

For example, suppose that a serial killer had murdered 50 blue-eyed, blond-haired twenty-year-old girls alongside South Carolina highways. A distinctive word, written out by the killer, was found on the forearms of all these victims. Under the majority's formulation of the Lyle rule, if a defendant were tried for one of the murders, evidence of the 49 other murders would not be admissible because, regardless of the amount of evidence tying the defendant to these signature crimes, the State could not demonstrate that the defendant had "exclusive control" over his victims. Because thousands of people, namely those who travel on the same highways, would have had the opportunity to commit the crimes, the defendant would not have had "exclusive control" over the victims; thus, the evidence of the previous crimes would be inadmissible. The absurdity of such a conclusion demonstrates that the majority opinion has formulated a standard that raises the level of proof to such unintended heights that it effectually abolishes the use of Lyle evidence in South Carolina trials.

[fn3] The majority states that even if Cutro's testimony is discounted because of her lack of credibility, there still remains the testimony of Cutro's husband. This argument would be persuasive were it not for the fact that the credibility of Mr. Cutro was as bad, if not worse, than that of his wife. For example, at the trial, it was revealed that Mr. Cutro had falsified significant information on his federal tax returns. He had affirmatively misrepresented the number of children he had. On his tax form, he had fabricated and listed the names of two "children" in order to be able to claim them as additional dependents. Again, the issue of his credibility was before the trial court.

[fn4] The majority's opinion criticizes our discussion of Conyers, suggesting that Conyers summarily affirmed the admission of some Lyle evidence, without "any" analysis or discussion. Although the discussion in Conyers is terse, it is nevertheless present, an analysis which invites us to review the record: "[A]fter a careful review of the testimony, we are convinced that the trial judge properly admitted evidence of the poisoning of Bazen [son-in-law], Louise Conyers [mother-in-law], and Iris Stevens [business acquaintance]. . . ." Conyers, 268 S.C. at 281, 233 S.E.2d at 96 (emphasis added).

STATE v. BROOKS, ___ S.C. ___ (Ct.App. 1999)
___ S.E.2d ___

The State, Respondent, v. Ivadella Brooks, Appellant.

Opinion No. 2973

Court of Appeals

Submitted March 9, 1999

Filed April 5, 1999

Lyle Case

Appeal from Orangeburg County Daniel E. Martin, Sr., Circuit Court Judge.

AFFIRMED

Assistant Appellate Defender Melody J. Brown, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia; and Solicitor Walter M. Bailey, Jr., of Summerville, for respondent.

HOWELL, C.J.:

Ivadella Brooks appeals from her conviction for forgery. We affirm.

I.

On November 11, 1996, Ivadella Brooks presented a check dated the same day for \$70 to a cashier at a Winn Dixie grocery store to pay for some paper items and receive some cash. The cashier asked the head cashier, Hattie Mae Glover, for a check approval. The account on the check belonged to Arthur Moss, Sr. or Vernelle Thomas. In addition, the check was written to the "order of Winn Dixie . . . for housekeeping." Glover recognized the names of Moss and Thomas as relatives of hers and knew both Moss and Thomas to be dead at the time - Moss for eight years and Thomas for several months. Glover asked Brooks a few questions, including how Brooks got the check and who signed it. Brooks responded that she did some work for Moss and that he had signed the check. At some point, Brooks endorsed the check. She was eventually arrested.

While in custody, Brooks gave a statement to the police. In that statement, she claimed that the cashier had written Winn Dixie on the check and that Blanche Thomas, whose husband had previously been married to Vernelle M. Thomas, had given the check to Brooks's mother as repayment of a loan. Brooks's mother then gave the check to Brooks to cash.

At trial, Blanche Thomas denied borrowing money from Brooks or her mother, denied ever having seen the check, and noted that she often gave clothes to Brooks for Brooks's daughters. Further, the State introduced evidence that the Moss account was closed in 1994 and that Brooks committed a prior forgery by writing a check on a closed account on Sept. 25, 1995. The State claimed the prior forgery evidence was admissible as an exception to Rule 404 (b), SCRE to show absence of mistake or accident and intent in the current forgery. Brooks objected, arguing the evidence was not relevant and, even if relevant, was more prejudicial than probative. The trial court overruled the objection and held the evidence was proper under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) [fn1] because the two forgeries were "similar in that both accounts were closed . . . and either she knew, or should have known, that the account . . . was closed."

II.

Brooks contends the trial court erred in admitting the evidence of the prior forgery. We agree.

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.

Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes. The trial judge must clearly perceive the connection between the other crimes and the crime charged. Further, other crimes which are not the subject of the conviction must be proven by clear and convincing evidence.

State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) (citation omitted).

[I]n analyzing whether evidence is relevant under Rule 404 (b), it must tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity. In other words, no link in the chain of inferences justifying relevance can be derived from the prior conduct's tendency to show character or disposition."

How does evidence of D/F Murder prove an issue actually in dispute in e/s case

State v. Nelson, 331 S.C. 1, 13, 501 S.E.2d 716, 722 (1998) (quoting State v. Melcher, 678 A.2d 146, 149 (N.H. 1996)); [fn2] accord Walter A. Reiser, Jr., Evidence of Other Criminal Acts in South Carolina, 28 S.C. L. Rev. 125, 127 (1976) ("Lyle, nevertheless, is precedent for the proposition that evidence of other crimes is admissible if it can reasonably lead to an inference of guilt by a chain of logic that does not include an inference link concerning the character of the defendant."). (Even if evidence of a prior bad act is otherwise proper under 404 (b), the act may not be admitted into evidence if its prejudicial effect outweighs its probative value. See State v. Carter, 323 S.C. 465, 467, 476 S.E.2d 916, 918 (Ct. App. 1996).

The State has not claimed that the two instances constitute a common scheme or plan to forge checks on closed accounts.

Instead, it argues that the prior conviction is admissible to show intent or absence of mistake or accident. We disagree.

(Admitting the prior forgery in the current case would require an impermissible inference of fact based on character. For the prior forgery to be relevant to any factual issue in the forgery at bar would require us to assume that, because Brooks previously pleaded guilty to an unrelated forgery of a check on a closed account, she had the intent or knowledge required to commit the current forgery, which also involved a check on a closed account. This reasoning amounts to a presumption that, because Brooks committed the prior forgery, she is a dishonest person with a propensity to commit forgeries and, therefore, must have committed forgery in the current case. This type of inference is exactly what Rule 404 and Lyle seek to prohibit. See State v. King, Op. No. 24916 (S.C. Sup. Ct. filed March 8, 1999) (Shearouse Adv. Sh. No. 10 at 31, 36) ("[E]vidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person."); Nelson, 331 S.C. at 7-10, 501 S.E.2d at 719-21 (prohibiting admission of evidence

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could only invite the jury to infer that the defendant was in conformity with this character trait (the crimes with which he was charged"); *id.* at 19 (noting that the Lyle rule is "grounded in the fact that character evidence is not admissible for the purpose of showing that the accused possesses a criminal propensity to commit the crime with which he is charged"). See *State v. Peake*, 302 S.C. 378, 380, 461 S.E.2d 190 (1990). [fn3]

The court affirmed the trial court's decision if its error was harmless beyond a reasonable doubt. See *Nelson*, 331 S.C. 18, 501 S.E.2d at 725 n. 18. When the other evidence is overwhelming, any error in the admission of the evidence is harmless beyond a reasonable doubt. See *State v. Brooks*, 330 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (finding error of prior bad act evidence harmless due to overwhelming evidence of appellant's guilt). This is just such a case. The State presented evidence that, when attempting to pay for the check, Brooks claimed she had received the check from Moss. Despite Moss's death in 1988, the check was dated November 1996. Although Brooks later claimed the check was for a loan to Blanche Thomas, this story does not explain why the words, "for housekeeping" were written on the check. Brooks's inconsistent statements give rise to an inference of guilt. See *State v. Scott*, 330 S.C. 125, 131, 403 S.E.2d 735, 738 (Ct. App. 1998) (finding inconsistent statements of criminal knowledge and intent). Additionally, Mrs. Thomas denied ever borrowing money from Brooks or her mother, and never having seen the check. In fact, Mrs. Thomas testified that she usually gave clothes to Brooks for her mother. In light of this evidence, we conclude that the evidence admitted against Brooks was overwhelming and that the error in admitting evidence of the prior forgery was harmless. [fn4]

For the above reasons, Brooks's conviction is

REVERSED.

JOSEPH J. BOLESBY, J., concurs in a separate opinion and CONNOR, J., concurs in part and dissents in part in a separate opinion.

[fn1] Rule 404 (b) codifies the rule in *Lyle*. See *State v. Gagum*, 330 S.C. 560, 563 n. 2, 492 S.E.2d 822, 823 n. 2 (Ct. App. 1997).

[fn2] In *Nelson*, the defendant was accused of four counts of criminal sexual conduct with a minor and four counts of lewd act on a minor due to his actions in connection with a three year old child. 331 S.C. at 3, 501 S.E.2d at 717. There, the State was attempting to introduce evidence otherwise unrelated to the crime which tended to show that the defendant was a pedophile. *Id.* at 4-5, 501 S.E.2d at 717-18. The Supreme Court reversed the conviction on the grounds that admitting the evidence violated the rule in *Lyle*. *Id.* at 16, 501 S.E.2d at 724.

[fn3] In *Nelson*, 331 S.C. at 12, 501 S.E.2d at 722, the defendant simply denied any sexual contact at all, "making it highly questionable whether the element of intent was a material issue in the case." Nevertheless, the opinion in *Nelson* concentrates more on the forbidden inference of conduct from character than it does on whether intent was at issue. See 331 S.C. at 6-13, 501 S.E.2d at 718-22. Although knowledge and intent were contested in the case at bar, the logical relevancy of the prior forgery depended on an impermissible inference of criminal conduct from

bad character. Thus, in this case, that intent and knowledge were contested does not allow for admission of the prior forgery evidence under Rule 404 and Lyle.

[fn4] Brooks claims admitting photographs of her holding a forged check in the prior forgery was improper as needless detail. In light of the other overwhelming evidence against her, this evidence was also harmless.

GOOLSBY, J., concurring:

I agree with the result reached by the majority and would likewise affirm. I would hold, however, the trial court properly admitted the evidence of the prior forgery. Rule 404 (b), SCRE.

Intent is an element of forgery. See S.C. Code Ann. § 16-13-10 (Supp. 1997); State v. Westcott, 316 S.C. 473, 477, 450 S.E.2d 598, 601 (Ct. App. 1994) ("The three important factors requisite to constitute forgery by uttering or publishing a forged instrument are: (1) it must be uttered or published as true or genuine; (2) it must be known by the party uttering or publishing it that it is false, forged, or counterfeited; and (3) there must be intent to prejudice, damage, or defraud another person."). Although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," evidence of that sort may be admitted "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404 (b), SCRE.

Evidence of Ivadella Brooks's previous forgery conviction for cashing a check on a closed account was logically relevant to her criminal intent and to the lack of mistake or accident regarding the offense for which she was then being tried. That Brooks's act in presenting the check in question was prompted by criminal intent rather than by mistake or accident was the issue at trial. Given the importance of the evidence of intent and the absence of mistake or accident, the prejudice Brooks sustained as a result of the trial court's admitting the challenged evidence does not substantially outweigh its probative value.

What the majority appears to have done here is to read the "intent" and "absence of mistake or accident" exceptions out of Rule 404 (b), SCRE.

CONNOR, J. (concurring in part and dissenting in part):

I concur in Chief Judge Howell's conclusion that the admission of Brooks's prior forgery conviction constituted error. However, I respectfully disagree that the improper admission of this evidence was harmless.

The determination of whether an error is harmless depends on the particular circumstances of the case. State v. Reeves, 301 S.C. 191, 193, 391 S.E.2d 241, 243 (1990). "No definite rule of law governs this finding; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. at 193-94, 391 S.E.2d at 243.

"Whether the improper introduction of [prior bad act] evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." State v. Berry, 332 S.C. 214, 220, 503 S.E.2d 770, 773 (Ct. App. 1998) (quoting State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993)); see State v. Parker,

230, 433 S.E.2d 831 (1993) (admission of unrelated prior evidence was not reversible error where there was no evidence of guilt and, therefore, its admission was beyond a reasonable doubt); Reeves, 301 S.C. at 194, 391 S.E.2d 243 (Error is harmless when it could not reasonably affect the result of the trial.).

In the facts of this case, I cannot find the error harmless beyond a reasonable doubt. Although Brooks's inconsistent statements concerning the check may have given rise to an inference of guilt, [fn1] Brooks presented witnesses which supported her explanation that the check was for repayment of a loan to Blanche Thomas. Brooks's mother, Frances Brooks, testified that Thomas gave her a check in October or November of 1996 for repayment of a loan. She stated Thomas had borrowed approximately \$70 from her the year before. One week after receiving the check, she gave the check to her daughter and asked her to cash it in order to pay for some medication. Williams, Brooks's boyfriend, testified that at some point in November of 1996, Thomas gave Brooks's mother a check. Brooks, Brooks's brother, testified Thomas had visited her home. He further stated Thomas gave his mother a

Brooks's conviction is based on circumstantial evidence and the testimony of the State's witnesses and Brooks's statements. If the evidence is conflicting, I cannot conclude the evidence of guilt is overwhelming. Moreover, I cannot find that reference to prior forgery did not affect the result of the trial. In this case, reference to the prior forgery was especially prejudicial and damaging to Brooks's credibility given that it was the same offense for which Brooks was being tried. State v. Jenkins, 322 S.C. 414, 472 S.E.2d 251 (1996). State v. Jenkins, 322 S.C. 414, 472 S.E.2d 251 (1996). When the prior bad acts are strikingly similar to the offense for which the appellant is being tried, the danger of prejudice is enhanced." (quoting State v. Gore, 283 S.C. 118, 322 S.E.2d 12, 13 (1984)).

For these reasons, I do not believe the error in admitting evidence of Brooks's prior forgery can be considered harmless. State v. Jenkins, 322 S.C. 414, 472 S.E.2d 251 (1996). The improper admission of evidence of prior burglaries in the appellant's trial for grand larceny and first-degree burglary was a reversible error where testimony was clearly prejudicial and the other evidence of defendant's guilt was not overwhelming; State v. Jenkins, 322 S.C. at 221-22, 503 S.E.2d 774 (improper admission of prior bad act evidence was not harmless error where evidence of guilt was not overwhelming and credibility was crucial to the defense case); see also Reeves, 301 S.C. at 194, 391 S.E.2d at 243 ("Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense."). Accordingly, I would reverse Brooks's conviction and remand for a new trial.

[fn1] The majority cites State v. Scott, 330 S.C. 125, 477 S.E.2d 735 (Ct. App. 1998), to support the proposition that Brooks's inconsistent statements give rise to an inference of guilt. Scott, however, is distinguishable from the instant case. On appeal, Scott challenged his conviction for breach of trust with fraudulent intent on the ground the trial judge erred in denying his motion for a directed verdict. This Court affirmed the conviction, finding there was sufficient evidence to submit the case to the jury. This evidence included Scott's apparently false explanation for missing bank deposits his employer claimed were misappropriated by Scott. Although I agree that Scott's inconsistent statements could be considered evidence of guilty

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knowledge and intent which would be sufficient to submit the case to the jury, this is not the procedural posture of the instant case. Here, we are required to decide whether Brooks's guilt is conclusively proven by competent evidence, such that no other rational conclusion can be reached. In light of this standard, I do not believe an inference of guilt based on Brooks's inconsistent statements is sufficient to find Brooks's guilt is the only rational conclusion that can be reached from the evidence presented.

STATE v. KELSEY, 331 S.C. 50 (1998)
502 S.E.2d 63

The State, Respondent, v. Joseph Kelsey, Appellant.
Opinion No. 24801
Supreme Court

Heard February 4, 1998

Decided June 8, 1998

Rehearing Denied July 20, 1998

from McCormick County Marc H. Westbrook, J.

Conspiracy Case
2) Prior Bad Acts ✓
3) Asking Questions of ✓
specific acts of witnesses
may be asked
4) Photographs ✓

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respondent.

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TOAL, Acting Chief Justice:

This case involves the murder of fifteen-year-old Melanie
Richey. Joseph Kelsey and Geoffrey Payne were tried together and
convicted of Richey's murder. Kelsey appeals his conviction. We
affirm.

FACTUAL/PROCEDURAL BACKGROUND

In early July 1994, sixteen-year-old Kelsey was staying
with his friend, seventeen-year-old Mike Kirchner in Martinez,
Georgia. At the time, Kirchner's father was away from home on
business. On Monday, July 11, 1994, Kirchner left to go to

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work, leaving Kelsey, seventeen-year-old Geoffrey Payne, and seventeen-year-old Jamie Lynn Lee ("Defendants") alone in the house. Defendants decided to manufacture homemade pipe bombs. They initially constructed a bomb using copper tubing and gun powder extracted from firecrackers. They detonated the bomb near a tree in Kirchner's backyard.

Defendants then decided to construct more sophisticated pipe bombs. To accomplish this, they shoplifted pipe material and shotgun shells from a nearby hardware store and Wal-Mart. Under the direction of Kelsey, they built three galvanized steel pipe bombs, one of which they detonated in Kirchner's backyard. The explosion produced a crater approximately four inches deep and one foot wide. It left bomb fragments in the side of Kirchner's house and in a nearby privacy fence. Kelsey placed the other two unexploded bombs in his travel bag inside Kirchner's house.

Later that evening, Defendants gathered at Kirchner's house for a party. In addition to Defendants, the following individuals showed up for the party: Tom Wurtzinger, April Reese, Tommy Speigel, and Joey Ingram. Everyone was drinking beer. At around midnight, Lee and Payne left the party to go to a nearby Texaco station, a popular "hang-out" area among local teens. When Lee and Payne arrived at the station, they spotted Melanie Richey standing near a telephone booth. They noticed something was wrong with her foot. In the process of sneaking out of her house to meet with a friend, Richey had severely cut her foot. Lee and Payne offered to take Richey to Kirchner's house in order to clean and bandage her injuries. Richey accepted.

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Lee, Payne, and Richey returned to Kirchner's house at around 1:30 a.m. Lee and Payne helped Richey bandage her foot and then all three rejoined the party. Soon thereafter, Payne and Richey went outside on Kirchner's back porch where Payne repeatedly tried to coax Richey into having sexual intercourse with him. Richey refused Payne's advances. At several points during the night, Payne expressed to Lee his frustration over Richey's intransigence. Kelsey testified that at one point he overheard Payne tell Lee that he was so mad he could kill Richey.

Payne instructed Lee to crush up a tablet of "Ecstasy," a mild hallucinogen. Payne poured the powder into a mixture of tea and water in order to hide the taste of the drug. Payne gave the drink to Richey and told her it would help calm a stomach-ache she had been complaining about earlier in the evening. Payne did not tell her that the drink was laced with Ecstasy. Kelsey testified that while this was going on, he was resting on the floor by the stereo and occasionally changing the music selection.

At around 3:30 a.m., Defendants decided to take Richey home. While Richey was waiting for Defendants outside of Kirchner's house, Payne asked Lee to get something to knock Richey out with. Lee retrieved a wrench from Kirchner's garage. Payne then suggested that Kelsey bring the unexploded pipe bombs. Kelsey complied by retrieving the bombs from his travel bag. Kelsey testified that he was unaware, at the time, of what Payne actually intended to do with the wrench and bombs.[fn1]

Defendants and Richey then got into Lee's car, ostensibly to take Richey home. Lee was driving, Kelsey was in the passenger seat, and Payne and Richey were in the backseat. Although Richey had given them directions to her house, Lee detoured in the opposite direction. Richey asked where they were going; Payne replied that they were going to drive around for a while. Lee

drove across the Georgia border and into South
Lee testified that the music

was loud in the car, and he was going about 90 m.p.h.

After entering South Carolina, Lee noticed his tachometer
at 6000 r.p.m. Lee looked down at the gear shift and
Richey's foot had knocked the gear into neutral. Lee
saw that Payne had Richey in a "strangle hold"
on Lee continued to drive. A few minutes later, Lee
heard "quick, empty thud type sounds." He again turned around
and Payne still had Richey in a strangle hold. Lee
noticed that Payne had the wrench in his hand. Kelsey
also had also turned around and saw that Richey's
face was pale, and her lips were blue.

Minutes later, Payne leaned forward to tell Lee to turn
around. According to Lee's testimony, Payne stated, "I'm
she's knocked out, guys." Payne then instructed Lee
to "cross the bridge" which crossed over Stevens Creek, the
line between Edgefield and McCormick counties. Lee drove
where he parked the car.

Lee got out of the car, leaving Richey in the backseat.
Lee told Lee and Kelsey that he was going to have sex with
Payne took off his clothes and Richey's shorts. A few
minutes later, Lee warned Payne that a car was coming. Defendants
got back into Lee's car and began driving. After the
vehicle passed, Lee turned the car around and went
back to the bridge. Lee testified that Richey was unconscious the
time, and "she was definitely alive." Kelsey, on the other
hand, testified that he had checked Richey's pulse, and he
she was dead.

Lee again drove away from the bridge. He got approximately
down the road when Payne told him to stop the car.
Payne pulled Richey out of the car and carried her into the
up an embankment where they placed her on the ground.
Payne returned to the car. Payne and Kelsey remained by Richey's

Lee testified that while he was standing over Richey's body,
Payne instructed him to place a pipe bomb into Richey's mouth.
Lee complied. Payne then lit the fuse, and the

A few seconds later, the bomb exploded. Defendants
ran to Kirchner's house where they fell asleep.

Defendants were eventually arrested and charged with Richey's
murder. Kelsey was arrested in Maryland and brought back to South
Carolina to stand trial. Kelsey's case was transferred from
Circuit Court to the Court of General Sessions where Kelsey and
Payne were tried together as adults. Payne was found guilty of
murder and criminal conspiracy. Kelsey was found guilty of
possession of a pipe bomb, and criminal conspiracy.
Kelsey was sentenced to life imprisonment for murder and consecutive
sentences of five years for possession of a pipe bomb and criminal
conspiracy.

Kelsey appeals his conviction, raising the following issues:

- 1) Did the trial court err in denying Kelsey's
directed verdict motions because there was
insufficient proof that Kelsey was guilty of murder
and criminal conspiracy?

(2) Did the family court err in transferring jurisdiction over Kelsey's case to the Court of General Sessions?

(3) Did the trial court err in denying Kelsey's motion for a change of venue?

(4) Did the trial court err in failing to declare a mistrial when Payne's attorney pitted Kelsey's testimony against a police officer's testimony?

(5) Did the trial court err in not allowing testimony and introduction of evidence to rebut the State's innuendos that Kelsey's statement was not given in earnest?

(6) Did the trial court err in precluding Kelsey from introducing Payne's statement into evidence?

(7) Did the trial court err in not allowing Kelsey to admit evidence regarding codefendant Payne?

(8) Did the trial court err in denying Kelsey's motion for severance?

(9) Did the trial court err in denying Kelsey's motion for a mistrial when Payne's attorney cross-examined Kelsey about prior bad acts that allegedly occurred in Georgia?

(10) Did the trial court err in admitting a diagram and photographs of the crime scene into evidence?

(11) Did the trial court err in failing to give proper conspiracy and mere presence instructions?
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(12) Did the trial court err in refusing to charge the jury on the law of mistake of fact?

LAW/ANALYSIS

I. DIRECTED VERDICT MOTIONS

Kelsey argues that the trial court erred in denying his directed verdict motions because there was insufficient proof that he was guilty of murder and criminal conspiracy. We disagree.

At the close of the State's case in chief, the defense moved for directed verdicts on the murder and conspiracy charges, arguing the evidence was insufficient to support these charges. The court denied the motions. The defense again moved for directed verdicts on murder and conspiracy at the end of its case. The court again denied the motions.

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. Rowell*, 326 S.C. 313, 487 S.E.2d 185 (1997); *State v. Venters*, 300 S.C. 260, 387 S.E.2d 270 (1990); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989). In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its

Williams, 303 S.C. 274, 400 S.E.2d 131 (1991).

"the killing of any person with malice aforethought, express or implied." S.C. Code Ann. § 16-3-10 (1985). The wrongful intent to injure another and indicates a depraved spirit intent on doing wrong. *State v. Richey*, 277 S.C. 127, 352 S.E.2d 480 (1987). Malice may be inferred from the defendant's use of a deadly weapon. *State v. Richey*, 277 S.C. 377, 339 S.E.2d 109 (1985).

In this case, we find there was sufficient evidence to sustain the murder charge to the jury. The following evidence supports our conclusion:

1. The testimony that Kelsey essentially masterminded the planting of the pipe bombs at Kirchner's house on July 11; that Kelsey and Payne were alone together in the woods with Richey's body; that Lee believed Richey was definitely alive, but was lying in the car; and that Kelsey and Payne were in the woods away from Richey's body when the pipe bombs exploded;

2. Agent Joseph Powell's testimony that metal fragments found at the crime scene matched fragments found at Kirchner's house;

3. The forensic pathologist's testimony that the explosion was the probable cause of death;

4. April Reese's and Tom Wurtzinger's testimony corroborating Richey's statements concerning the events that took place at Kirchner's house on July 11 & 12; and

5. Kelsey's admission that he was the one who placed the pipe bombs into Richey's mouth.

Therefore, when the evidence is viewed in the light most favorable to the State, the trial court correctly denied Kelsey's motion for a directed verdict on the murder charge. [fn2]

CONSPIRACY

Conspiracy is defined as the "combination between two or more persons for the purpose of accomplishing a criminal or unlawful act or an object neither criminal nor unlawful by criminal or unlawful means." S.C. Code Ann. § 16-17-410 (1985). To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. *State v. Fleming*, 277 S.C. 265, 133 S.E.2d 800 (1963). In *State v. Childs*, 299 S.C. 471, 339 S.E.2d 839 (1989), the defendant

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argued that the trial court erred in denying his motion for a directed verdict on a conspiracy charge. We disagreed, finding that the following facts tended to prove the defendant's guilt: evidence that defendant knew codefendant; defendant was seen running from the area where the victim's body was found; bloodhounds tracked the victim's scent to the codefendant's house; and defendant had given a written statement stating that he agreed to be a lookout for codefendant.

In this case, evidence indicated that Kelsey was instrumental

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in constructing the pipe bombs at Kirchner's house; that Kelsey was with Lee and Payne on the night of the murder; that Kelsey helped Payne carry Richey into the woods; that Kelsey and Payne were alone together in the woods with Richey's body; and that Kelsey placed the pipe bomb into Richey's mouth. We therefore find the evidence was sufficient to submit the conspiracy charge to the jury.

II. TRANSFER OF JURISDICTION

Kelsey argues that the family court erred in transferring jurisdiction over his case to the Court of General Sessions. We disagree.

In making its motion to transfer jurisdiction, the State relied on S.C. Code Ann. § 20-7-430 (4) & (6) (1985). Section 20-7-430 (4) provides that the family court may transfer jurisdiction if that court finds "it contrary to the best interest of such child or of the public to retain jurisdiction." [fn3] After conducting a hearing on the State's transfer motion, the family court ordered jurisdiction over Kelsey's case be transferred to the Court of General Sessions. The family court found it was in the best interest of Kelsey and the community to have Kelsey tried as an adult. The family court's findings were
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based primarily upon criteria established in the appendix to the United States Supreme Court case of *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 15 L.Ed.2d 84 (1966). [fn4]

It is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of reasons for, and considerations leading to, that decision. Conclusory statements, or a mere recitation of statutory requirements, without further explanation will not suffice. In *re Sullivan*, 274 S.C. 544, 265 S.E.2d 527 (1980). The serious nature of the offense is a major factor in the transfer decision. See *Sanders v. State*, 281 S.C. 53, 314 S.E.2d 319 (1984) (transfer upheld where defendant was charged with two counts of murder and two counts of assault and battery with intent to kill); *State v. Wright*, 269 S.C. 414, 237 S.E.2d 764 (1977) (transfer upheld where defendants were charged with armed robbery and assault and battery with intent to kill).
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In this case, the family court's transfer hearing was extensive. It not only included the testimony of relevant witnesses, including Kelsey, but also the submission of a lengthy preadjudicatory transfer evaluation. Additionally, the family court's transfer order was detailed and raised the following points: (1) Kelsey was charged with the serious and violent offense of murder, and the victim was a young girl; (2) it was likely that the Grand Jury would return an indictment against Kelsey; (3) Kelsey's two codefendants were going to be tried in the Court of General Sessions; (4) if tried as a minor, Kelsey would only get 24 to 54 months if convicted of the murder charge - this was not in the community's best interest due to the seriousness of the crime; and (5) Kelsey would have less of a chance of rehabilitation in the juvenile justice system because his sentence under that system would be brief.

We therefore find the family court properly transferred jurisdiction to the Court of General Sessions pursuant to section 20-7-430. [fn5]

III. CHANGE OF VENUE

that the trial court erred in denying his motion for a change of venue due to the enormous amount of pretrial publicity surrounding his case. We disagree.

During voir dire, the trial judge asked all of the prospective jurors whether they had heard anything about the case through the news. Of the ninety prospective jurors, seventy-nine indicated that they had heard something about the case. The trial judge asked these prospective jurors whether they could put aside what they had heard and base their verdict on the evidence presented at trial. Thirty-five indicated that they could not and were subsequently excused by the trial judge. The trial judge then questioned three of the remaining jurors after defense counsel expressed concern about their initial responses. After this questioning was completed, the defense renewed its motion for a change of venue. The trial judge denied the motion, stating:

My instinct though tells me that just because people have heard about the case doesn't have necessarily mean that they have formed some opinion about the case. To do that I think would have in essence, assume that they believed everything they had seen or read and that, in essence, they were just a sort of automatons that were dictated to by the media. I don't think I can go that far.

Twelve jurors finally seated, three had not heard anything about the case.

Defendant argues that the media attention surrounding his case was so great that it precluded any possibility of him obtaining a fair trial by an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution. Kelsey further argues that this prejudice is demonstrated by the fact that such a large number of prospective jurors indicated, during voir dire, that they had heard something about the case. Kelsey suggests that all of the prospective jurors not excused during voir dire were in some way subconsciously affected by the high volume of media coverage surrounding the case.

A motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). When the trial judge bases his ruling upon an adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted by outside influence will not be disturbed absent extraordinary circumstances. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1991); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816; *State v. Simpson*, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The exposure to pretrial publicity does not automatically disqualify a prospective juror. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816. When jurors have been exposed to such publicity, denial of a change of venue is not error where jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented at trial. *Id.* Moreover, it is the defendant's burden to demonstrate actual juror prejudice.

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As a result of news accounts of the defendant's case. *State v. Owens*, 305 S.C. 161, 359 S.E.2d 275 (1987).

Kelsey cites *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 S.Ct. 2d 751 (1961) and *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct.

THE STATE v. HENRY, ___ S.C. ___ (Ct.App. 1993) *Vyle Case*
432 S.E.2d 489

The State, Appellant, v. Levern Henry, Respondent.
Opinion No. 2011
Court of Appeals
Heard March 24, 1993
Filed May 10, 1993

Appeal from Richland County William B. Traxler, Jr., Circuit
Court Judge

AFFIRMED IN PART

REVERSED IN PART

AND REMANDED

Attorney General T. Travis Medlock, Chief Deputy Attorney
General Donald J. Zelenka, Assistant Attorneys General Harold
L. Coombs, Jr., and Miller W. Shealy, Jr.; and Solicitor
Richard A. Harpootlian, all of Columbia, for appellant.

William F. Nettles, IV, of Savage, Royall & Sheheen, of
Camden, for respondent.

GARDNER, J.:

Levern Henry (Henry) was indicted for sexual crimes against
his step-daughter, Jenne Blount. At a pre-trial hearing, the
State made a motion to admit the testimony of an older
step-daughter, Nayenda, and a younger step-daughter, Tenita,
both of whom had allegedly been sexually abused by Henry. The
trial court denied the State's motion. The State appeals. We
affirm in part, reverse in part and remand.

FACTS

The facts, as proffered by the State, show that Henry abused
his two other step-daughters over a period of years. The
alleged abuse of Nayenda and Jenne consisted of a number of
common elements including: viewing pornographic videos in the
home, offering money to accomplish his objectives, touching in
a sexually offensive manner, and threatening that if the
victims did not participate, privileges would be withheld. Henry allegedly
attempted to extend this abusive pattern to his youngest
step-daughter, Tenita, but his progression was stopped when she
disclosed his behavior to her mother. Shortly thereafter, the
mother contacted the police, and Henry was arrested on February
19, 1991.

DISCUSSION

We review this appeal under State v. McKnight, 287 S.C. 167,
337 S.E.2d 208 (1985) overruling State v. Thomas,
275 S.C. 274, 269 S.E.2d 768 (1980), which provides in pertinent
part:

A pre-trial order granting the suppression of
evidence which significantly impairs the
prosecution of a criminal case is directly
appealable under S.C. Code Ann. § 14-3-330(2) (a)
(1976).

Id. at 168, 337 S.E.2d at 209. Henry argues that the State
can obtain a conviction without the subject testimony and,
therefore, the exclusion of such evidence does not

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significantly impair the prosecution of the case. We disagree and hold that the suppression of the subject testimony would significantly impair the State's case. Accordingly, the pre-trial order is directly appealable.

Generally, evidence of prior offenses is not admissible to prove the crime for which the defendant is charged. E.g., State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). If, however, evidence of prior bad acts is sufficiently similar to the offense charged, it may be admitted if its probative value clearly outweighs its prejudicial effect. State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). See also State v. Simmons, Op. No. 23784 (S.C. Sup. Ct. filed Feb. 1, 1993) (Davis Adv. Sh. No. 3 at 12) (evidence of other crimes admissible under Lyle as tending to establish intent).

We hold that the testimony of the oldest step-daughter, Nayenda, is clearly admissible under Lyle. Both Jenne and Nayenda experienced similar acts of abuse from the defendant which occurred in the same places and during the same time frame.[fn1] We hold that the probative value of Nayenda's testimony substantially outweighs any danger of unfair prejudice. Thus, her testimony falls within the Lyle common scheme exception.

The testimony of the youngest step-daughter, Tenita, is a much closer question. Tenita, fortunately, was not subjected to the defendant's abusive conduct to the extent of her sisters. The crimes committed on Jenne and Tenita are not "so related to each other that proof of one tends to establish the other." State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980), citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). ~~There must be a connection between the crime charged and the prior bad acts of the accused should be given the benefit of the doubt.~~ State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). Accordingly, we hold that Tenita's testimony should be excluded to prevent undue prejudice.

Thus, we hold that the trial court erred in suppressing the testimony of Nayenda, and reverse and remand for further proceedings consistent with this decision. We affirm the trial court's exclusion of the testimony of Tenita as insufficiently related to the crimes charged.

For the foregoing reasons, we affirm in part, reverse in part and remand.

1 AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

SHAW and BELL, JJ., concur.

[fn1] In State v. Rogers, 293 S.C. 505, 362 S.E.2d 7 (1987), the Supreme Court held that the testimony of the victim's sister, regarding other abusive conduct by the defendant, did not tend to show a common scheme because the acts were dissimilar from the offense charged and occurred ten years apart. We distinguish Rogers from the present case based on the similarity in character and time of the alleged crimes.

STATE v. LYLE, 332 S.C. 100 (1998)
304 S.E.2d 324

✓ D Lyle Case ***

The STATE, Respondent, v. Brenda Gail CUTRO, Appellant.

Opinion No. 24834.

Supreme Court of South Carolina.

Heard September 18, 1997.

Decided August 31, 1998.

Rehearing Denied September 25, 1998.

Appeal From Circuit Court, Richland County, M. Duane Shuler, Judge.

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Thomas M. Neal, III, H. Wesley Kirkland, Jr., and S.C. Office of Appellate Defense, all of Columbia; and L. Lisa McPherson, of Lexington, for appellant.

Attorney General Charles Molony Condon, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, Solicitor Warren B. Giese, and Deputy Solicitor Jonathan S. Gasser, all of Columbia, for Respondent.

MOORE, Justice:

Appellant Brenda Gail Cutro was convicted of one count of murder and sentenced to life imprisonment. We reverse.

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FACTS

In 1993, appellant and her husband operated a day care center in their home. During that year, two infants died while in their care. A third child was diagnosed with Shaken Baby Syndrome. Appellant was convicted of murder for the September 1993 death of four-month-old Ashlan Daniel. The death of Parker Colson in January 1993 and the June 1993 diagnosis of Asher Maier with Shaken Baby Syndrome were admitted into evidence as prior bad acts at appellant's trial.[fn1]

ISSUE

Did the trial judge err in admitting evidence of Parker's death and Asher's diagnosis of Shaken Baby Syndrome which the state offered to prove common scheme or plan pursuant to State v. Lyle?[fn2]

DISCUSSION

Appellant contends the trial judge erred in admitting Lyle evidence.[fn3] We agree. The State offered evidence of two

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alleged prior bad acts: 1) Parker's death which occurred eight months before Ashlan's death and while he was in appellant's care on January 4, 1993; and 2) the diagnosis of Asher with Shaken Baby Syndrome three months prior to Ashlan's death on June 23, 1993. Prior to trial, the trial judge held a hearing on the admissibility of this evidence. He ruled that he would let the State introduce the evidence and if the State was unable to tie the evidence together he would grant a mistrial. After the State concluded its case, the trial judge found the evidence admissible and held that the State had presented clear and convincing evidence, albeit circumstantial, that appellant had committed these other offenses.

In the case of the common scheme or plan exception under Lyle, a close degree of similarity or connection between the

prior bad act and the crime for which the defendant is on trial is necessary. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). See also State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983). A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary. Id.

Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes. The trial judge must clearly perceive the connection between the other crimes and the crimes charged. Lyle, supra. Further, other crimes which are not the subject of conviction must be proven by clear and convincing evidence. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997).

obtain case

In *Pierce*, we held the trial court erred in admitting prior bad act evidence of child abuse because the State had failed to offer clear and convincing proof that the appellant had inflicted the prior injuries. Similarly, in *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989), we held proof appellant committed a prior murder was not clear and convincing.

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Likewise, here, the evidence is insufficient to establish that appellant was the actor in Parker's death or Asher's injuries. [fn4]

Appellant and her husband testified she routinely left all of the children in her husband's care while she ran errands. In fact, on the day Parker died, they testified appellant's husband provided almost all of their care. On that day, appellant left the house for over two hours to go to the bank, grocery store, a crafts store, and Wal-mart. Appellant's husband was holding Parker when she returned and he put Parker down for his nap. Appellant's husband found Parker not breathing an hour later.

The experts seem to agree that Asher's injuries occurred sometime within the seventy-two-hour-period prior to when he was taken to the hospital. Further, because he was not dehydrated, it was ascertained that the injury probably occurred within the prior twenty-four hours. [fn5] Asher was taken to the hospital on the morning of Wednesday, June 23rd. Appellant and another parent testified Asher appeared sick when his mother, Catherine Maier, dropped him off at approximately 7:30 a.m. Appellant called Catherine that morning around 10:30 a.m. and asked her to take him to the doctor. Appellant's husband immediately carried Asher, who was already strapped into his car seat, out to the car when Catherine arrived to take him to the doctor at approximately 11:30 a.m.

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Several persons other than appellant, including Catherine and appellant's husband, had access to Asher within this preceding twenty-four hour period. We think the evidence is insufficient to establish that appellant injured Asher.

The dissent states "[Appellant] had nearly exclusive control over Asher and Parker; the only other person with clear access to Asher and Parker was [appellant's] husband." (emphasis added). This view of the evidence does not support the conclusion that appellant was the sole person who could have inflicted the injuries. The dissent points to appellant's testimony that Parker was her responsibility and it was her job to give him back to his mother that day. This testimony does not somehow exclude appellant's husband from being the perpetrator. The dissent states appellant's credibility was in doubt at trial. Even if we

discount appellant's testimony because of her lack of credibility, there is still appellant's husband's testimony that he helped care for the children. More importantly, the State did not present any evidence to the contrary. Thus, the only evidence on this issue is that appellant did not have exclusive control of the children.

The facts of this case are very similar to the facts in *State v. Conyers*, 268 S.C. 276, 233 S.E.2d 95 (1977). In *Conyers*, the appellant was convicted of murdering her second husband by poisoning him with arsenic. The State introduced evidence regarding the poisoning of appellant's son-in-law, mother-in-law, first husband, and a potential business partner. The Court summarily concluded the trial judge properly admitted evidence of poisoning of the son-in-law, mother-in-law, and potential business partner. However, the Court held the trial court had erred in admitting evidence of the poisoning of appellant's ex-husband. Appellant's first husband died six years before her second husband. The first husband's body was exhumed and it was found to contain the highest level of arsenic of any of the other victims. (There was very little evidence, however, to establish that appellant poisoned her first husband other than the fact that she was his wife and he had some life insurance. This evidence alone was insufficient to establish the identity of appellant as the actor in poisoning her first husband.) 268 S.C.

at 281, 233 S.E.2d at 96.[fn6] The
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Court held the admission of this evidence was clearly prejudicial and reversed.

Likewise, here, the evidence is insufficient to establish that appellant was the actor in Parker's death or Asher's injuries and we hold the trial judge erred in admitting this evidence. Accordingly, we reverse.

Appellant's remaining issues are affirmed pursuant to Rule 22D(b)(2) and the following authorities: Issue 2: *State v. Perkins*, 319 S.C. 415, 462 S.E.2d 59 (1995).[fn7] Issue 3: *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993) (appellant cannot on appeal complain about the admission of evidence which she elicited). Issue 4: *State v. Williams*, 303 S.C. 274, 400 S.E.2d 131 (1991) (in ruling on a motion for a directed verdict, the trial judge is concerned with the existence or nonexistence of evidence, not its weight). Issue 5: *State v. Bailey*, 276 S.C. 32, 274 S.E.2d 913 (1981) (admission of evidence is within the trial court's discretion and absent an abuse of this discretion will not be reversed by this Court); *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986) (evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears); *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (appellant cannot complain of prejudice from admission of evidence if he opened the door to its admission).

REVERSED.

TINNEY, C.J., and WALLER, A.J., concur.

TOAL and BURNETT, JJ., dissenting in separate opinion.

[fn4] After an autopsy, Parker's death initially was attributed to pneumonia. This was subsequently changed to SIDS by the pathologist who had performed the autopsy after she consulted an expert on SIDS. Ashlan's cause of death was listed as "undetermined/presumed SIDS." Ashlan's autopsy was performed by a different doctor and with the knowledge of Parker's death and

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Asher's injury and the suspicions surrounding appellant and her husband. SIDS is a diagnosis by exclusion (i.e. no cause of death can be ascertained). The bodies of the babies were exhumed in July 1994 and the State's experts determined the babies had died from asphyxiation as a result of trauma. The doctors who had performed the original autopsies did not change their opinions as to the cause of the deaths. Further, several defense experts also testified the children did not die as a result of trauma.

[fn2] 125 S.C. 406, 118 S.E. 803 (1923).

[fn3] Contrary to the dissent's assertions, appellant properly raised this issue on appeal. In her brief, appellant states that "[i]n the absence of any properly-admitted evidence that [appellant] shook each of these three (3) children, the necessary Lyle connection fails and the Colson/Maier evidence should not have been admitted." Appellant argues that Parker and Ashlan died from SIDS (i.e. not from trauma). Appellant's trial strategy was to prove that Parker and Ashlan died from SIDS. In doing so,, she implicitly argued she did not commit any bad act. There could be no other way to view this argument. As for Asher, appellant does not dispute that the child was shaken - she contends, however, that she did not do it.

[fn4] The dissent blatantly concludes the "SIDS diagnosis was in error" even though the highly qualified medical experts who testified in this trial could not agree this was the case. Unlike the dissent, we find it unnecessary to summarize the testimony of the numerous medical experts. We base our opinion upon the lack of evidence presented that appellant was the perpetrator, if there was one.

We note, however, the dissent misleadingly states Dr. Daniel, who had originally performed the autopsy on Parker, testified that her findings were consistent with forced asphyxiation. Dr. Daniels testified her findings were consistent with forced asphyxiation and SIDS. She testified she made her final decision by determining that it was more likely than not that this was a SIDS death.

[fn5] Dr. Louis Becton testified Asher was not dehydrated and after he had been shaken he would have immediately lost his motor skills and been unable to eat. He also testified it takes an infant hours, rather than days, to become dehydrated.

[fn6] Contrary to the dissent's assertions, the Conyers opinion, which summarily affirms the admission of some Lyle evidence without any analysis or discussion, provides no support for the admission of the Lyle evidence in this case. Furthermore, the Conyers decision is not the only precedent upon which we base our decision in this case.

[fn7] Based solely upon the grounds which appellant raised, we affirm the admission of the statistics.

TOAL, Justice:

The majority affirms all issues, except the question of Cutro's prior bad acts. It finds that the trial court erred in admitting, under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), evidence of the death of Parker Colson and the injury

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of Asher Maier. Because this finding fails procedurally and substantively, I must dissent from this portion of the majority's opinion.

A. PROCEDURAL GROUNDS

The majority opinion holds that evidence of Brenda Cutro's prior bad acts is inadmissible because the State failed to prove her commission of these acts by clear and convincing evidence. This argument is procedurally barred inasmuch as it was neither raised, nor argued, on appeal by Cutro. Before this Court, Cutro contests the trial court's ruling concerning the Lyle evidence on two distinct bases: (1) the State has not established a sufficient connection for the prior bad acts to be admissible because of dissimilarities between the prior bad acts and the current murder; and (2) even if the evidence were admissible, the State has introduced too much evidence, thereby prejudicing Cutro.

Cutro does not argue that the State failed to prove the prior bad acts by clear and convincing evidence. This issue has been raised by the majority *sua sponte*. Because this ground is procedurally barred, it is improper for this Court to consider it. See *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981). An issue not argued in the appellant's brief is deemed abandoned. The impropriety of reaching this issue is compounded by the fact that the parties have not had the opportunity to adequately brief this issue. This is particularly necessary in a case like this one, a complex two-week trial that involved a parade of over eighty witnesses, a collection of over one hundred exhibits, and a record exceeding three thousand pages.

In footnote 3 of its opinion, the majority attempts to rebut our position that its argument is procedurally barred. It posits, in a very generalized fashion, the argument that somehow the issue is before this Court. In claiming that Cutro has properly presented the issue that the State has failed to prove by clear and convincing evidence that she committed the prior bad acts, the majority has not - and cannot - cite to a single paragraph of the argument contained in Cutro's brief to support its position. [fn1] A perusal of the eleven-page Lyle

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argument contained in Cutro's brief will demonstrate beyond peradventure that this issue is procedurally barred. Even an examination of Cutro's argument headings suffices to convince that the argument is not appellant's, but rather a *sua sponte* product of the majority's analysis. As an aid to the reader, we quote these argument headings:

I. The trial judge improperly allowed the State to introduce evidence concerning the death of Parker Colson and the injury to Asher Maier.

A. There was doubt as to the connection between the death of Ashlan Daniel (the charge for which Appellant was tried) and the death of Parker Colson and the injury to Asher Maier.

B. If any such evidence was admissible, the State introduced too much evidence and effectively tried the Appellant on all three (3) charges.

See Appellant's Brief, pp. 16-26.

The arguments that were presented by Cutro's brief are as follows: Where an alleged bad act is strikingly similar to the one for which a defendant is being tried, the danger of prejudice is enhanced; this is particularly true in a case resting upon circumstantial evidence. The case against Cutro was purely circumstantial in nature. See Appellant's Brief,

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pp. 16-17. Further, the State did not prove the bad acts were similar. See Appellant's Brief, pp. 20-22. Finally, if the evidence were admissible, the State introduced too much of it. See Appellant's Brief, pp. 22-26.

It is most revealing that the argument created for Cutro by the majority even contradicts, at the most basic level, one of the very arguments she did make: The majority champions the cause that the State did not present enough evidence. Contrarily, Cutro's brief contends that the State presented too much evidence. This discrepancy alone should alert us to the procedural mischief afoot.

Thus, because Cutro has never presented the argument lying at the center of the majority's conclusion, the matter should be considered procedurally barred.

B. SUBSTANTIVE GROUNDS

Even if we assume the issue has been properly presented on appeal, it fails on the merits. The majority opinion concludes that there was not clear and convincing evidence that Cutro caused Parker's death and Asher's injuries. The record is otherwise.

Cutro operated a day care center in her home in Irmo, South Carolina. During an eight month period in 1993, three children in Cutro's care either died or were severely injured. In January 1993, Parker Colson died while in Cutro's care; in June 1993, Asher Maier suffered severe brain damage while in Cutro's care; in September 1993, Ashlan Daniel died while in Cutro's care. Cutro was eventually indicted for the murder of Ashlan. The State sought to introduce, under Lyle, evidence of Parker's death and Asher's injuries in order to show motive, a common scheme or plan, and identity. There were a number of similarities between the three cases:

1. all three children were in the custody, care, and control of Cutro;

2. all three children were between four and five months old;

3. all the events occurred at Cutro's house;

4. all the events occurred during daytime;

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5. all three children died as a result of physical abuse (suffocation or shaking);

6. all three children suffered injuries to the brain area;

7. the deaths and injury were all inconsistent with Sudden Infant Death Syndrome [SIDS];

8. all three children had insignificant medical histories;

9. all the children were born after normal, full-term pregnancies; and

10. there was absence of evidence that the injuries were caused by accident.

The trial court admitted the evidence of the prior bad acts, finding this to be a "textbook" Lyle situation. The court further found that the probative value of the evidence outweighed its prejudicial effect. Moreover, it concluded that, in this circumstantial evidence case, the State had proved the prior bad acts with clear and convincing evidence.

The admission of evidence in a criminal prosecution is within the discretion of the trial court, and its ruling will not be disturbed on appeal unless an abuse of discretion is shown. *State v. Wright*, 322 S.C. 253, 471 S.E.2d 700 (1996). A review of the record reveals there is ample evidence to uphold the trial court's ruling that the prior bad acts were proven by clear and convincing evidence.

1. PARKER COLSON

Parker was a healthy baby in the days preceding January 4, 1993. He was perfectly fine when he was dropped off at Cutro's day care center on January 4th. In the middle of the day, his mother received a call from the day care center and was told that Parker was not breathing. Emergency medical personnel were called to Cutro's home where they found that the infant's heart was not beating. They were told upon their arrival that Parker had been found on the bed not breathing and that he had been checked 10 or 15 minutes earlier and was okay. They attempted to resuscitate Parker, but were unsuccessful. Parker was transported to the hospital where for 20 minutes the emergency room physician attempted to resuscitate him. The physician also failed. Parker was declared dead at 2:55 p.m.

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On January 5th, Dr. Beverly Williams-Daniel, a pathologist at the Lexington Medical Center, performed an autopsy on Parker. She did not discover any external signs of trauma to Parker's body. Based on collections of cells found in Parker's lungs, she originally listed his cause of death as acute bronchopneumonia bilateral. After getting more information from Parker's parents, Dr. Daniel felt that she may have misdiagnosed the cause of death. She consulted another pathologist who advised that Parker did not die from pneumonia. Because she did not have another cause of death, Dr. Daniel amended the report to list SIDS as the cause.

Dr. Enid Gilbert-Barness, a professor of pediatrics and pathology and a hospital director of pediatric pathology, examined the evidence related to Parker's death. At the time, Dr. Barness had over 40 years of experience in pediatric pathology, having performed in excess of 4,000 autopsies. After reviewing the autopsy reports and the pathological specimens, she was alarmed to find the presence of petechial hemorrhages in Parker's brain. In her 40 years of practicing pediatric pathology, she had never observed gross (i.e. visible to the naked eye) petechial hemorrhaging in the brain of an infant diagnosed with SIDS. She testified that Parker died of trauma, which was very likely caused by shaking, resulting in a subdural hemorrhage and petechial hemorrhages in the brain.

Dr. John Emery, a forensic pediatric pathologist, also testified for the State. In Dr. Emery's 45 years of experience, he had performed autopsies on over 6,000 infants. After reviewing the evidence, Dr. Emery concluded that the cells in Parker's lungs were not connected with his death. Misdiagnosis based on this symptom occurs when pathologists do not have experience performing autopsies on infants. Dr. Emery found petechiae in Parker's brain in a distribution that was "quite different" than

in control studies. The petechiae were increased to a level of clinical significance. He was convinced that there was blood in the dura before the child had died. It was his opinion that Parker had died as a result of trauma.

Dr. Janice Ophoven similarly testified. As a pediatric forensic pathologist, she had had over 23 years of experience; the last 18 of those years had been primarily focused on

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infant autopsies. She reviewed the microscopic slides of Parker's major organs, photographs of body parts after exhumation, as well as his complete medical history and other medical information. After reviewing the information, she concluded that Parker did not die naturally. She observed petechial hemorrhages in the brain that were visible to the naked eye. This is a sign of asphyxia. In all her years of experience, Dr. Ophoven had never observed gross petechial hemorrhages in infants who had died of SIDS. Nor had she ever seen a scientific journal describing a case of SIDS involving grossly visible petechial hemorrhages. Based on this finding, and also the presence of subdural blood, she concluded that Parker had died of non-accidental trauma or child abuse.

Dr. Ophoven also had the opportunity to review the autopsies of every South Carolina infant who had died in the period January 1, 1993 to June 14, 1994 and whose cause of death had been listed as SIDS. After reviewing 102 autopsies from 31 counties, she found that of all the infants in these cases, only two had suffered hemorrhaging in the brain, detectable grossly and microscopically. These two infants were Parker Colson and Ashlan Daniel, the child Cutro was found guilty of murdering in the instant case.

2. ASHER MAIER

Asher was dropped off at Cutro's home on June 23, 1993 at 7:30 a.m. At 10:30 a.m., Cutro called Asher's mother, asking her to take him to the doctor because he would not eat or sleep and kept crying. Asher's mother arrived soon thereafter and took Asher to the doctor.

Dr. Lewis Becton, who examined Asher, testified that when Asher was brought into the hospital, he was pale and irritable, had very poor neck control, could not focus, and was obviously not neurologically normal. His neck was completely limp, and he had retinal hemorrhaging. Asher was diagnosed as suffering from shaken baby syndrome. Dr. Becton testified that Asher's condition was such that he could not suck or take food. Such symptoms occur immediately after a baby has been shaken. Because Asher was not dehydrated, he must have had food within the previous 24 hours. Thus, the shaking of Asher must have occurred in this 24 hour period.

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The last time Asher had been seen to be normal was when he was dropped off at Cutro's day care. A parent who went by the day care center that morning testified that he saw Asher holding his head up and turning around. Cutro herself had given a statement about the events of June 23rd. In her statement, she said that Asher was dropped off at the day care center by her mother. Cutro indicated that Asher was not fully alert that morning. She made no mention that Asher exhibited any highly unusual symptoms, such as a limp neck.

Dr. Randall Alexander, a nationally recognized expert in the field of pediatrics and child abuse, testified that his examination of the evidence revealed that Asher had suffered from

at least two episodes of violent shaking. This conclusion was based on both medical and historical evidence. C.T. scans and M.R.I. scans showed that Asher had sustained considerable head trauma. Moreover, he had had retinal hemorrhaging, which appears in up to 90 percent of shaken baby syndrome cases. The symptoms of shaking appear shortly after the abuse. Accordingly, Dr. Alexander concluded to a reasonable degree of medical certainty that the second shaking episode must have occurred between 7:30 a.m. and 11:30 a.m. on June 23rd - between the time Asher was dropped off at Cutro's and the time he was presented at Dr. Weston's office.

Dr. Wilbur Smith, Jr. also testified. As an expert in pediatric radiology and child abuse, he was, at the time of the trial, one of only 30 or fewer physicians in the country who were exam-certified in the field. He stated that because of the evidence of the retinal hemorrhages, the subdural hematomas, and subarachnoid hemorrhages, "there is no question [that] there is no other medical diagnosis" than shaken baby syndrome. Sufficient tests, he declared, were done to rule out any other cause. Based on the eyewitness evidence of how Asher was acting when he was dropped off, Dr. Smith concluded that Asher must have been shaken on June 23rd, sometime between 7:30 a.m. and when he was taken to the doctor's office.

The above evidence, which is uncontested, clearly and convincingly shows that Asher was normal when he was dropped off. When he emerged after a few hours in Cutro's care, he exhibited the signs of shaken baby syndrome.

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3. PROPER ADMISSION OF EVIDENCE BY TRIAL JUDGE

Cutro argues, and the majority agrees, that there was conflicting evidence concerning the proof of the prior bad acts. Although I would concur that the evidence was not contradicted (as it rarely is in a criminal case), I find that the weight of evidence establishing Cutro's abuse of Parker and Asher is simply overwhelming. The State presented significant, but not excessive, evidence to establish a close degree of similarity or connection between all of Cutro's bad acts.

The majority implicitly suggests that SIDS, not trauma, was the real cause of Parker's death. This argument fails on numerous grounds. First, the opinion does not specify exactly what this evidence is. My reading of the record leads me to conclude that evidence of SIDS was minimal, in comparison to the mountain of evidence presented that abuse was the cause of death. The convincing testimony of highly-qualified experts has been described in detail above.

Second, even if Cutro's defense witnesses presented some evidence of SIDS, the persuasiveness of this evidence was essentially nullified by the same witnesses' candid and compelling arguments in favor of the State's position. Cutro's own expert, Dr. Sandra Conradi, remarkably testified that she "was very suspicious of homicide." She further said on the stand that she did not recall, in her years of experience, ever seeing grossly or microscopically petechial hemorrhages in a SIDS case. Dr. James Reynolds, who also testified on behalf of Cutro, stated that in his 23 years of experience, he had never seen petechial hemorrhages in the brain of a SIDS infant. Finally, Dr. John Pless, another of Cutro's expert witnesses, declared that in his opinion, Asher Maier was shaken.

Third, Cutro has failed to rebut the evidence presented by the

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State as to why Parker's death may have initially been misdiagnosed as SIDS. Dr. Daniel, who had labeled Parker's death as SIDS (after changing it from pneumonia), testified that there were three major factors which did not make this a SIDS case: (1) it was uncommon for SIDS deaths to occur in the middle of the day; they are much more common during the night; (2) she did not find any petechial hemorrhages in the intrathoracic area, which is commonly found in SIDS

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cases; and (3) she found petechiae in the brain, which she had never seen occur in a SIDS case. She indicated that her findings were consistent with forced asphyxiation.

Furthermore, Dr. Barness testified that the initial pathologist failed to take certain steps during the autopsy. If these steps - including the removal and examination of the eyes and the removal of the dura - had been taken, they would have assisted in making an accurate diagnosis. This was further confirmed by Dr. Ophoven who stated that in order to observe any type of hemorrhage or trauma to the eyes, the pathologist has to remove the eyes. At the initial autopsy, the eyes were not removed. Nor was the dura stripped. For these reasons, the SIDS diagnosis was in error. The initial misdiagnosis is understandable given that the autopsy was conducted by a general pathologist and not by one with specific training or expertise in performing infant autopsies. In contrast, the experts presented by the State had decades of experience in the fields of pediatric pathology, pediatric forensic pathology, and pediatric radiology, and had performed autopsies on thousands of infants.

The majority asserts there was insufficient evidence Cutro injured Asher or Parker. While the State obviously did not have direct evidence of these bad acts, it presented an overwhelming amount of circumstantial evidence. Cutro had nearly exclusive control[fn2] over Asher and Parker; the only other

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person with clear access to Asher and Parker was Cutro's husband. She herself testified that Parker "was my responsibility. It was my job to give him back to his mother that day." These children were dropped off in the morning at Cutro's. When they were picked up, they were already injured. Two expert witnesses testified that Asher's injuries occurred between 7:30 a.m. and when Asher was picked up (at approximately 11:30 a.m.). To further confirm that Cutro was the person taking care of Asher, we can look to the very affidavit Cutro gave about the incidences of that day, an affidavit given prior to her being charged in this case. She describes how Asher was feeling the day he was injured, details how she cared for him that day, and states how she called Asher's mother to inform her that Asher was not well. Nowhere in the affidavit is there any mention of anyone else having contact with Asher.

The majority now asserts that Cutro routinely left the children with her husband to run errands and that she was even gone for hours on the day of Parker's death. The majority bases these assertions on Cutro's testimony. The reliability of this information turns, therefore, on Cutro's credibility, a matter which was clearly before the judge. There was much evidence presented to call Cutro's credibility into doubt. At trial it became evident that on a sworn affidavit related to the present incidences, Cutro had made a material misrepresentation. On cross-examination, she testified that she had no explanation why she had lied on the affidavit. Additionally, at trial, she testified that she had no contact with Parker on the day he died. This, however, contradicted the deposition testimony she had previously given, where she stated that she had played and fed

her and had changed his diaper on that day. Because there was

elicting evidence at trial whether Cutro was present and what
of contact she had with the children, the matter of her
ability assumes great significance. The trial judge, not this
is in the best position to be the arbiter of her
ability. [fn3]

On ruling on the admission of evidence of a prior bad act, the
trial court must find that the bad act has been established by
clear and convincing evidence. On appeal, we are to ascertain
whether the trial court abused its discretion in admitting the
evidence. See *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263
(1985). (The admission of evidence is within the trial court's
discretion and absent an abuse of this discretion, will not be
reversed by this Court.), cert. denied, 516 U.S. 1080,
119 S.Ct. 789, 133 L.Ed.2d 739 (1996). Our task is not to engage in
de novo review of the evidence. Nor are we to usurp the authority
of the trial court by attempting to judge the credibility of witnesses.
The determination of credibility must be left to the trial judge who
saw and heard the witnesses and is therefore in a better position
to evaluate their veracity. Cf. *State v. Martin*, 278 S.C. 427,
348 S.E.2d 87 (1982); *State v. Rosier*, 312 S.C. 145,
399 S.E.2d 307 (Ct. App. 1993).

Although there may have been some conflicts in the evidence
presented in this case, the trial court had the opportunity, over
the span of the two-week proceeding, to evaluate the evidence; to
hear lay witnesses, to weigh the credibility of expert witnesses,
to assess their varying professional credentials, to appraise the
weight of their experience, and to attempt to resolve
discrepancies in their testimony in ascertaining whether the
prior bad acts were proven by clear and convincing evidence. The
trial court carried out this task. In fact, the judge's
application of this standard is explicitly enunciated in the
record. He states that although at a certain point in
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the trial he was not sure whether the clear and convincing standard
had been satisfied, after he heard the testimony of the State's
several experts, including Dr. Barness, he concluded that the
evidence was clear and convincing. He says, in reference to Dr.
Barness, that she was "very clear and very convincing." He
further remarks: "I don't know that I've ever heard a witness
state her opinion in a stronger fashion that she did."

Because I believe the trial court is clearly in a superior
position to assess the evidence first-hand and to judge the
credibility of the witnesses, on appeal, we must defer to its
determination whether the clear and convincing standard has been
met. As with any evidentiary ruling, this finding should be
reversed only if the trial judge abused its discretion. The
majority opinion suggests a different standard. It implicitly
proposes that this Court review the evidence de novo. Not only
would this improperly encroach upon the authority of the trial
court, but it would also force this Court to engage in
determinations of evidentiary questions without the benefit of
seeing, hearing, or assessing the witnesses. I would adhere to
our traditional path, rather than to traverse this new and
dangerously tortuous route.

If the above reasons were not sufficient, then certainly the
every case cited by the majority should alert us to the proper
course. The majority opinion cites *State v. Conyers*, 268 S.C. 276,
323 S.E.2d 95 (1977) in support of its argument that there
is insufficient evidence to establish the defendant was the actor
in the prior bad acts. I wholeheartedly agree with the majority

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that Conyers controls. However, Conyers does not suggest reversal of the present case, but rather compels its affirmance.

In Conyers, the defendant was tried for the poisoning of her husband. At trial, the State introduced, under Lyle, evidence of the alleged poisoning of Conyers's first husband, son-in-law, mother-in-law, and a business acquaintance. Conyers was convicted. She appealed her conviction, contesting the admission of the evidence of the other poisonings. She argued, in part, that these other bad acts had not been proven by clear and convincing evidence. This Court accepted her argument that evidence of the poisoning of her first husband was

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inadmissible; however, we held that evidence of the other three prior bad acts had properly been admitted. Because Conyers is a case in which some Lyle evidence was deemed sufficient and properly admitted, while other Lyle evidence was deemed insufficient and inadmissible, it provides an ideal vehicle for testing the sufficiency of the evidence in the instant case. To determine whether evidence of Cutro's prior bad acts should have been admitted, we must compare it with not only the evidence rejected in Conyers, but also the evidence found sufficient in Conyers.

In Conyers, we held that the evidence of the poisoning of Conyers's first husband was inadmissible because there was very little to connect Conyers to the poisoning. The only evidence the State offered in connection with this poisoning was that Conyers's husband had died six years earlier, that she had a life insurance policy on him, and that after the husband's body was exhumed and tested, it was found to contain high levels of arsenic. We concluded that this evidence was simply insufficient to establish the identity of Conyers as the person who poisoned her husband.

By contrast, we held that the trial court had properly admitted evidence of the poisonings of Conyers's son-in-law, mother-in-law, and a business acquaintance. Although the facts are not set out in the Conyers opinion itself, a review of the record reveals the following evidence in relation to these prior bad acts:

(a) son-in-law: Conyers's son-in-law and his wife lived with Conyers. The son-in-law became ill one day after supper. It was discovered months later that he had been poisoned with arsenic. The son-in-law ate meals with his wife and Conyers, and although Conyers generally did the cooking, the wife did cook on occasion. The son-in-law and the wife had had marital difficulties, having both admitted to one another their infidelity. The son-in-law testified that he did not know who had poisoned him. Both the wife and Conyers denied having given the son-in-law arsenic. The wife, in many ways, had just as much opportunity as Conyers to poison the son-in-law. We found evidence of this prior bad act to be admissible.

(b) mother-in-law: Conyers visited her mother-in-law three or four times per week. On each visit, Conyers would fix

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coffee for her mother-in-law. The mother-in-law's health had been good up to the time of these visits, but it deteriorated, and she died thereafter. A doctor testified that the mother-in-law had died of natural causes, but she had ingested arsenic at some point at least one to three months prior to her death. Examination of the mother-in-law's brain, kidney, and liver did not reveal unusual levels of arsenic; however, her nails and hair contained higher than normal levels. We found evidence of this prior bad act to be

able.

business acquaintance: Conyers visited an acquaintance a number of times and would usually prepare coffee for her. The acquaintance became ill shortly after the visits commenced. Tests conducted on the acquaintance revealed higher than normal arsenic levels. The acquaintance did not know she had been poisoned, did not attribute her symptoms to any coffee she had drunk, and knew no one gave for Conyers to poison her. We found evidence of this prior bad act to be admissible.

Conyers, we declared that we were "convinced" the trial court had properly admitted evidence of the poisonings of the son-in-law, the mother-in-law, and the acquaintance. Conyers, 315 S.C. at 281, 233 S.E.2d at 96 (1977). As the above factual descriptions suggest, in Conyers, we assumed a rather deferential approach to the findings of the trial court in relation to Lyle's evidence.

It is clear that the facts of the present case are well within the limits set out in Conyers. In fact, the evidence in the present case is orders of magnitude weightier than that which was upheld in Conyers. There is simply no comparison between the evidence presented of Cutro's abuse of Parker and Asher and the prior bad acts deemed admissible in Conyers, namely, the poisonings of the son-in-law, the mother-in-law, and the acquaintance. Conyers teaches that on appeal, this Court will reverse only when the trial judge has clearly abused its discretion (as was the case with the evidence about Conyers's first husband). [fn4] There is more than ample support

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to uphold the trial court's admission of evidence of Cutro's prior bad acts. The majority cannot show that the trial court abused its discretion. Accordingly, I must dissent. I would affirm the conviction.

BURNETT, J., concurs.

[fn1] The majority refers to the following statement: "In the absence of any properly-admitted evidence that Mrs. Cutro shook each of these three (3) children, the necessary Lyle connection fails and the Colson/Maier evidence should not have been admitted." This reference further reinforces our argument that Cutro has not specifically raised the issue of the State failing to prove the prior bad acts by clear and convincing evidence. First, the statement is very general in nature and does not identify the precise issue which the majority chooses to address. Second, it does not even appear in Cutro's statement of issues on appeal, nor in the argument portion of Cutro's brief. Instead, the above-quoted sentence is a passing reference in an introductory note in Cutro's brief.

It is well established that ordinarily no point will be considered which is not set forth in the statement of issues on appeal. Rule 207(b)(1)(B), SCACR; *Gamble v. International Paper Realty Corp.*, 323 S.C. 367, 474 S.E.2d 438 (1996). Further, a one-sentence argument is too conclusory to present any issue on appeal. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). The majority cannot overcome these procedural hurdles. We may search in vain Cutro's brief for the issue of the State failing to prove the prior bad acts by clear and convincing evidence. Ultimately, neither Cutro's statement of issues, nor a single full paragraph of her argument will yield the issue.

[fn2] The majority criticizes the statement that Cutro had

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2885, 81 L.Ed.2d 847 (1984), for the proposition that pretrial publicity may be so severe as to create a presumption of prejudice in the community, and therefore, make it impossible for the defendant to receive a fair trial. However, in *Dowd*, the Court stated there was no requirement that jurors be totally ignorant of the facts and issues involved in the case. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Dowd*, 366 U.S. at 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756. The Court in *Dowd* ultimately concluded that the pretrial publicity was unduly prejudicial to the defendant because eight of the twelve jurors finally placed in the jury box expressed, during voir dire, their belief that the defendant was in fact guilty. [fn6]

In the instant case, there was no indication that any of the jurors finally seated had formed a pretrial opinion that Kelsey was guilty. Nine of the twelve jurors admitted they had been exposed to some pretrial media coverage, but they told the trial judge they could put aside what they had heard and render a verdict based on the evidence presented at trial.

"[A defendant's] mere assertion that the jurors could have been subconsciously affected by . . . media exposure is insufficient to show prejudice." *State v. Owens*, 293 S.C. at 167, 359 S.E.2d at 278. Kelsey has not gone beyond this mere assertion to show actual prejudice in his case. Although media coverage was widespread and intense before Kelsey's trial; there was no indication that the trial court's voir dire failed to produce an impartial jury.

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IV. PITTING OF WITNESS

Kelsey argues that the trial court erred in failing to declare a mistrial when Payne's attorney attempted to pit Kelsey's testimony against a police officer's testimony. We disagree.

Kelsey was arrested by officer Slavin in Maryland. At trial, Slavin testified that when Kelsey was detained in his police car, Kelsey asked if he was going to be treated as an adult or juvenile. Slavin told him he would be treated as an adult. Slavin then testified, "[Kelsey] wanted to know why because he said he was a juvenile when he did it." The State also introduced into evidence a copy of Slavin's incident report to corroborate his testimony.

During Payne's cross-examination of Kelsey, the following exchange occurred:

Q. Have you read that document [Slavin's incident report] you just denied ever seeing?

A. I have never read through this document.

Q. You have never seen anything like that?

A. No, sir.

Q. Anyone who says you have would, of course, be mistaken or lying; is that correct?

Kelsey's attorney immediately objected, arguing the question improperly pitted Kelsey's testimony against Slavin's testimony. Kelsey moved for a mistrial. The trial judge sustained Kelsey's objection, but denied his motion for a mistrial. Payne's counsel

Examination of Kelsey:

and that you said, "I was
did it," Mr. Slavin was incorrect?

on the same grounds as before. The trial
objection but denied Kelsey's motion for a

grant or deny a mistrial is within the sound
trial judge and will not be overturned on
abuse of discretion. *State v. Crim*, 327 S.C. 254,
297 S.E.2d 298 (1989). The power of

are a mistrial ought to be used with the greatest caution
and obvious causes stated into the record by the trial
Dawkins, 297 S.C. 386, 377 S.E.2d 298.

A motion for a mistrial is an extreme measure which should
where an incident is so grievous that prejudicial effect can
no other way. 75B Am.Jur.2d Trial § 1706 at 491

that any prejudice to Kelsey could have been
trial court striking the testimony and giving a
instruction to the jury. See *State v. Simpson*, 325 S.C. 37,
297 S.E.2d 298 (1989) (an instruction to disregard incompetent
evidence is deemed to have cured the error in its
effect on the facts of the particular case it is
notwithstanding such instruction or withdrawal the
prejudiced). However, Kelsey's attorney failed to
motion before the trial court. See 75 Am.Jur.2d Trial
§ 1706 (a motion for mistrial does not automatically
motion to strike as a lesser prayer for relief).

Thus, we find that Kelsey was not unfairly prejudiced
testimony. Although it is improper for an attorney to
impeach a witness in such a manner as to force him to
deny the veracity of another witness, improper "pitting"
is reversible error only if the accused was unfairly
impeached. *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988).
Kelsey's credibility was at issue in the case, Kelsey
on direct examination that he had, in fact, placed the
into Richey's mouth. The critical issue for the jury to
was whether Richey was alive or dead when Kelsey committed
the crime. The above colloquy between Kelsey and Payne's attorney
directly relate to this issue. Kelsey merely disputed
Officer Slavin that he was a juvenile when he "did it."
Prejudice to Kelsey was minimal and does not warrant reversal.

FOR STATEMENTS

Kelsey argues that the trial court erred in denying his right
to introduce a prior statement in order to defend against

the State's allegation that he testified untruthfully during his
testimony before the jury. We disagree.

During the State's cross-examination of Kelsey, the solicitor
emphasized that Kelsey's trial testimony was inconsistent with
testimony he had given at the December 5, 1994 family court
hearing and with statements he had given to SLED agent Dan
Choate on September 29, 1994. In response, Kelsey called Choate
to the stand and attempted to elicit testimony from him

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concerning Kelsey's prior September statement. The State objected, arguing the defense was trying to introduce a prior consistent statement which was impermissible under Rule 801(d)(1), SCRE. Kelsey's attorney responded, arguing that he was entitled to have the entire inconsistent statement introduced so that it could be viewed in context. The trial judge sustained the State's objection. Kelsey did not proffer any of the excluded testimony.

Generally, where a portion of a witness's prior inconsistent statement has been introduced to impeach that witness, the entire statement is admissible in rebuttal to explain the inconsistency. See 98 C.J.S. *Witnesses* § 622 at 636 (1957); Wigmore On Evidence § 1045 (Chadbourn rev. 1970). However, the mere mention of a conversation or statement does not automatically entitle the opponent to bring out the other parts. Remaining portions which are not relevant or material in the explanation of the inconsistency are not admissible. See *People v. Cowper*, 496 N.E.2d 729 (Ill. App. Ct. 1986); *State v. Eugenio*, 565 N.W.2d 798 (Wis. Ct. App. 1997); 98 C.J.S. *Witnesses* § 622 at 637. The trial court has broad discretion in determining whether to admit such evidence. See *State v. Daly*, 798 S.W.2d 725 (Mo. Ct. App. 1990).

At trial, the solicitor asked Kelsey if Richey's mouth was bleeding inside the car. Kelsey responded that there was a small trace of blood on Richey's mouth. The following colloquy then took place between Kelsey and the solicitor:

Q. Mr. Choate over here. You had a conversation with Mr. Choate and your lawyer was there?

A. Yes, sir.

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Q. Do you remember Mr. Choate said, "Mr. Kelsey, was there any blood on Melanie or anywhere in that car?" You said, "No, sir, it wasn't." Didn't you?

A. I don't remember that brief conversation. I mean. I tried to write down exactly what we talked about right afterwards. I said we had a brief conversation before and that then they gave me the forms and I wrote it down.

At trial, Kelsey's attorney argued that Kelsey had a right to have the entire statement introduced so that it could be viewed in context. However, there was no attempt to explain why the other portions of the September statement were relevant or material in explaining the inconsistency. Additionally, Kelsey failed to proffer any of the excluded testimony. See *State v. Anderson*, 304 S.C. 551, 406 S.E.2d 152 (1991) (where no proffer of excluded testimony is made, the Court is unable to determine whether the appellant was prejudiced by the trial judge's refusal to admit the testimony into evidence). We therefore find that the trial court did not abuse its discretion in sustaining the State's objection.

VI. CODEFENDANT'S STATEMENTS

At trial, Kelsey's attorney called F.B.I. agent Harold Harrison to the stand to testify. Kelsey sought to elicit testimony from Harrison concerning statements Payne made to the F.B.I. during its investigation of Richey's death. Payne's attorney objected, arguing Payne's credibility could not be impeached unless Payne took the stand. Kelsey's attorney responded, stating that the

was to rebut Payne's theory that Kelsey made the statement and made it his own. Kelsey made the testimony. The proffer revealed that contain any admission of guilt by Payne, sequence of events surrounding the crime. The objection, stating that Payne might

statements were relevant as rebuttal evidence, induced by the trial judge's ruling. Lee had that Payne fabricated his story and had "flip everything around" and tell the

Kelsey killed Richey if questioned. Moreover, was more consistent with Kelsey's version of Payne's. Thus, even if Payne's statements were at best, needless presentation of cumulative 403, SCRE.

PHYSICAL APPEARANCE

that the trial court erred in not allowing him to concerning Payne's altered appearance at trial.

Kelsey called Mae Guin, a guidance counselor from high school. Kelsey's attorney attempted to about Payne's changed appearance since high school. Kelsey objected, arguing Payne's altered appearance was Kelsey argued that Payne's appearance at trial was an give the impression that he was something he was not. Judge sustained Payne's objection and gave a curative to the jury.

regarding the physical condition of a party is not relevant to an issue in the case. 29 Am.Jur.2d 560 at 627. The only ground offered by Kelsey to introduction of Guin's testimony was that Payne was something he was not. Payne's appearance was in no relevant to the case. We hold that the prejudicial such evidence substantially outweighed any probative may have had. See Rule 403, SCRE. Thus, it was properly

SEVERANCE

argues that the trial court erred in denying his motion for severance in the case. We disagree.

Before trial, Payne's attorney moved to have separate trials. did not join in the motion. The trial judge denied Payne's motion. After the defense rested its case, Kelsey's attorney for a mistrial and argued that Kelsey was entitled to a severance. The trial judge denied the motion.

South Carolina, criminal defendants who are jointly tried murder are not entitled to separate trials as a matter of law. *State v. Holland*, 261 S.C. 488,

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118 S.E.2d 118 (1973); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972).

Options for a severance and separate trial are addressed to the discretion of the trial court. *State v. Nichols*, 325 S.C. 111, 118 S.E.2d 118 (1997); *State v. Chaffee*, 285 S.C. 21, 126 S.E.2d 464 (1984), overruled on other grounds by *State v. Lawrence*, 305 S.C. 45, 406 S.E.2d 315

(1991). Absent a showing of an abuse of discretion, this Court will not disturb the trial court's ruling on appeal. *State v. Thompson*, 279 S.C. 405, 308 S.E.2d 364 (1983).

Kelsey argues that severance should have been granted based on the prejudice discussed in issues 5, 6, and 7 of this appeal. As discussed above, Kelsey was not unfairly prejudiced by any of the trial court's rulings discussed in issues 5, 6, and 7, nor was he unfairly prejudiced in any other way. At most, any prejudice was incidental and therefore insufficient to demonstrate an abuse of discretion on the part of the trial court in denying severance. See *United States v. Martinez*, 922 F.2d 914 (1st Cir. 1991).

IX. PRIOR BAD ACTS

Kelsey argues that the trial court erred in denying his motion for a mistrial when Payne's attorney cross-examined him about prior bad acts that allegedly occurred in Georgia. We disagree.

On cross-examination, Payne's attorney asked Kelsey if he had had any legal problems or been arrested before July 12, 1994, in Georgia. Kelsey responded that he had not. Payne's attorney then asked Kelsey if he had had any legal problems after July 12, 1994. Before Kelsey could answer, Kelsey's attorney objected. Payne's attorney made an *in camera* proffer of the testimony. Kelsey was asked whether he had ever been charged with the crime of forgery. Kelsey responded that he was not aware of any such charges. Payne's attorney withdrew the question. Kelsey moved for a mistrial which the trial judge denied. When the jury returned, the trial judge gave the following curative instruction: "I have stricken the last question. Let me be sure and remind you that an attorney's question is not evidence and I have stricken all that. So you will disregard that."
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Under Rule 608(b) SCRE, specific instances of the conduct of a witness may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness. South Carolina's Rule is identical to the Federal rule. The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement. See Weinstein's Federal Evidence, Character and Conduct of Witness § 608.12(4) (a-b) (1998). However, the cross-examiner may not go on a "fishing expedition" in the hopes of finding some misconduct. *State v. McGuire*, 272 S.C. 547, 253 S.E.2d 103 (1979).

In this case, Payne's attorney inquired into a prior act of forgery. When Kelsey stated he was not aware of any such charge, Payne's attorney properly withdrew the question. See Rule 609(b), SCRE (specific instances of conduct may not be proved by extrinsic evidence). We hold that any prejudice to Kelsey was cured by the trial judge's curative instruction to the jury. See *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced). Thus, the trial judge did not abuse his discretion in denying the motion for mistrial. See *State v. Crim*, 327 S.C. 254, 489 S.E.2d 478 (decision to deny mistrial will not be overturned on appeal absent abuse of discretion).

X. DIAGRAM & PHOTOGRAPHS

The trial court erred in admitting State's evidence. We disagree.

Consisted of a diagram of the crime scene showing various bone and bomb fragments and clothing. Kelsey notes that Richey's body was discovered six days after the crime was committed. Weather or local fauna could have altered the scene during this period. Thus, the State's depictions and representations of the scene

are prejudicial to Kelsey. Kelsey also argues the evidence was

irrelevant, immateriality, and admissibility of photographs is within the sound discretion of the trial court. If the photographs serve to corroborate testimony, it is not an error to admit them. State v. Tucker, 324 S.C. 155, 463 S.E.2d 888 (1996). A photograph should be excluded only if it is so inflammatory as to arouse the jury's sympathy or prejudice or is unnecessary to substantiate facts. Id. In this case, the photographs corroborated other testimony concerning the location of Richey's body as first discovered by police at the crime scene. Additionally, the location of bone and bomb fragments supported testimony that a bomb detonated in the area. Kelsey merely hypothesizes that the crime scene was disturbed by natural forces. We hold that the trial court did not abuse its discretion in admitting the evidence.

ACT AND MERE PRESENCE

Kelsey argues that the trial court erred in failing to give the jury conspiracy and mere presence instructions. We disagree.

Kelsey contends that the trial court's mere presence charge was so closely tied with the accomplice liability charge that it was not misleading. Kelsey further argues that the trial court failed to instruct the jury that one's mere presence with a person who commits a crime does not make a person an accomplice or a co-conspirator to the guilty person. The trial court's instruction provided, in part:

Of course, mere presence at the scene is not sufficient to prove someone guilty of a crime. The burden is upon the state to prove every element of the crime charged. If you find after reviewing all of the evidence that the state has proven that the defendant was only present at the scene of the crime and they have not proven beyond a reasonable doubt any other participation in the crime, then you must find a defendant not guilty.

The law says that proof of mere presence at the scene of the crime is not sufficient to find someone guilty. But, of

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Of course the law also says that the hand of one is the hand of all.

The law says - that if a person - if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both.

We find the trial court's charge was not misleading. It clearly explained that the prosecution had to prove every element of the

crime and that mere presence was not enough to sustain a conviction. Moreover, the trial judge extensively instructed the jury on the requisite criminal intent for each of the charged crimes. In charging the jury on conspiracy, the trial judge explained, "Before a defendant may be convicted . . . it must be proven beyond a reasonable doubt that a conspiracy existed and that the defendant was a *knowing* party to the conspiracy" (emphasis added). We hold that the trial court's instructions, taken as a whole, were adequate. See *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991) (jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error).

XII. MISTAKE OF FACT

Kelsey argues that the trial court erred in refusing to charge the jury on the law of mistake of fact. Kelsey contends that he believed Richey was dead when he placed the pipe bomb into her mouth. He asserts that even if Richey were alive when he did this, his mistaken belief that she was dead negates the criminal intent required to be convicted of murder. Thus, he was entitled to a jury charge. We disagree.

At trial, Kelsey requested the following jury instruction:

In this case the state is required to prove beyond a reasonable doubt that the defendant Joe Kelsey was not operating under a mistake of fact. If the state can not prove beyond a reasonable doubt that defendant Joe Kelsey knew that the victim was still alive when the pipe bomb was placed in her mouth, then defendant Joe Kelsey is entitled to a verdict of not guilty as to the charge of murder.

A mistake of fact which negates the existence of the mental element of the offense, will preclude conviction. 21

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Am.Jur.2d *Criminal Law*, § 141 at 276 (1981); William Shepard McAninch, *Criminal Law of South Carolina*, 542 (1996). If the particular offense is a general intent crime, the mistake of fact must be reasonable. See *State v. Dixon*, 390 P.2d 759 (Haw. 1964) (the mistake must not be due to the negligence or carelessness of the defendant). Moreover, a trial court is not required to give an instruction on mistake of fact unless and until the defendant introduces some evidence, direct or circumstantial, of a reasonable basis for having made the mistake. United States v. Norquay, 987 F.2d 475 (8th Cir. 1993). *

It is dubious, at best, to suggest that Kelsey's belief in this regard was objectively reasonable. Despite this, there are more fundamental reasons for rejecting Kelsey's argument. First, the trial judge extensively charged the jury on the requisite criminal intent for murder. The trial judge's instruction provided, in pertinent part:

Murder is the killing of any person with malice aforethought, either express or implied. Again, murder is the killing of any person with malice aforethought, either express or implied. Now, in order to convict these defendants on murder . . . the state must prove not only that the defendant killed Melanie Kaye Richey; but they must also prove beyond a reasonable doubt that they did so with malice aforethought. . . . There must be a combination of the previous evil intent and the act producing the

malice may be express or implied. There is evidence of previous lying in wait. In other words, it is directly that an intent to

actions made clear that the State not only knew Kelsey killed Richey, but that he did so with malice aforethought. Therefore, Richey was dead would be part of the fact that Kelsey "intended" to kill Richey.

Kelsey's requested jury instruction did not state the law in that it failed to provide that the fact must have been reasonable. The proposed instruction that the State must prove beyond

that Kelsey was not operating under a mistake was not error for the trial court to refuse to give the charge. See *State v. Davis*, 282 S.C. 45, 338 S.E.2d 198 (1984). (a trial court does not err in refusing to give a jury instruction where it does not state the correct

CONCLUSION

In the foregoing, we **AFFIRM** the trial court on all

JUSTICE BURNETT, JJ., and Acting Associate Justice C. S. Byrnes, concur.

He testified that he assumed Payne wanted to blow up the car with the pipe bombs. As for the wrench, he thought he was going to steal a car bumper to give to Kirchner's car because her bumper had been damaged earlier in a wreck.

He also argues that he should be exonerated because there is evidence supporting the defense of duress. However, in South Carolina, duress is not a defense to murder. *State v. Kirchner*, 310 S.C. 20, 425 S.E.2d 32 (1993).

Section 20-7-430 (4) provides, in full:

If a child sixteen years of age or older is charged with an offense which would be a misdemeanor or felony if committed by an adult and if the court, after full investigation, deems it contrary to the best interest of such child or of the public to retain jurisdiction, the court may, in its discretion, acting as committing magistrate, bind over such child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult.

In *Kent*, the Court established the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Court Act:

(1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.

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(3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

(4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

(5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

(7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

[fn5] Section 20-7-430 was repealed by 1996 Act No. 383, § 2, effective July 1, 1996.

[fn6] In *Dowd*, the pretrial news coverage was extremely intense and negative toward the defendant. The coverage included details of the defendant's background, including references to crimes he committed when he was a juvenile, convictions for arson almost 20 years previously, and burglary and AWOL court-martial charges. The news media further accused him of being a parole violator, announced his police line-up identification, his confession to the six murders, and his offer to plead guilty. *Dowd*, 366 U.S. at 725, 81 S.Ct. at 1644.

STATE v. KING, ___ S.C. ___ (1999)
___ S.E.2d ___

Respondent, v. Russell Nelson King, Appellant.

Opinion No. 24916

Supreme Court

Heard November 18, 1998

Filed March 8, 1999

___ County B. Hicks Harwell, Judge

___ of Columbia, for appellant.

___ al Charles M. Condon, Chief Deputy Attorney

___ McIntosh, Assistant Deputy Attorney General

___ Assistant Attorneys General Lauri J. Soles and

___, all of Columbia; and Solicitor Dudley

___ of Florence, for respondent.

___ appeals his convictions for murder, arson and armed
reverse.

FACTS

___ lived in Mullins, South Carolina with his wife and
___ Appellant's father-in-law, Billy Turbeville,
___ Appellant's family after Mr. Turbeville and his
___ in 1989. Mr. Turbeville had suffered a stroke in
___ could no longer live alone. Mr. Turbeville lived in an
___ which had been added to the King's home, and he paid
___ mortgage the Kings had obtained to build the

___ approximately 5:20 a.m. on the morning of March 10, 1995,
___ woke his wife when he discovered Mr. Turbeville's
___ was on fire. Because the apartment's door was locked,
___ broke a window in the door and reached through to open
___ Appellant and his wife ran into the apartment several
___ searching for Mr. Turbeville. The apartment was filled with
___ and they were unable to locate him. Officer Jimmy Collins
___ when he arrived, appellant was upset and said his
___ in-law might be inside, but the smoke was too thick.

___ the fire department extinguished the fire and the smoke
___ from the apartment, the body of Mr. Turbeville was
___ on the floor beside his bed. Mr. Turbeville had been burned
___ on the head with a blunt object such as a hammer. [fn1]
___ nine lacerations to the scalp. A pool of blood was
___ just inside the apartment door, more than nine feet
___ the body. Another pool of blood was discovered under Mr.
___ Turbeville's head. The authorities seized the trousers appellant
___ bearing when he entered Mr. Turbeville's apartment.
___ examination of the trousers revealed spatters of blood on the leg
___ patch. DNA analysis revealed the blood to be Mr.
___ Turbeville's.

___ gasoline-soaked newspapers and paper towels were found in the
___ apartment. A gasoline-soaked newspaper was found in the recycling
___ inside the Florida room of the King home. The Florida room is
___ at the back of the house facing Mr. Turbeville's
___ apartment. Authorities seized a gas can found in the garage and
___ other found in the back of appellant's truck.

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Appellant's ex-wife, Gina Turbeville-King, [fn2] testified her father usually went to the Huddle House restaurant at approximately 3:30 a.m. A witness testified Mr. Turbeville was at the Huddle House on the morning of March 10, 1995, and left the restaurant at approximately 4:45 a.m.

Mr. Turbeville received two checks each month totaling \$2200.00. After paying his bills totaling \$400.00, Mr. Turbeville kept the remaining cash in his wallet. A witness from the Huddle House testified Mr. Turbeville carried money in his front pants' pocket. No wallet or cash was found on Mr. Turbeville's body. Mrs. King testified her father's VCR was missing after the fire. Authorities never found the missing VCR or money.

Mrs. King testified, on the evening before the murder, she returned to her home at approximately 9:00 p.m. As she arrived home, she was surprised to see appellant pulling into the driveway because he was suppose to be home with the children. Later that evening, Mrs. King discovered approximately \$70.00 was missing from her purse. When she confronted appellant, he first denied and then admitted taking the money. Appellant left the house around 1:00 a.m. telling his ex-wife he was going to get some money to repay her. Appellant returned home at approximately 2:00 a.m. and got into bed with his ex-wife. He again got out of bed a short while later and returned to bed around 3:00 a.m. Mrs. King next remembered appellant yelling to her about the fire. Mrs. King testified appellant had told her she was to agree that she heard someone come into their yard that night and argue with her father. [fn3] According to Mrs. King, appellant had threatened to take the children if she did not agree with his story. Mrs. King testified she had not heard anything.

Frank Robinson, an acquaintance of appellant, testified appellant had come to his home at "around 11:00 p.m. or 12:00 a.m." the night of the murder to ask Robinson if someone had paid in advance for work appellant was to do for this person. Robinson told appellant he had not yet received the advanced payment. A few hours later, around 3:00 a.m., appellant returned to Robinson's home asking to borrow \$7.00 for gasoline. Robinson told him to return later in the morning. When appellant came back between 7:00 and 8:00 a.m., he told Robinson his father-in-law "got burned last night."

ISSUES

I. Did the trial judge err in refusing to grant a new trial after a television news reporter entered the courtroom midway through the jury charge and filmed the judge, parties, and jury?

II. Did the trial judge err in allowing appellant's ex-wife to testify regarding appellant's need for money prior to the murder because this testimony served no purpose other than to impugn appellant's character and its prejudicial effect outweighed any probative value?

DISCUSSION

I.

Immediately before beginning closing arguments, the trial judge ordered the bailiff not to allow anyone "to leave or reenter [the courtroom] once the arguments begin or [during] the charge of the law." In the middle of the judge's charge to the jury, a television news reporter entered the courtroom. With the use of a video camera, the reporter filmed the proceedings until the end

[not] object to this situation prior to the jury's verdict. Appellant raised this issue three days later in a motion for a new trial. During the post trial hearing, defense counsel admitted he discussed the matter with appellant and appellant's father prior to the jury's conscious decision [was] made not to make a motion for a new trial. Only after the jury returned with an unfavorable verdict did defense counsel attempt to raise this issue.

In ruling on the new trial motion, the trial judge found that appellant had waived this claim because his objection was not timely. Further, the trial judge found the reporter's activities were in accordance with Rule 605, SCACR, and did not distract or prejudice the proceedings.

Appellant waived review of this issue by failing to object to the jury's verdict. Rule 103(a)(1), SCRE; State v. King, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, and generally requires it be made at the earliest possible opportunity); see also State v. Kelly, 331 S.C. 132, 499 S.E.2d 99 (1998) (a new trial motion may not be used to raise an issue for the first time); McGee v. Bruce Hosp., 321 S.C. 340, 468 S.E.2d 633 (1996) (an issue may not be raised for the first time in a motion for a new trial); State v. King, 330 S.C. 537, 538, 273 S.E.2d 765, 767 (1981) (finding that appellant waived the issue where he did not make a motion for a new trial until after the verdict).

Defense counsel, after consultation with appellant, made a tactical trial decision not to object. Appellant and defense counsel weighed their options and, rather than moving for a new trial, decided to take the chance appellant would be acquitted. Under these facts, appellant has no basis on which to claim error.

II.

Appellant's ex-wife, Gina Turbeville-King, testified for the State. She testified she and appellant first separated in October 1994. They reconciled in January 1995 and separated again shortly after the murder. The State, in an attempt to elicit testimony of appellant's recent drug use, asked Mrs. King if "[a]ny changes in appellant had taken place then that lead [sic] to that separation?" Defense counsel objected on the basis of relevance. After an *in camera* hearing, the trial judge sustained the objection and ruled the State could not introduce evidence of appellant's drug addiction.

The State then requested permission to elicit testimony to show appellant had a pattern of taking money from his ex-wife and staying out late to prove motive and/or to establish the context of the crimes under the *res gestae* theory. The prosecution indicated it would not discuss appellant's drug use. Defense counsel objected claiming these were inadmissible prior bad acts. The court overruled the objection explaining the evidence was relevant to establish appellant's need for money and the prejudicial effect of this evidence did not outweigh its probative value. [fn4]

Before the jury, the State asked Mrs. King whether any changes in appellant's conduct led to the separation. Mrs. King responded appellant had been staying out late and he would leave several times during the night.

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The State then asked Mrs. King about appellant's need for money. She testified appellant had admitted taking items from their home, pawning them, then redeeming them and returning them to the home. Mrs. King also testified appellant stole cash from her purse, forged checks on her bank account, stole cash from her bank account by using her ATM card, and stopped paying his share of the bills. These incidents occurred prior to their separation in October 1994 and began to occur again after they reconciled in January 1995. Mrs. King testified their financial situation had not changed during this time.

Mrs. King then testified appellant stole \$70 from her purse on the evening before the murder. According to Mrs. King, when she confronted appellant he first denied, then admitted, taking the money. Mrs. King testified appellant promised to repay her. After this confrontation, appellant left the house at approximately 1:00 a.m. He returned around 2:00 a.m. Later, he got up from bed and returned around 3:00 a.m. Mrs. King testified she was not aware of appellant leaving the bed again until he woke her yelling there was a fire.

Appellant argues the trial judge erred in admitting Mrs. King's testimony regarding his prior bad acts of stealing because this testimony only served to establish his criminal propensity to commit the charged crimes and he is a bad person. The State argues this testimony was admissible to establish motive and/or to provide the context of the crimes.

In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue. Rule 404(a), SCRE; Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. Mitchell v. State, supra.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The evidence of the prior bad acts must be clear and convincing to be admissible. State v. Adams, supra. The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Adams, supra; State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998). Further, even though the evidence is clear and convincing and falls within a Lyle exception, it must be excluded, if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; State v. Adams, supra.

The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Adams, supra. This evidence of other crimes is admissible:

when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in

the story of the crime on trial by proving for the 'res gestae' or the "uncharged" together in point of time and the crime charged that one cannot be fully the other . . . [and is thus] part of the crime charged." And where evidence is this "full presentation" of the offense, to fragmentize the event under inquiry" of the "res gestae."

S.C. at 122, 470 S.E.2d at 370-71 (quoting Masters, 622 F.2d 83, 86 (4th Cir. 1980)). The evidence of prior bad acts is part of the res gestae, "where the record does relationship between the crime and (prior bad enough, 325 S.C. 88, 480 S.E.2d 77 (1997)). Under is important that the temporal proximity of the closely related to the charged crime. State v. If the evidence is relevant under this theory, on the trial judge should determine whether its clearly outweighs any unfair prejudice. Rule 403, Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

Probative Value

of this discussion we have divided the evidence the State into two categories: (1) the evidence of prior thefts from his ex-wife beginning in 1994 and (2) the evidence of the theft on the night under (immediate theft). The remote thefts were not under any theory. This evidence shows appellant's bad his propensity to commit crimes. These are purposes. The temporal connection between these and the charged crimes is too attenuated for under the res gestae theory or under Lyle. [fn5] trial judge erred in admitting evidence of the remote

opinion, the admission of this evidence is not harmless reasonable doubt. [fn6] State v. Bolden, supra. Whether introduction of this evidence is harmless requires to determine whether appellant's "guilt is conclusively competent evidence, such that no other rational could be reached." State v. Parker, 315 S.C. at 234, at 833; see also State v. Reeves, 301 S.C. 191, 194, at 241, 243 (1990) (finding an error is harmless if it not reasonably have affected the result of the trial); Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (even if was wrongly admitted, its admission may constitute error if the evidence did not affect the outcome of the

all the evidence was circumstantial. While this substantial evidence pointed to appellant's guilt, especially good evidence, the evidence was not overwhelming. The admission of the remote thefts was too prejudicial to be held less. The admission of this testimony allowed the State to equate to the jury that appellant had a drug problem. The actor's questions eliminated many legitimate reasons why appellant would need money. In the State's closing argument, the actor's use of words such as "craving" and "insatiable" tied to the jury that appellant's reason for needing money was and was probably related to an illegal activity - drug Appellant's drug use was properly found inadmissible by the trial judge because of its prejudicial effect. However, by way of the back door, the State was able to introduce appellant's drug problem to the jury.

South Carolina Case Law

This improper evidence suggested to the jury that appellant was guilty of committing the charged crimes because of his criminal propensity to commit crimes and his bad character. The State continuously stressed this improper testimony in its closing argument. Therefore, it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict. This improper testimony permeated the trial and the jury likely used this evidence to infer that since appellant had previously stolen from his ex-wife, he probably committed these crimes against his father-in-law also. See State v. Hough, supra.

Because analysis of the immediate theft is unnecessary for the resolution of this case, we decline to address it.

REVERSED.

FINNEY, C.J., TOAL, MOORE, JJ., and Acting Associate Justice George T. Gregory, Jr., concur.

[fn1] The weapon was never found.

[fn2] Mrs. King divorced appellant in 1996.

[fn3] Her father's stroke severely affected his ability to speak.

[fn4] The trial judge assured defense counsel that his objection would run throughout Mrs. King's testimony and it would be unnecessary to continue to object.

[fn5] While the remote thefts may have been minimally relevant to show motive under Lyle, the prejudicial effect of this evidence far outweighed this slight probative value.

[fn6] The State suggests any error in the admission of this evidence is harmless beyond a reasonable doubt because Mrs. King's testimony was cumulative to Robinson's testimony about appellant's need for money. We disagree. Robinson's testimony only established appellant had asked to borrow money from Robinson in the past and on the night of the murder. There was no suggestion that appellant had attempted to steal money. Mrs. King's testimony established appellant stole money from her and pawned household items for money. Her testimony was much more damaging to appellant. Thus, her testimony was not cumulative to Robinson's testimony.

STATE v. ADAMS, 332 S.C. 139 (Ct.App. 1998)
504 S.E.2d 124

✓ Lyle Evidence Case

STATE, Respondent v. William Hodges ADAMS, Appellant.
Opinion No. 2854.

Court of Appeals of South Carolina.

Heard June 2, 1998.

Decided June 15, 1998.

Circuit Court, Greenwood County, Frank P. McGowan,
Court Judge.

Assistant Appellate Defender Wanda H. Haile, of South
Carolina, Office of Appellate Defense, of Columbia, for appellant.

General Charles Molony Condon, Deputy Attorney General
of South Carolina, Assistant Deputy Attorney General Salley W.
of South Carolina, Assistant Attorney General G. Robert DeLoach, III,
of South Carolina; and Solicitor W. Townes Jones, IV, of Greenwood,
South Carolina, for respondent.

Judge:

Adams was convicted of attempted lewd act on a minor,
with intent to commit criminal sexual conduct, and
battery of a high and aggravated nature. The trial
court sentenced Adams to concurrent terms of imprisonment of ten
years for the attempted lewd act, eighteen years for assault with
intent to commit CSC, and ten years for ABHAN. Adams appeals. We

charges against Adams concern the alleged sexual abuse of
his daughter ("Victim"). In May 1995, Victim disclosed to her
mother that she had been sexually molested by her stepfather over
a period of eight years from the time she was ten years old.
Adams had married Victim's mother in 1983, and the first
molestation occurred less than two years later. At trial, the
court was allowed to present the testimony of Victim's sister
("Sister"), who testified that Adams had abused her at least once
a week for eight years. Sister was nine years old when Adams
first approached her. Sister disclosed the molestation when
Adams came forward.

Lyle Evidence

Adams first argues the trial court erred in admitting
prior bad-act evidence under a Lyle common-plan-or-scheme
exception. He asserts that "there was nothing more than a general
similarity between the prior bad acts" and that "there was no
clear and convincing proof of" the other bad acts.

Evidence is inadmissible to show propensity to commit a crime.
Rule 404(b), SCRE. Evidence is admissible, however, "if it tends
to show common scheme or plan and its close similarity to the
charged offense enhances its probative value so as to outweigh its
prejudicial effect." State v. Blanton, 316 S.C. 31, 32,
436 S.E.2d 438, 439 (Ct. App. 1994).

In Blanton, this court affirmed the trial court's admission of
evidence of prior bad acts of the defendant, who was charged with
CSC with a minor. There, three female victims testified that they
were approximately the same age when the defendant had sexually
abused them; "[e]ach was subjected to requests both for the
performance of cunnilingus and fellatio[;] [a]ll of the alleged
activities took place in [the defendant's] house or his

vehicle[;] . . . [and the defendant] took advantage of his relationship with the victim for his sexual gratification." *Id.* at 33, 446 S.E.2d at 439. The court held the "acts were sufficiently similar to the charged offense to be admissible." *Id.*

Likewise, in *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984), the supreme court affirmed the admission of testimony of sisters against their father. There, the attacks occurred on each girl when they were around the age of
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twelve, the defendant entered the sisters' room at night, he gave to each the same explanation for his actions, and he quoted Bible verses to each girl. *Id.*

In *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989), our supreme court again upheld the admission of prior bad acts against a defendant who abused several children. There, a foster parent abused foster children in his care. The court noted that the following similarities were sufficient to prove common scheme or plan: the children were similar in age when the foster father abused them; the defendant took advantage of his relationship with the girls for his own sexual gratification; the abuse commenced in exactly the same manner, by rubbing the victim's body outside her clothing, and under similar circumstances, usually in the barn or while riding on a tractor; and the abuse increased in frequency during the summer. *Id.*

Adams's first attack on Victim occurred in a hammock, and later attacks frequently occurred when Victim traveled with Adams in his truck. Adams would rub Victim's genitals and place her hand on his genitals. Adams also asked Victim to watch a pornographic video with him, but she refused. Adams would pick the lock to Victim's bedroom to watch her change clothes. Once Adams picked the lock to the bathroom when Victim was showering and ripped the shower curtain aside. Adams repeatedly harassed Victim by asking her when they were going to have sex. Victim failed to report the abuse because Adams told her, "If you ever tell anybody . . . you'll go down with me."

The first incident of abuse with Sister occurred when Adams called her to the hammock and asked her to touch his genitals. When she refused, he placed her hand on his genitals. Sister testified that Adams also molested her in his truck. Sister, too, testified that Adams had entered her bedroom while she was changing clothes and the bathroom while she was showering. Adams also asked Sister to watch a pornographic movie, and she refused. Sister testified that she did not reveal the abuse because Adams told her "if he was to go down, that I would go down with him."

As the supreme court stated in *McClellan*, "It would be difficult to conceive of a common scheme or plan more within
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the plain meaning of the exception than that presented by this evidence." *McClellan*, 283 S.C. at 392, 323 S.E.2d at 774. Here, Adams used his relationship as stepfather to control the girls; the girls were approximately the same age; the attacks began in the back-yard hammock; both girls were molested in Adams's truck; both girls were forced to place their hands on Adams's genitals while in his truck; Adams picked locks to both girls' bedrooms to watch them change clothes; Adams entered the bathroom while both girls were showering and pulled the shower curtain aside while they were bathing; Adams offered to show both girls a pornographic videotape; Adams repeatedly asked both girls when they could have sex; and, to control both girls from disclosing his abuse, Adams threatened both girls with the same line: "If

"I go down with me."

... similarities[fn1] are sufficient so that proof to prove the other. The evidence tended to show a ... plan, "and its close similarity to the charged ... its probative value so as to outweigh its ... effect." Hallman, 298 S.C. at 174, 379 S.E.2d at

*No Evidence that the
Witness saw SLS do any
thing. She heard him
say he couldn't do this*

... further argues that Sister's allegations were not proven ... convincing evidence. Corroboration of a victim's ... is not required in sexual assault prosecutions. S.C. ... 16-3-657 (1985). Sister

... Adams as her molester and described the attacks with ... Such detailed testimony rendered the evidence clear and ... and admissible. See State v. Aiken, ... 77, 470 S.E.2d 404 (Ct. App. 1996) ... witness's direct knowledge of defendant's ... tion provided sufficiently clear and convincing evidence ... bad acts under common-scheme-or-plan exception).

Directed Verdict

... next contends the State failed to present sufficient ... of intent to accomplish a sexual battery as defined by ... de Ann. section 16-3-651(h) (1976). He asserts that ... was insufficient evidence presented . . . establishing ... Adams) assaulted the prosecutrix with the intent to place ... his body parts into the genital or anal openings of her ... This precise argument was neither raised to nor ruled upon ... trial court. Adams argued only that the evidence did not ... the "level of a reasonable doubt as to counts 1, 2 and ... Moreover, the record does not reflect that Adams renewed the ... at the close of his case. Adams's argument, therefore, is ... preserved for our review. See Medlock v. One 1985 Jeep ... VIN 1JCWB7828FT129001, 322 S.C. 127, 132, ... S.E.2d 373, 376 (1996) ("The appellant has the burden of providing this ... with a sufficient record upon which to make a decision."); ... v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ... making "standard motions" at trial does not preserve an ... for appellate review and stating, "A party cannot argue one ... and for a directed verdict in trial and then an alternative ... and on appeal."); State v. Jordan, 255 S.C. 86, 93, ... S.E.2d 464, 468 (1970) ("This court has, in numerous cases, held that it ... not consider a question on appeal which was not presented in ... court below."); State v. Parler, 217 S.C. 24, 59 S.E.2d 489 ... 1950) (holding, under Circuit Court Rule 76, a defendant who ... is to renew a directed verdict motion after presenting ... dence during the defendant's case has not preserved the denial ... r review by the appellate court); see also Rule 19 note, ... CrimP (stating the rule is "substantially the substance of ... Circuit Court Rule 76"); 15 S.C. Juris. Appeal and Error § 80 ... 1992) ("If a defendant presents evidence after the denial of his ... directed verdict

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... motion at the close of the plaintiff's case, he ... must make a directed verdict motion at the close of all the ... evidence to appeal the sufficiency of the evidence."); cf. ... Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, ... 64 S.E.2d 112 (1995), aff'g in result and vacating in part 316 S.C. 34, ... 46 S.E.2d 440 (Ct. App. 1994) (affirming court of appeals' decision ... that directed verdict motion was not preserved for review because ... motion was not reviewed at the close of all the evidence, and ... vacating portion of court of appeals' opinion that addressed ... merits of directed verdict).

III. Co-worker Incident

Finally, Adams argues the trial court erred in allowing testimony regarding an unrelated bad act at work. We find Adams waived any objection on this issue. When Adams objected to the testimony at trial regarding Adams's grabbing of a co-worker, the trial court sustained the objection and gave a curative instruction to the jury. Adams did not object to the sufficiency of the curative instruction or request a mistrial. An error is deemed cured if the objecting party accepts the ruling of the trial court and does not contemporaneously object to the sufficiency of the curative charge or move for a mistrial. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).

AFFIRMED.

HOWELL, C.J., and CURETON, J., concur.

[fn1] Adams, himself, argued before the jury that the allegations tracked "almost identical abuse over eight or nine years."

[fn2] We find distinguishable the supreme court's recent decision in *State v. Nelson*, Op. No. 24778 331 S.C. 1, 501 S.E.2d 716 (1998). In *Nelson*, the trial court admitted the evidence as probative of a "personality characteristic," namely, that the defendant was a pedophile. Our supreme court reversed the trial court because "[s]uch evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged." *Id.* at 7, 501 S.E.2d at 719. The court further found that "the State's argument [that] th[e] evidence was relevant to show motive or intent [wa]s merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses." *Id.* at 12, 501 S.E.2d at 722. Here, the evidence clearly falls within the common-scheme-or-plan exception of Rule 404(b), SCRE, and parallels other South Carolina cases involving sexual abuse of children.

STATE VS SAMMIE STOKES

RESEARCH

Vol. II

①

Photograph Cases

1. State v Tucker

324 S.C. 155 (1996)

1. Relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court.
Exception: A photograph should be excluded only if it is calculated to arouse the jury's sympathy or prejudice or is irrelevant or unnecessary to substantiate facts.

2. State v Nance

320 S.C. 501 (1996)

1. If the offered photograph serves to corroborate the testimony, it is not an abuse of discretion to admit it.

3. State v Gardner

505 S.E.2d 338, 332

S.C. 389 (1998)

1. Photographs of the victim's body are admissible in the sentencing phase of a capital trial to show the circumstances of the crime and the defendant's character.

2. Trial judge is required to balance the prejudicial effect of a photo against its probative value. The scope of probative value is much broader in the sentencing phase of a capital trial than in other proceedings.

4. State v Riddle

341 S.C. 1 (1994)

1. This evidence includes photographs which depict the victim's body in substantially the same condition in which the defendant left.

5. State v Powers

331 S.C. 37 (1998)

1. Photograph excluded only if it is calculated to arouse the jury's sympathy or prejudice or is irrelevant or unnecessary to substantiate facts.

Photograph Cases

6. State v Kelsey
331 S.C. 50 (1998)

Same as State v Powers

Prior Bad Acts

1. State v Warren

330 S.C. 584 (Ct. App. 1998)

1. Prior Bad Acts alleged at trial. When evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered

- trial judge's failure to give a limiting instruction was reversible error where evidence of defendant's prior convictions was offered for impeachment purposes

2. Supreme Court held it was reversible error to refuse to give a requested limiting instruction when evidence of other crimes was introduced to prove only a common scheme or plan

Exception: If prior bad acts is being admitted as part of Res Gestae

- for common scheme or plan there must be sufficient similarity between the two crimes

Reason for limiting instruction is to protect against a jury convicting a defendant just because he has committed other crimes, and not because it has been proven that he is actually guilty of the crime for which he is accused

Evidence of other crimes is admissible when that evidence tends to establish

1. Motive
2. intent
3. absence of mistake or accident
4. a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others

2. State v Nelson
331 S.C. 1

1. Even relevant and otherwise admissible evidence may be excluded for undue prejudice - evidence of prior bad acts in analyzing whether it is ~~admiss~~ relevant under 404(b) "it must tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity. In other words no link in the chain of inference justifying relevance can be derived from prior conduct's tendency to show character or disposition.

3. State v Adams
332 S.C. 139 (Ct. App 1998)

1. Evidence is inadmissible to show propensity to commit a crime - specific similarities are sufficient so that proof of one tended to prove the other

4. State v Cutro
332 S.C. 600 (1988)

1. A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is necessary - connection must be more than a general

Similarity

- A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary

* Trial judge must clearly perceive the connection between the other crimes and the crime charged.

~~**~~ Other crimes which are not the subject of conviction must be proven by clear and convincing evidence

citing State v Smith 300 S.C. 216 Court held proof appellant committed a prior murder was not clear and convincing

5. State v Henry (Cl. App. 1993)

1. There must be a connection between the crime charged and the prior bad act or the accused should be given the benefit of the doubt.

6. State v King (1999)

1. Evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person

- must be clear & convincing
- logical relevance between PBA and crime for which defendant is accused

Except: it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.

State v Brooks (1998)

1. See Cutro & King above