

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of General Sessions

S.C. Supreme Court

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5265 (S.C. Ct. App. Filed August 20, 2014)

THE STATE,

Respondent,

v.

WAYNE MCCOMBS,

Petitioner

APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Appellant,

vs.

WAYNE DANIEL MCCOMBS

Respondent.

Appellate Case No: 2012-209947

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STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)

PLAINTIFF,)

v.)

WAYNE DANIEL MCCOMBS)

DEFENDANT.)
_____)

Portion of Transcript of Record
C/A #: 2009-GS-18-1493

Monday, March 5, 2012 and
Tuesday, March 6, 2012

BEFORE:

HONORABLE KRISTI L. HARRINGTON, PRESIDING JUDGE.

APPEARANCES:

Russell D. Hilton, Assistant Solicitor
Andrew John Savage, III, Esquire

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

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EXHIBITS

(There were no exhibits marked during this portion of the hearing)

1 Bailiff: All rise. The court is in session. The honorable
2 Judge Harrington presides.

3 The Court: Thank you, be seated. Alright, we will start
4 with the motions in the state of South Carolina
5 versus Wayne McCombs. Is the state ready to proceed,
6 Mr. Hilton?

7 Mr. Hilton: The State is ready to proceed, Your Honor.

8 The Court: Is the defense ready to proceed Mr. Savage?

9 Mr. Savage: The defense is ready, Your Honor.

10 The Court: And in any particular order that we wish to
11 go forward?

12 Mr. Hilton: However the court desires.

13 Mr. Savage: The State has a motion, I think one motion,
14 right?

15 Mr. Hilton: The state does have a couple motions. The
16 only thing I guess we would ask is we save the Lyle
17 motion and maybe the forensic interview, the discussion
18 of the forensic interview, we will save that for last. I
19 think we can dispose of the other ones relatively
20 quickly.

21 The Court: Alright, counsel was in chambers. Just for
22 members of the audience. I had a foot surgery so I am
23 propping my foot up. So, please do not think I am being
24 disrespectful or just relaxing up here on the bench, but
25 I will have my foot propped up, so thank you for your

1 Alright.

2 (Court Break)

3 Mr. Hilton: Alright, Your Honor, the State will call

4 Jessica [REDACTED].

5 The Court: Ma'am please come forward and be sworn.

6 Bailiff: Please raise your right hand. State your full
7 name for the record.

8 Ms. [REDACTED]: Jessica [REDACTED].

9 Bailiff: Do you solemnly swear to tell the truth the whole
10 and nothing but the truth?

11 Ms. [REDACTED]: I do.

12 Mr. Hilton: May it please the Court, Your Honor?

13 The Court: Yes sir.

14 Mr. Hilton: Thank you.

15 Proffer Examination of Jessica [REDACTED] by Mr. Hilton:

16 Q: Jessica. What's your full name?

17 A: Jessica [REDACTED].

18 Q: Okay, and where are you living now?

19 A: Rhode Island.

20 Q: And that last name is [REDACTED]?

21 A: Correct.

22 Q: Okay, and you said you live up in Rhode Island? Where
23 were you living back in 2001?

24 A: South Carolina, Summerville.

25 Q: Okay, and do you remember what days what dates not

1 necessarily specifically, but from what year to
2 whenever you moved?

3 A: Third grade to fifth grade.

4 Q: And were you in the fifth grade around 2001?

5 A: Yes.

6 Q: Okay, and how old were you, well let me just ask you,
7 how old are you now?

8 A: Twenty-two.

9 Q: And how old were you back in 2001, on May 27, 2001?

10 The Court: Ms. [REDACTED], I might need you to speak up.

11 A: Eleven.

12 The Court: Thank you.

13 Q: And do you remember where you were living back at
14 that time?

15 A: I believe it was Waring Lane.

16 Q: Okay, and do you know what subdivision that was in?

17 A: I do not.

18 Q: Alright, if I said the name Green Hurst, does that
19 sound familiar?

20 A: No.

21 Q: Okay. Specifically on May 27, 2001, did you know a
22 kid by the name of Joshua?

23 A: I did. He was my friend.

24 Q: And who was he?

25 A: He was my best friend.

- 1 Q: But who were his grandparents?
- 2 A: Wayne McCombs and I don't remember his grandmother.
- 3 Q: Okay, and do you remember going somewhere with Joshua
- 4 that day?
- 5 A: I went to his grandparents house.
- 6 Q: What was the purpose of that?
- 7 A: There was a party, but I'm not sure what kind.
- 8 Q: And what were you going to do at that party?
- 9 A: Go swimming.
- 10 Q: Did Joshua's grandparents, Mr. McCombs, did he have a
- 11 pool?
- 12 A: He did.
- 13 Q: Where was his pool?
- 14 A: In the backyard.
- 15 Q: When you went to the party, were there other people
- 16 there?
- 17 A: Yes.
- 18 Q: How many people would you say?
- 19 A: I'm not sure.
- 20 Q: More than two or three?
- 21 A: Yes.
- 22 Q: Okay, adults?
- 23 A: Yes.
- 24 Q: Other kids?
- 25 A: Yes.

- 1 Q: And when you got to the party what did you do?
- 2 A: The other kids may of went swimming, but I didn't.
- 3 Q: Okay, at some point in time did you ever go swimming?
- 4 A: Yes.
- 5 Q: Alright, and how did that take place?
- 6 A: Wayne told me that if I didn't get in the pool that I
- 7 couldn't be at his house.
- 8 Q: Okay, and did you know, and you're calling him Wayne,
- 9 is that Mr. McCombs you're talking about?
- 10 A: Yes.
- 11 Q: And did you know him at the time?
- 12 A: No, that was my first time meeting him.
- 13 Q: Joshua was the one that you knew?
- 14 A: Yes.
- 15 Q: And when he asked you to get into the pool what did
- 16 you do?
- 17 A: I got into the pool and started swimming.
- 18 Q: Tell us what happened after that?
- 19 A: He was already in the pool and he was kind of leading
- 20 me around the water by my waist.
- 21 Q: Okay, and what happened at that point.
- 22 A: He stuck his finger underneath my bathing suit.
- 23 Q: And did what?
- 24 A: Felt my vagina.
- 25 Q: You said he felt your vagina?

1 A: Yes.

2 Q: Okay, were there other people in the pool at this

3 time?

4 A: Yes.

5 Q: Like who?

6 A: Other kids.

7 Q: Were there any other adults in the pool?

8 A: No, I don't believe so.

9 Q: Okay, and would somebody have been able to, if they

10 were looking, would somebody be able to see what was

11 going on?

12 A: Yes.

13 Q: Do you remember what kind of bathing suit you were

14 wearing?

15 A: I was wearing a two piece. A blue and purple

16 stripped bikini.

17 Q: Do you remember, do you remember if he was talking to

18 you during this episode?

19 A: Yes, he was talking to me, but not about what was

20 going on.

21 Q: And what do you mean by that?

22 A: About what he was doing.

23 Q: Can you remember what he was talking about?

24 A: I don't.

25 Q: Okay and do you know if it had anything to do with

- 1 him touching you?
- 2 A: It didn't.
- 3 Q: Was anybody drinking at the party?
- 4 A: Yes, adults were.
- 5 Q: Had the defendant been drinking?
- 6 A: I believe so.
- 7 Q: Was he playing with other kids at the party, in the
- 8 pool as well?
- 9 A: He wasn't.
- 10 Q: So it was kind of just you and him?
- 11 A: Yes.
- 12 Q: And do you remember how he positioned his hand into
- 13 your bathing suit? Do you remember how that took
- 14 place?
- 15 A: I believe it was up the bottom of my bikini, but I'm
- 16 not quite sure.
- 17 Q: Okay, and was this hand underneath the clothing, the
- 18 cloth of the bathing suit?
- 19 A: Yes.
- 20 Q: Was it skin to skin contact?
- 21 A: Yes.
- 22 Q: Did he ever go like up inside of you?
- 23 A: No.
- 24 Q: Do you remember if he was convicted of that conduct?
- 25 A: I don't.

1 Q: Okay. So you weren't present for any court hearings?
2 A: No.
3 Q: Alright, and after he touched you under your bathing
4 suit, what did you do at that point?
5 A: I got out of the pool.
6 Q: Why?
7 A: To go get chips and a drink.
8 Q: Was that the real reason?
9 A: No.
10 Q: Okay and did you get out of the pool?
11 A: I did.
12 Q: And what did he do?
13 A: Followed me.
14 Q: And where did you go?
15 A: To the kitchen.
16 Q: And where did he go?
17 A: To the kitchen.
18 Q: And what happened in the kitchen?
19 A: I was very nervous so I was chewing my nails and he
20 told me to stop and he then sat me on his leg.
21 Q: Okay and then what did you do then?
22 A: The other kids came in and went to the computer room
23 so I followed them.
24 Q: Okay the other kids being Joshua and whoever else was
25 there?

1 A: Yes.

2 Q: Okay and you said you followed them into the computer
3 room. Where was he?

4 A: What?

5 Q: Where was he?

6 A: He followed me in there.

7 Q: Okay and what did he do while you were in there?

8 A: He came up behind me and stuck his hands down my
9 pants from behind.

10 Q: Okay, did he fondle you?

11 A: Yes he touched.

12 Q: Okay, and was that on your vaginal area as well.

13 A: Yes.

14 Mr. Hilton: Your Honor, I just ask that the record
15 reflect that Ms. Jessica [REDACTED] is a white
16 female. Please answer any questions that Mr. Savage may
17 have for you. Thank you.

18 The Court: Mr. Savage.

19 Mr. Savage: If it please the Court. One moment. Your
20 Honor, may I hand this up to the court?

21 The Court: You may.

22 Mr. Savage: I've shown that to the prosecutor. That's the
23 discovery information we were provided with reference
24 to this incident. In light of that and the variance
25 with the testimony today, we would ask for a recess

1 for sufficient time to interview witnesses who
2 investigated this matter as the present testimony is
3 at an extreme variance with the information we were
4 provided.

5 The Court: Mr. Savage, do you have any questions for this
6 witness at this time?

7 Mr. Savage: Oh I have plenty of questions, but I'm not
8 prepared. Her testimony is at extreme material
9 variance with the information that was provided to
10 law enforcement in 2001. What this will require is
11 that we recess and interview the investigating
12 officers who wrote those reports to determine whether
13 or not they were complete and accurate at that time.
14 It's incredible how the testimony today is not only a
15 variance, but tracts specifically the allegations
16 against the defendant who is on trial today.

17 The Court: Alright, Mr. Savage, I wish for you to inquire
18 of this witness at this time and then we will take a
19 recess.

20 Proffer Testimony of [REDACTED] by Mr. Savage:

21 Q: Is it [REDACTED] ma'am?

22 A: [REDACTED]

23 Q: [REDACTED]?

24 A: Yes.

25 Q: I'm sorry. Ms. [REDACTED], you live up in Co Hog country

1 now?

2 A: Yes.

3 Q: And how long have you been in Rhode Island?

4 A: Three years.

5 Q: And are you going to school up there?

6 A: I have a daughter.

7 Q: You have a daughter?

8 A: Yes.

9 Q: She lives with you in Providence or Kingston?

10 A: Yes.

11 Q: Outside of Providence?

12 A: Yes.

13 Q: So, do you go for dinners on federal hill? Do you

14 know what federal hill is?

15 A: I don't.

16 Q: How old is your daughter?

17 A: Two.

18 Q: And have you come back to Summerville or this area

19 Dorchester County, Charleston at all since you moved?

20 A: No.

21 Q: And do you know a Kiara [REDACTED]?

22 A: I do not.

23 Q: Have you ever talked to her? Have you ever shared any

24 information with her?

25 A: I haven't.

1 Q: Are you in anyway related to her at all by face book
2 or any of those other social media websites?

3 A: I'm not.

4 Q: And in this incident that happened, that you've
5 testified today at Mr. McCombs house. Was that the
6 only time that you had been to his house?

7 A: Yes.

8 Q: Was this the only time you ever had any interaction
9 with him?

10 A: Yes.

11 Q: And you say a couple of things happened that day. One
12 is that he forced you into the swimming pool.

13 A: Yes.

14 Q: And did you tell that to the solicitor?

15 A: I did.

16 Q: And did you tell that to the law enforcement back at
17 the time that this happened?

18 A: I did.

19 Q: And that is a truthful statement? Correct?

20 A: Correct.

21 Q: Now, prior to going to his house that day, you didn't
22 even know Mr. McCombs? Isn't that correct?

23 A: Yes.

24 Q: This is the first time that you had met him?

25 A: Yes.

1 Q: And these incidents. You have given us a couple of
2 incidents that happened that day. One was in the
3 swimming pool.

4 A: Right.

5 Q: And today you mentioned that he had put his hand down
6 your bathing suit. Is that correct?

7 A: Yes.

8 Q: Now before you came to court today have you had a
9 chance to talk about this case to the prosecutors?

10 A: Yes.

11 Q: And did they ask you questions?

12 A: They did.

13 Q: And did you say that you knew everything, that you
14 remembered it perfectly well or some things were
15 foggy and perhaps you aren't as certain as you would
16 of been ten years ago, or I guess it's eleven years
17 ago now.

18 A: I did tell them.

19 Q: And did they try to encourage you to help you
20 remember certain things?

21 A: Yes.

22 Q: For instance, back when this came up and this was
23 reported to you, you never told any of the police
24 that were involved that in the swimming pool Mr.
25 McCombs stuck his hand down your bathing suit. You

1 told them that he was just throwing you up in the air
2 and that he was touching you outside of your bathing
3 suit on your breasts and vaginal areas.

4 A: I don't remember everything. I was eleven.

5 Q: Well do you remember, did the prosecutors show you
6 the statement that you made back in 2001 and go over
7 it with you in detail?

8 A: Yes.

9 Q: And do you know now that back in 2001 you never said
10 that Mr. McCombs had stuck his hand down your bathing
11 suit in the swimming pool. You told them that he had
12 touched your breasts when he was throwing you in the
13 air and whatnot in the swimming pool.

14 A: I remember him touching me inappropriately. I don't
15 remember the details.

16 Q: But the details, and I'm going to go slowly, and if
17 you want me to stop, you just say I've had enough.
18 I'm not trying to embarrass you.

19 A: That's okay.

20 Q: Back in 2001 in the swimming pool at that time you
21 talked to the police and whatnot you remembered more
22 accurately then you do today what happened. Is that
23 fair?

24 A: Yes.

25 Q: Because half your life's has gone away since then,

1 right? Your getting older. You're a mama. And back
2 then you accurately remembered what happened. Do you
3 remember telling the police that he did not put his
4 hand down your bathing suit, but he touched you
5 inappropriately on the breasts and of the buttocks or
6 whatever?

7 A: I don't remember telling them but I remember reading
8 it.

9 Q: Okay, and was that truthful at that time?

10 A: Yes.

11 Q: Today you said he stuck his finger under your bathing
12 suit and felt my vagina.

13 A: I remember that as well in the pool.

14 Q: But you didn't say that back then. When did you first
15 say that? When did you tell the prosecutor that?

16 A: I told him last night and I told him on the phone
17 when we talked months ago.

18 Q: Alright, and you told him that he stuck his finger
19 down your bathing suit in the swimming pool?

20 A: Yes.

21 Q: Or did you tell him that you got out of the swimming
22 pool and went inside the house and that's where he
23 stuck his hand down your bathing suit?

24 A: I told him that as well.

25 Q: So really there are two separate instances here.

1 A: Yes.

2 Q: And in neither instance did he ever, you said

3 touching, but what was the terminology you used?

4 A: It was touching.

5 Q: Do you know what a sexual battery is?

6 A: Yes.

7 Q: How do you know what a sexual battery is?

8 A: It's when someone does something against ones will.

9 Q: Has anybody told you what a sexual battery is?

10 A: No.

11 Q: You say that you do remember that day that Mr.

12 McCombs was drinking. Was he drinking more than a

13 coke?

14 A: He had alcohol, but I'm not sure what kind.

15 Q: And could you smell it on his breath?

16 A: Yes.

17 Q: And so it was obvious that he had been drinking more

18 than just a sip or beer or liquor or whatever he was

19 drinking?

20 A: Yes.

21 Q: You weren't drinking that day were you?

22 A: No.

23 Q: Was there any other party going on that day besides

24 the one in the swimming pool?

25 A: No, that was it.

- 1 Q: I'm not sure whether you indicated, I know you said
2 some of your friends were in the swimming pool, maybe
3 his grandson?
- 4 A: Josh, yes he was.
- 5 Q: And other adults?
- 6 A: No.
- 7 Q: And how many other children were there?
- 8 A: There was a few other children in the pool, but I
9 don't remember who they were.
- 10 Q: So, no adults were present? No food or anything like
11 that at the party?
- 12 A: There were other adults there.
- 13 Q: Were they in the pool?
- 14 A: No they were standing around the pool talking.
- 15 Q: And you say after this incident in the pool happened
16 you got out of the pool and he followed you?
- 17 A: Yes.
- 18 Q: Were there other adults present when he followed you?
- 19 A: No.
- 20 Q: And he followed you into the house?
- 21 A: Yes.
- 22 Q: And in the house is when he inserted his hand down
23 your bathing suit?
- 24 A: Yes, not at first.
- 25 Q: And you say he touched you, but didn't fondle you,

1 what do you mean by that?

2 A: He touched me. He never stuck his fingers in me.

3 Q: Do you remember talking to Detective Miller?

4 A: I don't.

5 Q: Do you know who that is?

6 A: No.

7 Q: Do you remember talking to Sandy Lance, Sunday Lance?

8 A: Yes.

9 Q: And when was the last time you spoke to her?

10 A: The night she was at my house after it happened.

11 Q: Have you spoken to her since then?

12 A: She talked to my grandparents a few times after that.

13 Q: Alright, have you spoken to her in the last two or

14 three years?

15 A: No.

16 Q: And when you spoke to Detective Miller or Detective

17 Lance did you provide them with a written statement?

18 A: I believe she wrote it.

19 Q: And did you talk also with ... well was Detective

20 Miller the only one you spoke to from the police

21 department?

22 A: I don't remember.

23 Q: Do you remember telling Detective Miller that you

24 knew the difference between touching and

25 inappropriate touching?

1 A: I don't remember telling him that.

2 Q: Do you remember telling him that Mr. McCombs lifted
3 you up out of the pool by her buttocks and ran his
4 hands all over your body? Do you remember that?

5 A: I don't remember saying that.

6 Q: And you do remember telling him, did he threaten you
7 that you couldn't leave his house unless you got into
8 the pool with him?

9 A: I'm sure he was joking, but I took it differently.

10 Q: And did you tell the detective that you were made to
11 get into the pool?

12 A: Yes.

13 Q: Do you remember not telling them anything at all
14 about being touched inappropriately in the pool
15 except when he lifted you in the air by the buttocks
16 to throw you in the water?

17 A: I don't know.

18 Q: You've seen that though?

19 A: Yes.

20 Q: And this was truthful back then. You knew he was
21 going to court back then and you told the truth at
22 that time.

23 A: Yes.

24 Q: You told the police that Mr. McCombs was drinking
25 beer?

1 A: Yes.

2 Q: Did you have an opportunity to review the arrest
3 warrant that Detective Miller signed?

4 A: I believe so.

5 Q: And in that, as far as the pool goes, you never told
6 him, nor was Mr. McCombs ever charged with touching
7 you inappropriately in the pool other than picking
8 you up by your buttocks and throwing you in the pool?

9 A: I really don't remember.

10 Q: He is playing with you in the pool at that time,
11 correct?

12 A: He wasn't really playing with me at the time.

13 Q: Were you playing?

14 A: No.

15 Q: Do you know that that's the word that they used in
16 the arrest warrant "playing in the pool?"

17 A: I was very scared.

18 Q: He used both his hands to fondle the chest and
19 buttocks area of the victim. A female eleven years of
20 age while the defendant and the victim were playing
21 in the backyard pool.

22 A: That's what I was intended to go there and do.

23 Q: Did you say that the defendant kissed you?

24 A: He didn't kissed me. He stuck my fingers in his
25 mouth.

1 Q: Do you remember telling the police that he attempted
2 to insert his tongue into your mouth?

3 A: No.

4 Q: Do you remember telling that in the police report and
5 the arrest warrant?

6 A: I do not.

7 Q: And the only time that you say in your arrest
8 warrant, or excuse me, the police arrest warrant,
9 your statement to the police, is that he touched you
10 in your private area was in the bedroom of his home.
11 Excuse me the computer room. Is that correct?

12 A: Correct.

13 Q: Is there any reason you can think of today, why you
14 would not have told either the police, the victims
15 advocate, or did you go see somebody at the
16 Children's Center?

17 A: I don't remember.

18 Mr. Savage: Excuse me just a moment. Your Honor, I just
19 heard that maybe she did and there may be a report that we
20 haven't seen yet. I would like to have an opportunity to
21 review that if there was one and it exists before I
22 complete my examination of this witness.

23 The Court: Mr. Hilton, do you know if there is additional
24 reports?

25 Mr. Hilton: There is a report of the forensic examination.

1 All in the packet that we turned over to Mr. Savage.
 2 Mr. Savage: I'm sure we have a written letter. May it
 3 please the Court, Your Honor. As a matter of fact in our
 4 office when we received discovery we sent a confirmation
 5 letter. I have my confirmation letter of October 20, 2009
 6 addressed to Jean Koprowski insisting of twenty-three
 7 items that we have received. March 30, 2010 to Jean
 8 Koprowski listing two items that we received. August 2,
 9 2011, Mr. Hilton, this is a little bit more than
 10 individual documents because it contains a disk containing
 11 fifty-one photographs and then approximately a dozen other
 12 documents. We don't have, we have not received, we have
 13 received a DCC protocol for Kiara [REDACTED] We have not
 14 received one for this witness.

15 The Court: Alright, Mr. Hilton, you indicated that you had
 16 provided that to Mr. Savage?

17 Mr. Hilton: We did, Your Honor. I remember specifically
 18 Mr. Bishoff and Mr. Rhodes coming to the office and
 19 sitting down well past five o'clock one day and we stayed
 20 there and went though the whole file and we flipped
 21 through page by page.

22 The Court: Do you have it with you?

23 Mr. Hilton: I do have it with me, yes, ma'am.

24 The Court: Alright, can you allow Mr. Savage to have some
 25 one else make him another copy?

1 Mr. Hilton: Absolutely.

2 The Court: Do you need a few moments to review that before
3 you continue?

4 Mr. Savage: Yes.

5 Mr. Savage: What I'm looking for are third parties that
6 the witness might of spoken to. I've seen several here.
7 It's about another fifteen pages. I can look at it over
8 lunch if Your Honor will allow me.

9 The Court: Alright, I will go ahead and allow you a lunch
10 break to continue to review that report. We will go ahead
11 and break in this matter. Alright and do not discuss your
12 testimony with anyone. Do you understand what that means?

13 A: Yes.

14 The Court: You may step down, thank you. Alright, so then
15 we will continue. The State is ready to select a jury? Is
16 that correct?

17 Mr. Hilton: We are, Your Honor.

18 The Court: Mr. Savage?

19 Mr. Savage: Yes ma'am.

20 The Court: Alright, so be prepared. I'm qualifying the
21 panel and then be prepared to select your jury. So we will
22 be at ease until two in this matter. Alright, thank you.

23 Mr. Hilton: Alright, thank you.

24 (Court Lunch Break)

25 (Panel was qualified)

1 (Back on the Record)

2 The Court: What do we need to do this afternoon. We need
3 to continue with our ...

4 Mr. Hilton: I guess finish with our Lyle Motion this
5 afternoon.

6 The Court: Alright. Is she ready?

7 Mr. Hilton: She is but I would like just a few minutes to
8 use the restroom, if that is alright.

9 The Court: I was just going to say let's go ahead and take
10 our comfort break, we will take about five, seven minutes,
11 get her ready.

12 (Court break)

13 Mr. Savage: Sorry, Judge, but we were working. We're
14 trying to do Ms. Winston before she left.

15 The Court: Just always when I tell you five minutes, I
16 like to be back in five minutes.

17 Mr. Savage: I thought you said seven. I had six fifty-
18 nine.

19 The Court: All right.

20 Mr. Savage: But it is important for us to follow up with
21 Ms. Winston. She said I could call her at home.

22 The Court: All right.

23 Mr. Savage: She did mention that there was a victim
24 advocate, maybe, that may have done the TSCC. I'm not
25 sure which, I didn't get that far into it.

1 The Court: All right. Let's put your witness back on the
2 stand.

3 Mr. Hilton: Continue cross examination of Ms. Shaw.

4 The Court: Yes. Mr. Savage, did you need additional time?

5 Mr. Savage: As soon as we broke I asked the investigators
6 and lawyers to review the police officer who was involved
7 in the statement ten years ago, eleven years ago. I
8 understand they are on their way back but I don't rather,
9 I have no idea what they ...

10 The Court: If need be Mr. Savage, I will allow you to
11 recall her tomorrow if need be but I would like to go
12 ahead.

13 Mr. Savage: I think I'm through, Your Honor, except for
14 that additional knowledge.

15 The Court: Okay.

16 Mr. Savage: If you will give me just a moment to ...

17 The Court: Certainly. I remind you that you are still
18 under oath, okay. Mr. Savage.

19 Mr. Savage: I'll try to be brief. You know, lawyers are
20 never brief. I try to be as suscient as I can, but if I
21 ever say anything that is misleading to you, you'll punch
22 me back, you'll tell me I'm wrong. Okay?

23 A: Yes.

24 Continued Proffer Testimony of Ms. [REDACTED] by Mr. Savage:

25 Q: I understand that this incident happened eleven years

1 ago?

2 A: Yes.

3 Q: In May, thereabouts, in 2001?

4 A: Yes..

5 Q: And that prior to that date, you didn't know Dan or

6 Mr. McCombs?

7 A: No.

8 Q: And you had never been to his residence before that?

9 A: No.

10 Q: No relationship at all with him?

11 A: No.

12 Q: Never heard anybody speak about him, say he had a

13 swimming pool, nothing?

14 A: No.

15 Q: What ever happened that day to you, happened that

16 day?

17 A: Right.

18 Q: There was nothing that happened on a telephone call

19 inticing you to come there, there was no invitation

20 extended to you to come there and there wasn't

21 anything after you left that continued a pattern of

22 conduct with Mr. McCombs?

23 A: No.

24 Q: Everything happened that day?

25 A: Yes.

1 Q: And what happened that day, among other things is
2 that you were threatened?

3 A: Yes.

4 Q: And you were threatened on a book end. You were
5 threatened to get in the pool ...

6 A: Yes.

7 Q: Prior to the engagement of the unlawful conduct.

8 A: Yes.

9 Q: And when it was all over at the end of the night
10 after he assaulted you in his residence he asked you
11 if you were mad at him?

12 A: I don't remember him asking me that.

13 Q: Well, if it was in the police report, have you had an
14 opportunity to review that?

15 A: Then I guess.

16 Q: So, if that is true, if that is true, at the
17 beginning of the day he threatened you to get into
18 the pool and at the end of the day he asked you
19 whether or not you were mad at him, had that
20 conversation?

21 A: Yes.

22 Q: Now, after threatening you in the pool, you remember
23 him drinking alcohol that day?

24 A: Yes.

25 Q: Would you say now, as an adult that he was

1 intoxicated that day?

2 A: I don't remember.

3 Q: But you remember a distinct odor of alcohol or some
4 type of beverage on his breath that was alcohol in
5 nature?

6 A: Yes.

7 Q: Do you remember now or remember telling the police at
8 the time this happened that he tried to force his
9 tongue in your mouth?

10 A: I don't remember saying that.

11 Q: But if you did say it at the time and you reported it
12 to the police it would have been true at that time?

13 A: Yes.

14 Q: Do you remember telling the police that it wasn't
15 playful, it was a very aggressive in touching you,
16 that he acted aggressive towards you?

17 A: Yes.

18 Q: Is it your testimony today that he was not playful?

19 A: Right.

20 Q: Did you tell the police then and is it true today
21 that he put your hands in his mouth?

22 A: Yes.

23 Q: Is it what you told the police ten years ago and is
24 it still truthful today that you were alone with him
25 in the house?

- 1 A: Yes.
- 2 Q: Did you tell the police ten years ago and do you
- 3 reaffirm today that he put his whole hand, in fact,
- 4 two hands in your bathing suit?
- 5 A: I do not remember that.
- 6 Q: If you told the police ten years ago, would it have
- 7 been truthful then?
- 8 A: Yes.
- 9 Q: Do you recall telling the police that there were two
- 10 separate occasions in which he improperly touched
- 11 you? Once in the pool and once in the house?
- 12 A: Yes.
- 13 Q: And that those two separate incidences were similar
- 14 in nature?
- 15 A: Yes.
- 16 Q: Do you remember today of the events or do you
- 17 remember telling the police any difference between
- 18 the two events other than where the location was?
- 19 A: No.
- 20 Q: And do you recall that the police charged Mr. McCombs
- 21 with a lewd act for one of the offenses?
- 22 A: No.
- 23 Q: You do not remember that he was charged criminally?
- 24 A: My grandmother probably did but she never mentioned
- 25 anything to me.

- 1 Q: So you didn't know that he had been charged
- 2 criminally?
- 3 A: No, not until later on.
- 4 Q: And if you didn't know what he was charged with
- 5 criminally you would not know what he was charged for
- 6 regarding the two different incidences?
- 7 A: Right.
- 8 Q: Was there anything different about the incidents
- 9 other than he went in the house with you on the
- 10 second occasion?
- 11 A: No.
- 12 Q: Now, in your relationship to Mr. McCombs, did he try
- 13 to keep up with you? Did he email you or text you or
- 14 phone you or in anyway try to further that conduct
- 15 that occurred on May 30 of 2001?
- 16 A: No.
- 17 Q: Was there any continuing pattern of conduct on his
- 18 part? Did he do anything --- do you know what
- 19 pattern means?
- 20 A: Yes.
- 21 Q: Do you know what single incident means?
- 22 A: Yes.
- 23 Q: Was this a single incident or was this a pattern?
- 24 A: Single.
- 25 Q: A single incident on that day?

1 A: Yes.

2 Q: Without connection to anything else with respect to
3 you?

4 A: (No response).

5 Mr. Savage: Beg the Court's indulgence one moment to
6 review my notes.

7 The Court: Yes, sir.

8 Q: Is it your testimony today and would it have been
9 your statement to the police ten years ago or eleven
10 years ago that he held you tight?

11 A: I don't remember.

12 Q: Do you remember him holding you tight?

13 A: I remember him putting his hands on my waist.

14 Q: Do you remember him holding you in a manner which
15 made you uncomfortable?

16 A: Yes.

17 Q: Do you remember telling the police or if you would
18 have told the police eleven years ago would it have
19 been truthful that he picked you up in the pool by
20 your buttocks and ran his hand all over your body?

21 A: I don't remember that. If it said it eleven years
22 ago, then yes.

23 Q: Do you believe that everything you told the police on
24 that occasion was reported by the police and
25 discussed with your grandparents or others that took

1 care of you at the time?

2 A: Yes.

3 Q: Do you remember somebody by the name of Sundi Lance,

4 L-A-N-C-E?

5 A: Sundi?

6 Q: Sundi, Sundi, I guess.

7 A: Yes.

8 Q: And did you make a statement to Sundi Lance?

9 A: Yes.

10 Q: Who is Ms. Lance or Mr. Lance?

11 A: The investigator that came to the house.

12 Q: All right. From the Sheriff's Department?

13 A: I guess.

14 Mr. Savage: That's all we have, Your Honor, of this

15 witness at this time. We reserve the right to recall

16 depending on what other testimony comes out.

17 The Court: Mr. Hilton, redirect?

18 Mr. Hilton: Thank you, Your Honor.

19 Redirect Proffer Testimony of Ms. [REDACTED] by Mr. Hilton:

20 Q: Jessica, when you talk about --- when Mr. Savage

21 asked you about some threats, were they mean threats

22 or joking threats or how would you characterize them?

23 A: I took them like I had to get in the pool, but I'm

24 sure he was joking.

25 Q: Was he hollering at you?

1 The Court: I'm going to need you to speak up, please.

2 A: No, he wasn't.

3 Q: Okay. I think / asked you early on, I think before
4 lunch, if you remember giving a forensic interview.
5 Do you remember giving a forensic interview?

6 A: No.

7 Q: Do you remember talking to folks about this case when
8 it happened back in 2001?

9 A: Yes.

10 Q: And do you remember telling, well, let me ask you if
11 you remember a girl by the name of Erin Shade, do you
12 know who that was, do you remember who that was?

13 A: I don't remember.

14 Q: Would you disagree with me if I said that was your
15 forensic interviewer?

16 A: I would not.

17 Q: And to use a question that Mr. Savage said, if you
18 told her something back ten years ago, do you think
19 that would be the truth?

20 A: Yes.

21 Q: Do you remember telling Ms. Shade that you were
22 wearing a bathing suit?

23 Mr. Savage: Of course, Your Honor, there is a difference
24 between prosecutor and defense in cross examining, he's
25 leading the witness. We object to the leading.

1 The Court: Your objection is leading?

2 Mr. Savage: Object to leading.

3 The Court: Watch your leading questions.

4 Mr. Hilton: Your Honor, since there is no jury, I would
5 just like to address the Court for a moment. She has been
6 accused of being untruthful in her testimony today so at
7 this time I think I get to talk about a prior inconsistent
8 statement. I get to talk to her about making that
9 statement and she gets that chance to either admit or deny
10 in making that statement. That's within the rules and to
11 do that I have to ask her about what statement she made.

12 The Court: Do you feel that you get to ask her leading
13 questions, counselor?

14 Mr. Hilton: Well, I just asked her did she give this
15 statement.

16 The Court: Watch the leading questions.

17 Mr. Hilton: Thank you, Your Honor.

18 Mr. Savage: Your Honor, if I may be heard. I'm not saying
19 she's untruthful now or then I'm just saying the testimony
20 part of the consideration of the court is to concur the
21 two. So, I'm not saying she's lying today. I mean it's
22 eleven years since then that goes to the very fact that
23 the distance between the two events, this is a perfect
24 example of why it shouldn't be allowed, but I'm not saying
25 that she's lying, God knows I'm not saying that.

1 The Court: Why the testimony shouldn't be allowed under
2 404(b) ...

3 Mr. Savage: Correct.

4 The Court: I'm going to give Mr. Hilton some leeway so
5 that he can clarify the prior statement.

6 Mr. Hilton: If Mr. Savage is saying that her testimony is
7 truthful ...

8 The Court: Mr. Hilton, you don't need to address Mr.
9 Savage.

10 Mr. Hilton: I'm not, Your Honor.

11 The Court: I said you may inquire about her prior
12 statements.

13 Mr. Hilton: Thank you, Your Honor.

14 Continued Proffer of Ms. [REDACTED] by Mr. Hilton:

15 Q: Jessica, do you remember telling the forensic
16 interviewer that you were wearing a bathing suit and
17 a shirt at the grandparents house, in Joshua's
18 grandparents house?

19 A: I don't remember.

20 Q: You don't remember. I tell you what, let me just
21 show you this.

22 Mr. Savage: This is direct testimony. She said she
23 refreshed her memory last night and went through all these
24 documents but certainly during the course of her testimony
25 she can't be spoon fed information that the State might

1 seem to be favorable to them. If he's cross examining her,
2 did you make this statement, here's this statement, did
3 you make it.

4 The Court: What is your objection?

5 Mr. Savage: The form of the question.

6 Mr. Hilton: May I show the witness this document to
7 refresh her recollection?

8 The Court: Do you have an objection to him showing her the
9 document to refresh her recollection?

10 Mr. Savage: I trust the court will sift through all this,
11 I don't mean to be delaying everything.

12 The Court: All right. You may approach.

13 Proffer testimony of Ms. [REDACTED] continued by Mr. Hilton:

14 Q: Jessica, I'm going to show you this if you can read
15 the highlighted portions, you can read it to
16 yourself.

17 A: (Witness reviews document).

18 The Court: All right. Mr. Hilton, just so the record is
19 clear, what have you handed her?

20 Mr. Hilton: I handed her the interview notes of 2001?

21 Q: Are you finished?

22 A: Yes.

23 Q: Having read that does that refresh your recollection
24 of what you told Ms. Shade back in 2001?

25 A: After reading it, not really.

1 Q: Well, as Mr. Savage asked you, if you read this and
2 it's in the report and we say you told this to the
3 police back 2001, would you say that information was
4 inaccurate?

5 A: No, I would say it is correct.

6 Q: And is that the same statement that you testified to
7 earlier when we were talking about what happened in
8 the pool?

9 A: Yes.

10 Q: And to go over that statement again that we talked
11 about earlier when you were in the pool, it was a
12 pool party you said?

13 A: Yes.

14 Q: Were you swimming?

15 A: Yes.

16 Q: Did Mr. McCombs touch you?

17 A: Yes.

18 Q: How did he do that?

19 A: He put his hands under my bathing suit.

20 Q: After that, with some details, you said you got out
21 of the pool for some reason, what was that reason?

22 A: To get some chips and a drink.

23 The Court: I need you to speak loudly. I know I'm having
24 a hard time hearing you and I know that Mr. Savage is
25 having a hard time hearing you.

1 Q: So, all that information that you testified to before
2 lunch, did you tell the forensic interviewer that
3 before this report?

4 A: Your Honor, we have nothing further for Ms. [REDACTED] at
5 this time.

6 The Court: Mr. Savage recross?

7 Mr. Savage: Very briefly.

8 Recross Proffer Testimony of Ms. [REDACTED] by Mr. Savage:

9 Q: Not like t.v. is it?

10 A: No.

11 Q: Do you know what refreshing your memory means?

12 A: Yes.

13 Q: You were shown some documents and the prosecutor
14 asked you if that refreshed your memory?

15 A: Right.

16 Q: Other than looking at the documents and you looked at
17 some documents last night and you were thinking about
18 this today, did you independently remember or do you
19 now independently remember what you told these
20 people?

21 A: I remember bits and pieces of what I told them but
22 not everything.

23 Q: And the question specifically that was asked to you
24 by the prosecutor, do you distinctly have a memory of
25 telling that to somebody?

1 A: Somewhat.

2 Q: What does that mean, somewhat?

3 A: What did I remember saying to the prosecutor?

4 Q: Well, you talked to the prosecutor.

5 A: Right.

6 Q: That was last night and on the telephone. What I'm
7 saying to you, do you remember without reference to
8 any documents saying that eleven years ago to the
9 police officer, Detective Miller or to whoever it was
10 he was referring to?

11 A: No.

12 Q: The only way you have a memory of that is because the
13 prosecutor showed you a document?

14 A: Right.

15 Q: So that's not refreshing your memory, that is forging
16 a memory.

17 A: I remember some things. I remember he touched me
18 inappropriately.

19 Q: But as far as the details of that?

20 A: No.

21 Mr. Savage: Thank you very much. We have no further
22 questions.

23 The Court: You may step down. Thank you very much. I'm
24 assuming she is still under subpoena, is that correct Mr.
25 Hilton?

1 Mr. Hilton: She is, Your Honor.

2 The Court: And she knows when to be here?

3 Mr. Hilton: Our investigator is her ride, so ...

4 The Court: Great, great. We will see you at a later time.

5 Thank you. She knows not to discuss her testimony with
6 anyone.

7 Mr. Hilton: Thank you, Your Honor.

8 The Court: Thank you.

9 Mr. Hilton: Your Honor, at this time the State would offer
10 a certified copy of the conviction for Mr. Wayne Daniel
11 McCombs. He plead guilty in 2002, actually July 18th 2002
12 to indictment 2001-785. The indictment was for lewd act
13 upon a child. That indictment was true billed.

14 The Court: Any further testimony from the State?

15 Mr. Hilton: None from the State, Your Honor.

16 The Court: Any additional testimony from the Defendant?

17 Mr. Savage: No, Your Honor, I believe that the State is
18 going to have to provide the testimony of Ms. Gertz in
19 order to see whether this is a prior act that would
20 conform to the rules in terms of their offering to
21 introduce it. I would suggest to the Court that I would
22 stipulate that that indictment is one that he has pled
23 guilty to. The real question is what did he plead guilty
24 to and whether or not they are going to have to show by
25 clear and convincing evidence those portions that he did

1 not pled guilty to. There are two separate warrants. One
2 was a lewd act, one was a criminal sexual conduct. One was
3 based on what I believe she reported to the police that
4 she was touched outside her clothing which was the lewd
5 act. There was an attempted sexual conduct of an incident
6 that happened in the house. So, you can't just take that
7 indictment and throw it up against the wall and say hey it
8 sticks because somewhere along the line he may have done
9 one of these things. That's why I asked this morning with
10 specificity in one of our written motions specificity of
11 what the 404(b) allegations are. But, we still are
12 putting the cart before the horse because we haven't heard
13 what the substantive evidence in this case and I would
14 argue vigorously that the fact scenario that was given to
15 the court and memorandum and motion by the solicitor is at
16 odds with what you've seen on the video.

17 The Court: Mr. Savage, do you believe that the victim must
18 testify or that I can take the statements from the video
19 as to what she will testify to?

20 Mr. Savage: Well, it has to be on the record. How you do
21 it, I leave to the court, but if this case is appealed,
22 which hope it is not, you know, we're actually putting the
23 cart before the horse. Is she going to testify and is
24 that testimony going to be consistent with what she said
25 in the video or is it going to be consistent with what was

1 reported by the parents to the police that night in terms
2 of criminal sexual conduct to sexual battery. We don't
3 know what she is going to say. We suppose that is going
4 to stay consistent with what the video is but we don't
5 know that and I don't think the Court can assume that
6 because she's ...

7 The Court: Mr. Hilton.

8 Mr. Savage: ... told various stories.

9 The Court: Hold on. I didn't mean to interrupt you. Mr.
10 Hilton.

11 Mr. Hilton: Well, Judge, I will say before this hearing
12 started part of the questions that I had was is the
13 defense okay with putting the forensic interview before
14 the court as evidence of the charge against him, if you
15 will. That was fine then. Now we get to the end of the
16 hearing and now he wants the victim to testify so that's a
17 little bit concerning. I'm relying on the forensic
18 interview what was brought up in court. So, the evidence
19 of this case is what is on that forensic interview. It
20 would be played during the trial pursuant to the statute,
21 pursuant to the agreement by the defense counsel. So, I
22 do think that is appropriate evidence. I don't think I
23 need to traumatize the victim in the current case by
24 having her testify twice in some evidentiary hearing where
25 hearsay and everything else is admissible. And, so, you

1 know, that's the whole purpose of these forensic
2 interviews and why that statute is in place to be able to
3 minimize the number of times that the victim does testify.
4 By just making her testify in some pretrial hearing I
5 think that kind of defeats the purpose of the statute to
6 being with.

7 Mr. Savage: I don't have any problem with that. You just
8 can't rule.

9 The Court: I'm sorry?

10 Mr. Savage: You just can't rule at this time. The statute
11 requires that the child testify at the proceeding. I
12 don't make that up, it's the law.

13 The Court: Alright. My understanding was that you were
14 stipulating as to what she had said and that would be the
15 testimony, would that ...

16 Mr. Savage: I don't know that.

17 The Court: ... be incorrect?

18 Mr. Savage: No, that is incorrect.

19 The Court: That is incorrect.

20 Mr. Savage: Because that is not consistent with other
21 statements that she made. I don't have any objection to
22 the Court reviewing the video in advance to save the court
23 time or whatever. But the statute requires that the child
24 testify at the proceeding and subject to cross examination
25 on the elements of the defense and the making of the out

1 of court statements. That's the foundation against this
2 video in is that statute and you can't just pick and chose
3 what section of the statute you want.

4 The Court: But we're not making a determination of whether
5 or not the video --- I thought you were stipulating ...

6 Mr. Savage: I don't have a problem with the video. The
7 video comes in. I don't have any objection to that.

8 The Court: So, then the next question that I had Mr.
9 Savage is I thought for purposes of this hearing only that
10 you were stipulating that that would be the testimony what
11 the child testified to and I think that is what Mr. Hilton
12 understood as well.

13 Mr. Savage: Provided it's not invariance to what she
14 testifies to.

15 The Court: All right. I didn't hear that part and so Mr.
16 Hilton.

17 Mr. Hilton: I agree that for the trial, for the jury that
18 she has to testify before that video is played. I agree
19 with that. That's what the statute says. But for this
20 hearing that's not what is required and this is a motion
21 in limine. You can make a preliminary determination by
22 now and the final determination comes at trial. That's
23 the case law and ...

24 Mr. Savage: I think we are all in agreement. I don't see
25 this as an issue. Your Honor, now has all the evidence

1 you need to rule on whether it becomes appropriate to rule
2 on.

3 The Court: My concern is Mr. Hilton is going to get up in
4 his opening statement tomorrow and say, so I'm assuming
5 you want me to rule as to whether or not the 404(b)
6 evidence of prior conviction is coming in before your
7 opening statement?

8 Mr. Hilton: Yes, ma'am. We need a ruling on that. That's
9 why we are having this hearing.

10 The Court: That's why it is an issue Mr. Savage because he
11 wants to stand up tomorrow morning and say this is what is
12 going on, this is what happened.

13 Mr. Savage: Well, if that's what he wants to do he's got
14 to jump through the hoops just like the statute requires.
15 Just so I am clear is your child here, is your victim here
16 to testify?

17 Mr. Hilton: She is.

18 The Court: All right. Do you need a moment to prepare her
19 to testify for the 404(b)?

20 Mr. Hilton: All I need is to tell her, because she wasn't
21 expecting to testify this afternoon.

22 The Court: I know. I know. I thought we had taken care
23 of this but I believe that the statute requires that I
24 hear what she is going to say plus that I make a finding
25 of her testimony and the key to me is that it is under

1 oath. All right.

2 Mr. Hilton: Thank you, Your Honor.

3 The Court: Let me know how much time you need and I don't

4 mean to prep her but ...

5 Mr. Hilton: Just forty-five seconds or so.

6 The Court: All right. Thank you. Please come forward

7 right up here. Swear her in.

8 Kiara [REDACTED] was sworn to tell the truth:

9 Proffer Testimony of Kiara [REDACTED] by Mr. Hilton:

10 Q: Kiara, how are you?

11 A: Good.

12 Q: All right. Your full name is Kiara [REDACTED]

13 A: Kiara [REDACTED].

14 Q: Spell it.

15 The Court: I'm going to need you to use your outside voice

16 and I need you to also say yes or no because my court

17 reporter can't write down uh-huh. Okay?

18 A: (Nods head affirmatively).

19 The Court: Let's practice. Was that a yes?

20 A: Yes.

21 The Court: Do you have a glass of water?

22 A Yes, ma'am.

23 The Court: Okay. We are just going to practice because we

24 are outside the presence of the jury and I know a lot of

25 times I know, are you nervous?

1 A: Yes.

2 The Court: If you need a break you just look at me and let
3 me know, but it is very important that you follow the
4 rules, do you understand?

5 A: Yes, ma'am.

6 The Court: Because I am going to look at you, I'm
7 going to give you that look and if I can't hear you, I
8 just want to keep telling you to talk louder. Do you play
9 sports?

10 A: No.

11 The Court: Do you talk on the phone to your friends?

12 A: Yeah.

13 The Court: Is that a yes?

14 A: Yes.

15 The Court: Okay. I want you to yell so that that person
16 in the red jacket can hear you, can you do that for me?

17 A: Yes, ma'am.

18 The Court: All right. Sorry, Mr. Hilton.

19 Q: All right, Kiara I'll try to remind you about the uh-
20 huh. Where do you live Kiara?

21 A: Summerville.

22 Q: Do you know your address?

23 A: [REDACTED]

24 Q: [REDACTED]

25 A: Yes.

1 Q: Do you know the defendant in this case Mr. Wayne
2 McCombs or Mac McCombs or Dan McCombs, you might know
3 him as?

4 A: Yes.

5 Q: What do you call him?

6 A: Dan.

7 Q: Where does he live in relation to you?

8 A: Up the street.

9 Q: Same neighborhood?

10 A: Yes.

11 Q: Let me take you back to August 1st, 2009, that's the
12 day that we're hear for, do you remember that day?

13 A: Yes.

14 Q: What was going on that day?

15 A: We were getting ready for my grandma's fifty party.
16 We were getting ready for it like me and my mom were
17 at our house, we were getting food ready and bringing
18 stuff up to the house.

19 Q: When you say bringing it up to the house, whose
20 house?

21 A: Dan's.

22 Q: What were you all doing for your grandmother?

23 A: Were having a fiftieth birthday party for her because
24 she had never had a birthday.

25 Q: Why were you doing it at Mr. Dan's house?

- 1 A: Well, my mom asked him if we could and he said yes.
- 2 Q: Was there any particular reason why it was at his
- 3 house as opposed to your parents house?
- 4 A: I'm not sure.
- 5 Q: Did Mr. McCombs and I'll call him Mr. Dan since
- 6 that's what you call him. Did Mr. Dan have a
- 7 swimming pool in his backyard.
- 8 A: Yes, an in-ground one.
- 9 Q: Did you ever go up there to swim?
- 10 A: Only once or twice.
- 11 Q: Okay. Were you good friends with Mr. Dan?
- 12 A: I wouldn't say that we saw him every day, it was just
- 13 often.
- 14 Q: Why was that?
- 15 A: Well, we don't do too much out in the neighborhood.
- 16 We don't really, we only had like specifically two
- 17 people that we really saw in our neighborhood.
- 18 Q: And on that day of August 1st 2009, this would be at
- 19 your grandma's birthday party, do you remember how
- 20 old she was turning?
- 21 A: Fifty.
- 22 Q: Did you go to that party?
- 23 A: Yes.
- 24 Q: Who else went to that party? And you don't have to
- 25 name everybody, just your family.

- 1 A: My family members and friends in the neighborhood.
- 2 Q: Were there a bunch of people there?
- 3 A: There was at least like thirty or forty.
- 4 Q: Were they all there for your grandma's party?
- 5 A: Yes.
- 6 Q: Was Mr. McCombs there, was Mr. Dan there?
- 7 A: Yes.
- 8 Q: And did you go swimming?
- 9 A: Yes.
- 10 Q: Do you like to swim?
- 11 A: Yeah.
- 12 Q: Do you remember what kind of bathing suit you had
- 13 that day?
- 14 A: A bikini.
- 15 Q: Do you remember the colors or anything?
- 16 A: Blue, I think.
- 17 Q: At some point in time during the day was Mr. Dan ever
- 18 in the pool with you?
- 19 A: Yes. Actually quite a couple of times he would come
- 20 in the pool and I would talk to him and he would ask
- 21 me the same questions over again and again like
- 22 what's your favorite subject in school. It was the
- 23 same questions over and over again.
- 24 Q: Did you enjoy talking to him?
- 25 A: I was like more into swimming then hanging out with

1 him because I didn't really, I was more interested in
2 swimming at the time then talking with somebody who
3 was asking me the same questions over again.

4 Q: And Mr. Dan, he was much older than you, right?

5 A: Yes.

6 Q: How old would you just guess that he was?

7 A: Sixty or sixty-five.

8 Q: How old are you?

9 A: 12.

10 Q: How old were you back at the time, do you remember?

11 A: Eight or nine.

12 Q: That was back in the 2009?

13 A: Yes.

14 Q: When you were swimming in the pool, were there other
15 people in the pool with you?

16 A: Yes, most all the kids were in the pool and maybe
17 like two adults.

18 Q: Was that also during the times that Mr. Dan was in
19 the pool with you?

20 A: Yes.

21 Q: Describe for the court just kind of how the pool
22 looks.

23 A: It was like oval pretty much and it had like curves
24 on the side though.

25 Q: Is it like open from one end to the other?

1 A: Yes.

2 Q: Is there any private areas in the pool?

3 A: There's a deep end and a shallow end.

4 Q: But can you see from the deep end to the shallow end?

5 A: Yes.

6 Q: Is there any wall that divides the two?

7 A: No.

8 Q: Were people at the party drinking beer, liquor or

9 anything?

10 A: Yes.

11 Q: Do you remember if Mr. Dan was drinking beer?

12 A: No.

13 Q: When Mr. Dan was in the pool with you, did he do

14 something to you that was kind of out of the

15 ordinary?

16 A: Yes. He had touched me in the private parts.

17 Q: Okay. Let's talk about that a minute okay Kiara.

18 Where were you standing when he came up to you?

19 A: He --- well, I was swimming and I guess I came to go

20 saw hi to him and he started asking me the same

21 questions over again because I was sitting on his lap

22 because he was, we were in the shallow end he was

23 knealing down.

24 Q: Okay. You said you were sitting on his lap?

25 A: Uh-huh.

1 Q: And he was ...

2 The Court: Is that a yes?

3 A: Yes.

4 Mr. Hilton: I'm sorry.

5 Q: And he was knealing down?

6 A: Yes.

7 Q: What do you mean by that?

8 A: He was on his knees. Not on his knees, he had one
9 knee on the ground and he was holding me up by the
10 other knee.

11 Q: Okay. What was he talking to you about at that time?

12 A: He was asking me the same questions over again.

13 Q: Like what?

14 A: What's my favorite subjects in school? Things like
15 that.

16 Q: Okay. And at some point in time did he do something
17 to you?

18 A: He had touched me on my private part.

19 Q: What do you mean by that?

20 A: My vagina.

21 Q: How did he do that?

22 A: Well, I guess at the time I was swimming in the pool
23 so much that the bathing suit was kind of getting
24 loose and I don't know if he purposely slipped
25 underneath there or accidentally but I'm pretty sure

1 he purposely did it.

2 Q: Was his hand underneath the cloth of your bathing
3 suit?

4 A: Yes.

5 Q: And did he touch you on the vagina?

6 A: Yes.

7 Q: And do you know what I am talking about whenever I
8 say vagina?

9 A: Yes.

10 Q: Is that the same thing as what you called your
11 private part?

12 A: Yes.

13 Q: Where were all the other kids when this was taking
14 place?

15 A: They were swimming. Two of my friends were waiting
16 for me. They were over in the pool, just a little
17 ways over.

18 Q: Had somebody been looking would they have seen what
19 was going on?

20 A: No. Because it was underneath and I don't think
21 anybody would have paid attention anyways.

22 Q: Would they have been able to see you and Mr. Dan in
23 the pool?

24 A: Yes.

25 Q: So, all this was done under the water?

1 A: Yes.

2 Q: After that happened, what did you do with Mr. Dan?

3 A: On the outside the pool there is concrete that you
4 can, if you see, if you go to the pool people are
5 sitting on the concrete and they have their feet in
6 the water, I was trying to get on the side and he was
7 pushing harder and I was trying to get on the side
8 and I finally did get on the side. It took about
9 three or five seconds.

10 Q: When you say he was pushing harder, what do you mean,
11 he was pushing harder on?

12 A: My, somewhere on my vagina.

13 Q: Okay.

14 Mr. Hilton: Thank you Kiara. Please answer any questions
15 that Mr. Savage may have for you, okay.

16 The Court: Mr. Savage.

17 Mr. Savage: If it please the court. Thank you, Your
18 Honor.

19 Cross Examination of Ms. [REDACTED] by Mr. Savage:

20 Q: Kiara, I'm Andy Savage. I'm an attorney. I represent
21 Mr. McCombs, your neighbor. Not against you but
22 just in an effort to find out what really happened
23 that day. What I heard you tell, is that Mr. Hilton?

24 A: It is.

25 Q: You've seen him before?

- 1 A: Yes.
- 2 Q: How many times have you talked to him?
- 3 A: About twice.
- 4 Q: He's gone over some photographs with you? Has he
- 5 shown you some pictures of the pool part and who was
- 6 there that day and what not?
- 7 A: Yes.
- 8 Q: And you had a lot of friends or relatives down from
- 9 what is it West Virginia or ...
- 10 A: Virginia.
- 11 Q: It was your grandmama's birthday?
- 12 A: Yes.
- 13 Q: And she had had a birthday before but never had a
- 14 birthday party before?
- 15 A: Yes.
- 16 Q: So, that's why you were there to celebrate her
- 17 birthday, correct?
- 18 A: Yes.
- 19 Q: Now, did Mr. McCombs ask you to come to his house?
- 20 A: No.
- 21 Q: Did your mother ask Mr. McCombs if she and her
- 22 friends and relatives could go to his house?
- 23 A: My mom asked if she could hold a birthday party at
- 24 his house and he said yes.
- 25 Q: It was your mom who asked to go there not Mr. McCombs

1 asking you to go there?

2 A: Yes.

3 Q: Did Mr. McCombs ever say to you, you better get in

4 the pool?

5 A: No.

6 Q: Did he ever threaten you in anyway to get in the

7 pool?

8 A: No.

9 Q: Did Mr. McCombs drink any beer or alcohol that day?

10 A: I'm not sure, I wasn't watching him.

11 Q: Did you smell any on his breath?

12 A: No.

13 Q: Did he try to kiss you?

14 A: No.

15 Q: Well, he did kiss you, didn't he. Didn't he kiss you

16 on the cheek?

17 A: Yes. Sometimes.

18 Q: Of course, that was before that day he had kissed you

19 on your cheek a number of times before, not on your

20 lips but on your cheek.

21 A: Not the day before?

22 Q: Not the day before but in the times that you had seen

23 him before that was his way of greeting you to kiss

24 you on the cheek.

25 A: Yes.

1 Q: Now, your mom was aware that you had gone up to his
2 swimming pool with your friend. I can't remember her
3 name now, but you would go over there with friends,
4 wouldn't you?

5 A: Yeah, I went once or twice.

6 Q: You would never go there alone, correct?

7 A: Yes.

8 Q: And you would always ask permission to go and your
9 mother consented to that. Your mother said it was
10 okay for you to go?

11 A: Yes.

12 Q: On those occasions when you went to his home, would
13 he be drinking?

14 A: No, I'm not sure.

15 Q: Well, he would be responsible for watching you in the
16 pool, correct?

17 A: Yes.

18 Q: And as you've said before, he'd be eating a sandwich
19 and drinking a Coke-Cola?

20 A: Yes.

21 Q: Is that true?

22 A: Yes.

23 Q: Any of those other occasions where there was once or
24 twice or many other times, however many times he went
25 there, did he ever say anything to you, do you know

1 what sexual means?

2 A: Yes.

3 Q: Did he ever say anything sexual about you or ...

4 A: No.

5 Q: ... about your body or anything like that?

6 A: No.

7 Q: Did he ever touch you inappropriately?

8 A: No.

9 Q: Did he ever encourage you to stay with him or go
10 inside the house with him to do inappropriate things?

11 A: No. Well he did ask me once if, I think, I can't
12 remember, I'm not sure if it was before the party or
13 --- it was probably before the party he had said
14 well, you can come spend the night one day.

15 Q: Did you ever spend the night with him?

16 A: No.

17 Q: Would your mother ever allow you to spend the night
18 there?

19 A: No.

20 Q: Now, before that day, did he ever touch you?

21 A: No.

22 Q: Before, on that day, in the swimming pool, did he
23 ever touch you?

24 A: He might have hugged me but he didn't touch me
25 inappropriately.

1 Q: Now, as I understand when you were in the swimming
2 pool, based on what you told Mr. Hilton, he was down
3 on one knee and you were sitting on his knee?

4 A: Yes.

5 Q: You say when you sat in his lap you were actually
6 sitting on the extension of his leg over his knee?

7 A: Yes.

8 Q: And he was bouncing you up and down?

9 A: No.

10 Q: He wasn't bouncing you up and down on his knee?

11 A: No.

12 Q: Do you remember telling people that he was bouncing
13 you like a baby on his knee?

14 A: No.

15 Q: Do you remember telling the lady at the Dorchester
16 that he was like, like you would rock a baby except
17 it was on your knee?

18 A: No.

19 Q: You don't remember that?

20 A: No.

21 Q: Did he ever say anything to you other than ask you
22 about school?

23 A: No.

24 Q: All your conversations with him that day about
25 reading and what's your favorite subject and your

1 teachers ...

2 A: Yes.

3 Q: ... that sort of thing?

4 A: Yes.

5 Q: Kind of a boring old man asking you constantly about
6 school?

7 A: Yes.

8 Q: Did he ever say anything other than to ignore you
9 about asking about school?

10 A: No.

11 Q: Now, the bathing suit you wore that day, you
12 described it very accurately. We've saw the
13 photographs of it. Where is that bathing suit?

14 A: I'm not sure.

15 Q: Do you know whether the bathing suit was given to the
16 police?

17 A: No.

18 Q: Did you ever get to wear it again?

19 A: No.

20 Q: That's that bathing suit that was kind of loose and
21 saggy about you because you had been in the water
22 that day?

23 A: Yes.

24 Q: Now, when this incident happened, which I'm sorry
25 for, was it a finger that touched you in your private

1 area?

2 A: It was two or three.

3 Q: And was there a hand inserted in your bathing suit?

4 A: Yes.

5 Q: When did you first remember that a hand was inserted

6 in your bathing suit?

7 A: When I was sitting on his knee. I didn't quite feel

8 it until he actually touched me.

9 Q: While this was going on, was he talking to you?

10 A: Yes.

11 Q: How did he react?

12 A: He didn't really have a reaction. The only reaction

13 that I had was I wanted to hurry up and get on the

14 concrete before he hurt me.

15 Q: And he didn't say anything to you about that?

16 A: No.

17 Q: In fact, you said that you didn't even think that he

18 knew that it happened?

19 A: Yes.

20 Q: Is that correct?

21 A: Yes.

22 Q: That he didn't acknowledge that he did it in any way

23 react to that ...

24 A: He didn't act like he did it at all.

25 Q: No sexual gratification or anything like that?

1 A: No.

2 Q: Do you know the changes in mens bodies when there is
3 a sexual gratification?

4 Mr. Hilton: Objection, Your Honor.

5 The Court: What's the basis.

6 Mr. Hilton: This has nothing to do with the incident in
7 the pool. He's fishing for cross examination material
8 which she shouldn't even be testifying for anyway.

9 The Court: I'm going to allow it. You may answer.

10 Q: Was there any change in his body at or about the time
11 this incident occurred?

12 A: I'm not sure.

13 Q: Did he ever say anything to you afterwards or later
14 that evening that he hoped you were not mad at him or
15 not to tell your parents or anything like that?

16 A: No.

17 Mr. Savage: Beg the court's indulgence.

18 The Court: Yes, sir.

19 Q: Other than that singular touching that you described,
20 did he ever grab your hands and put your fingers in
21 his mouth?

22 A: No.

23 Q: Did he ever grab you in any other manner that day?

24 A: No.

25 Q: Now, when this incident took place, you've listed

1 about nine or ten of your friends and cousins that
2 were in the pool with you, JJ and everybody else,
3 correct?

4 A: I'm not sure.

5 Q: Were there adults sitting on the concrete around the
6 pool?

7 A: Yes.

8 Q: Were there adults that were by the shed that could
9 see the pool?

10 A: Yes.

11 Q: Did anybody come up around the pool and ask if y ou
12 are okay is something wrong, did something happen to
13 you?

14 A: No.

15 Mr. Savage: Beg the court's indulgence. Thank you, Your
16 Honor. We have no further questions of this witness.

17 The Court: Mr. Hilton?

18 Mr. Hilton: Nothing further, Your Honor.

19 The Court: You may step down, thank you. Anything
20 additional, Mr. Hilton?

21 Mr. Hilton: Nothing in regard to testimony or anything of
22 that nature.

23 The Court: Any additional witnesses Mr. Savage, any
24 witnesses?

25 Mr. Savage: No, Your Honor.

1 The Court: I'm going to allow you just a brief argument,
2 Mr. Savage.

3 Mr. Savage: Well, he's the one that is moving.

4 The Court: Mr. Hilton, sorry.

5 Mr. Hilton: Thank you, Your Honor. Now, you have heard
6 the testimony of both Jessica [REDACTED] and you have
7 heard the testimony from Kiara [REDACTED] the victim in the
8 current case and it's my understanding that the Court has
9 also reviewed the forensic interview that occurred shortly
10 after this incident happened. Based on the testimony, we
11 know a couple of things. First of all, we know that Mr.
12 McCombs was convicted and actually plead guilty to the
13 incident that happened back in May of 2001 with Ms. [REDACTED].
14 He pled guilty to that offense. Based on the information
15 we know at the time, the information given to the forensic
16 interviewer and more importantly the information Ms. Shaw
17 testified to on the stand here today. We know that at the
18 time she was an eleven year old, and still is a white
19 female, in this particular incident here, she's a nine
20 year old white female. We know that the incident happened
21 at the exact same place, [REDACTED] that's the
22 Defendant's address. His address for the plea back in
23 2001 is actually listed on the plea sheet and that's the
24 address that he lives at currently. It was his back yard
25 pool. Both incidents occurred in the exact same pool. In

1 both incidents you heard testimony from both victims that
2 it was a party, that there were people at the party. That
3 other folks about have been able to see what was happening
4 had they been looking and we would submit to the court
5 that is part of the Defendant's way of acting. He doesn't
6 want to do this behind closed door necessarily. He wants
7 people to be able to see. It's just all under the surface
8 of the water. We know that both of the children were
9 neighborhood children. Ms. [REDACTED] lived on [REDACTED] Lane,
10 which is less than half a mile by the way the crow flies
11 and Ms. [REDACTED] lives right down the street. Both of them
12 were wearing a two piece bikini. Both of them, both
13 testimonies indicated that the Defendant was playing with
14 them and talking with them in some fashion, kind of
15 singled them apart from the group. Ms. [REDACTED] testified
16 that he was talking about school and other things that
17 were unimportant to her that had nothing to do with the
18 incident. Ms. [REDACTED] testified that she couldn't remember
19 exactly what he was saying, but she knew, she did remember
20 it had nothing to do with the incident what he was saying
21 to her. Both victims alleged that he reached under their
22 bathing suit, under the clothing, under the cloth of the
23 bathing suit and it was skin to skin contact to the vagina
24 area. Also, some things that Mr. Savage pointed out
25 during his cross examination. There was, it was a single

1 incident. They are not repeated incidents of contact
2 between a single individual. It's a single incident
3 between both Ms. [REDACTED] and Ms. [REDACTED]. It made both of them
4 feel very uncomfortable. Mr. McCombs never asked either
5 one of them, after the incident occurred, he never asked
6 either one of them anything else about it. That's the way he
7 operates.

8 Under the case law and predomiently I'm relying on
9 State vs. Karl Wallace and I can supplement the record
10 with the citation. Well, actually it's 683 SE2d 275.
11 That case, a recent case, relatively recent, back in 2009,
12 set out a test for determining whether under State vs.
13 Lyle and under Rule 404(b), Rules of Evidence, whether
14 this type conduct that is some similarly connected,
15 similarly situated, the test for determine if proof of one
16 can become proof of the other. And that test is a five
17 (5) element test. The age of the victims when the abuse
18 occurred. Again they are similar ages. The relationship
19 between the victims and the perpretator. They were not
20 family, they were neighborhood kids in both cases. The
21 location where the abuse occurred. The exact same pool,
22 the exact same swimming pool. The use of coercion and
23 threats. In neither case was there coercion or threats to
24 the extent of I'm going to do something to you if you
25 tell. There was no threat towards Ms. [REDACTED] about getting

1 in the pool because she was already in the pool. He
2 didn't have to make any threats with regard to that but to
3 be able to abuse Ms. [REDACTED] he had to get her in the pool,
4 so he tells her in redirect she said he wasn't necessarily
5 that he was hollering at her or fussing at her it was just
6 hey come get in the pool. She be an eleven year old girl
7 took it as a threat. And, five, the manner of the
8 occurrence. For example, the type of sexual battery.
9 You've got fondly, at a pool party, in the pool, under the
10 bathing suit, skin to skin contact.

11 I submitted my, I think it was six (6) page,
12 Memorandum in Support of prior bad act testimony in this
13 case to show. Because proof of one is proof of the other.
14 Case law supports that, law supports that and this
15 testimony is squarely on point with all of those lines of
16 cases that talk about a common scheme or plan being
17 substitutive proof in a subsequent case. If this case isn't
18 a common scheme or plan we have no exception. If this
19 case doesn't fit the bill there is no such thing. Thank
20 you, Your Honor.

21 The Court: Mr. Savage.

22 Mr. Savage: Well, Your Honor, I think what 404(b) does not
23 allow and that is character evidence or propensity
24 evidence. There is nothing in the facts that the court
25 has heard today that would show anything but propensity.

1 We have not yet had an opportunity to talk to Detective
2 Miller. The reason why I don't mind proceeding at this
3 time is because I think we can reach a resolution of this
4 without getting into the similarities. I would reserve
5 the right to further investigate the similarities if we
6 ever get there. There is no pattern behavior here. These
7 are two incidents separated by eight years of which the
8 Court can take notice of. They are extremely different
9 depending on which way you're looking at it.

10 The first party came and an incident occurred that
11 day. We don't know what the 404(b) evidence is that the
12 State is going to submit. Is it the pool incident or is
13 it the house incident or is it a combination of the two.
14 What is it that we are trying to submit? I think we are
15 entitled to know that before we argue whether it is
16 submissible or not. In any event, there is no connection
17 between the two. There is no pattern. If Mr. Hilton
18 looks at all the cases that he has cited in his brief they
19 are not singular incidents. They are patterns of conduct.
20 They are repeated grooming and repeated sexual acts. We
21 don't have that in this case on either side. So, the
22 first thing we looked at is whether there is a continuing
23 illicit conduct. There's none. The subject of this trial
24 had been to his home on prior occasions before this
25 incident, nothing happened. There's no conduct, there's

1 no inducement, there is no grooming whatsoever. She says
2 that on the date that it occurred, [REDACTED] says on the date
3 that it occurred there was no prior misconduct, there was
4 no post misconduct. What the state is lacking here. This
5 doesn't even hit the 404(b). There is no evidence of
6 willfulness, none. The only witness who was presence
7 there that was the subject of this says he didn't even
8 know he did it. It could have been an accident. That's
9 not McCombs statement, that's the victim's statement.
10 Willfulness is defeated. In addition to that, the other
11 element which would be some sexual gratification on her
12 part or the perpetrator's part there is no evidence of
13 that at all. Nothing said, there's no facial expression,
14 there's no grunts or groans or any, any evidence
15 whatsoever on her part, apparently not, obviously not or
16 his part, apparently not. And quite obviously not from
17 her own view. So, I don't know how you get past a
18 directed verdict with that testimony. No willfulness, not
19 evidence at all of a touching for sexual gratification.

20 The difference then between the two events is
21 (coughing) other than for the location and the defendant.
22 Two unrelated young women, nothing in common, one young
23 woman who came to the house and was violated, as she says,
24 on two occasions at the house. One young woman who came
25 to the house had been there on previous occasions with no

1 untoward conduct is violated on one occasion. One young
2 woman who is threatened to get in the pool allegedly to
3 carry out the misconduct, the other young woman who was
4 not in anyway even asked to come in the pool. The young
5 woman who voluntarily swam over to him did not sit on his
6 lap, sat on his knee. The young woman who says her
7 bathing suit was loose. And you can image any of us that
8 have been in a pool and playing with a child and throwing
9 a child in the air or whatever those type of touching can
10 occur inadvertently, by accident, by mistake. He didn't
11 say that she said that. That's her testimony, the
12 victim's testimony, that she thought he might have done it
13 inadvertently. One young woman who is kissed on the lips,
14 allegedly with a tongue thrust, not the same case with the
15 [REDACTED]. One young lady that said hands went in her bathing
16 suit, another one that said a finger or two went in the
17 bathing suit. Your Honor, you have to recall to that this
18 evidence of this Gertz case has evolved over time. It was
19 a criminal sexual conduct, a sexual battery at one time.
20 No evidence of a sexual battery in the other case that was
21 dismissed. On one occasions there was an allegation of
22 misconduct at Mr. McCombs home where he was alone with her
23 inside.

24 Your Honor, I think that the case law as cited by the
25 prosecutor in this case, number one, we don't have

1 willfulness, number two we don't have a touching for a
 2 sexual purpose, number three, there is no course of
 3 conduct. There is no pattern of conduct. There is no
 4 grooming, there is no progression of sexual acts. There
 5 is no multiple sexual acts. There is not a case that the
 6 State can cite similar to this where there are isolated
 7 incidents, coincidental incidents eight years apart with
 8 one incident each, totally unrelated. There is no length
 9 between the two at all and then the dissimilarities
 10 depending on what your view point is of the
 11 dissimilarities. Is it drinking in one incident, there's
 12 no drinking in the other incident.

13
 14 Your Honor, if you were to allow the 2001 event, that
 15 would do nothing but show the propensity for Mr. McCombs
 16 to engage in this conduct. We believe that such an
 17 admission would be not just error but it would be a
 18 reversible error. Particularly since there is no
 19 substantiation of a criminal act by anyone in this case.
 20 It is pure speculation. The victim doesn't say that she
 21 was sexually assaulted with criminal intent. She says
 22 quite the opposite that the touching could have been
 23 inadvertently or at least it wasn't acknowledged.

24 We respectfully ask the court to deny the State's
 25 request to argue 404(b). This Motion is in limine and we

1 reserve the right if the Court rules against us to raise
2 it once again. Thank you.

3 The Court: Mr. Hilton?

4 Mr. Hilton: Thank you, Your Honor. Just to respond to
5 some of Mr. Savage's arguments. The state is proceeding
6 under the theme of common scheme or plan. That is what
7 was discussed mainly in Wallace but 404(b) also allows,
8 there are some other exceptions. Absence, intent, so
9 forth. And, for him to get up and argue there was no
10 intent, you know, that this was an accident and that it
11 was a loose bathing suit and so forth. That opens up new
12 reasons for 404(b) evidence to come in and he can't get up
13 and argue that stuff to the Court or the jury for that
14 matter and not be subject to this prior incident coming
15 in. But, I do want to stick to the common scheme or plan
16 because I think that is where this case lies. The
17 similiarities in this case are so obvious to me that it is
18 kind of confusing how Mr. Savage can stand up and argue
19 that they are dissimiliar. One, you know, he was drinking
20 beer, the other one, I'm not sure if Kiara said he was
21 drinking beer or not. There's a photograph that we have
22 that has been introduced into evidence with him sitting
23 there with a beer by the pool. So, it that's the only
24 dissimiliarty then, I mean ... The bottom line is, Your
25 Honor, is that these cases are so significantly similiar

1 in the type of conduct that he engaged in. Mr. Savage
 2 points out that there was no continuing course of abuse.
 3 Well, that's not what is required for 404(b). And, while
 4 there may not be any sexual cases that talk about that,
 5 404(b) isn't limited to sexual assault cases. In
 6 Cheeseboro, that was a death penalty case where they
 7 allowed 404(b) evidence in and there was no continuous
 8 course of conduct. So, yes there are plenty of other
 9 cases where somebody committed one burglary just the same
 10 as another burglary and they allowed that in. And I'm
 11 generalizing there, Your Honor, I don't have a specific
 12 case to give you but I know that 404(b) evidence is not
 13 limited to sexual conduct. It just happens to be the way
 14 most people operate is under a continuous course of
 15 conduct over one victim. In this case that's not what we
 16 have but it is a similiarity between Ms. [REDACTED] and Ms.
 17 [REDACTED]. In both cases there was no continued course of
 18 conduct. There was no conduct before the incident or after
 19 the incident. It was a one day thing and he stopped and
 20 he didn't do anything after that. To me that's a
 21 similarity. That's not a difference. The case law
 22 certainly supports our position. I know Mr. Savage says
 23 something about the, you know, the ten years that the
 24 court can consider. The court can consider that and the
 25 Supreme Court has considered that in State vs. Hubner.

1 That was a fourteen year incident dealing with a church
2 member that sexually abused a child in one year and
3 fourteen years prior he had done the same thing and the
4 Court of Appeals originally reversed that case and the
5 Supreme Court said no in view of Wallace, in view of the
6 decision in Wallace that testimony was perfectly proper
7 and reversed the Court of Appeals decision. So there you
8 have a fourteen year time frame. Almost twice as long as
9 what we are dealing with here. And that's just one
10 element for the court to consider. You've got all of the
11 other five elements that are just so squarely on point.
12 There is no difference. Wallace, and the court can read
13 those facts. I want go through the facts but there were
14 simliarities there. There were also differences in that
15 case as well. You just weigh those similiarites versus
16 differences. They don't have to be one hundred percent
17 identical. It's a weighing test and the court can engage
18 in that weighing test but the State submits that it is
19 certainly simliarly and that 404(b) evidence would be
20 proper pursuant to State vs. Karl Wallace.

21 The Court: All right.

22 Mr. Savage: Briefly, Your Honor.

23 The Court: Well, Mr. Savage, I was going to give you the
24 first and the last but then you said it was his motion so
25 I'm not going to, because now that you have clearly

1 pointed out it is his I'm --- we're not going to play
2 that, going back and forth. Thank you.

3 Mr. Savage with that being said is there an
4 additional witness that you feel you need to talk to
5 before I can make my ruling?

6 Mr. Savage: I need to know what the 404(b) evidence is
7 that they are trying to introduce. Is that the whole ...

8 The Court: Hold on one second. It's after 5:00.

9 Mr. Hilton: Briefly, very briefly. In preparing this case
10 we looked at the whole incident but after going back and
11 looking over it I think we do need to carve off some of
12 the conduct with Ms. [REDACTED] that happened subsequent to the
13 pool. So, what we are trying to get in is the pool
14 incident where the conduct started in the pool with Ms.
15 [REDACTED] and that is contemplated in Wallace as well as some
16 of the other cases. So, it would be the pool conduct with
17 Ms. [REDACTED] and, of course, the pool conduct with Ms. [REDACTED].

18 The Court: Okay. Mr. Savage, just so the record will be
19 clear does that carve out for you what ...

20 Mr. Savage: Huge help.

21 The Court: Okay.

22 Mr. Savage: Now, the question is what was he convicted of
23 so that we know whether we are dealing with the court's
24 recognition of a conviction or are we dealing with clear
25 and convincing?

1 The Court: Mr. Hilton.

2 Mr. Hilton: Your Honor, he was convicted of ABHAN, we have
3 the indictment where he committed a lewd act on Jessica
4 [REDACTED]. Can you tell from the face of that indictment and
5 from the facts that we have, I agree that you can't tell
6 specifically the facts that he was convicted on. We tried
7 to get a transcript as well ...

8 The Court: We don't have the transcript so we don't know
9 what the ...

10 Mr. Hilton: That's correct. That's unavailable. But I
11 introduced that as a piece of evidence to make it clear
12 and convincing as to what Ms. [REDACTED] was testifying to.
13 She's not just making this story up. He pled guilty to
14 conduct that happened back in May of 2001. So, I think
15 the warrant that he was convicted of, plead guilty to,
16 that he admitted to, that he gave a statement to at the
17 time, that that conduct in connection with Ms. [REDACTED]'s
18 testimony certainly proves clear and convincing evidence,
19 if not beyond a reasonable doubt in that he was convicted.
20 But it certainly meets that burden of clear and convincing
21 evidence.

22 The Court: Of the incident in the pool, Mr. Hilton?

23 Mr. Hilton: Yes, Your Honor. There are some cases that
24 talk about just testimony of the victim alone is enough to
25 meet the standard of clear and convincing evident.

1 The Court: Mr. Savage?

2 Mr. Savage: That helps tremendously, Your Honor. So, I
3 understand what we are dealing with in the 2001 incident
4 is to the pool only and we don't know whether the plea was
5 to the pool or to the house so therefore Mr. Hilton I
6 think is conceding that he has to prove the incident by a
7 clear and convincing basis.

8 The Court: Out of an abundance of caution since we don't
9 know what ...

10 Mr. Savage: The specifics of ...

11 The Court: ... the conviction is ...

12 Mr. Savage: I think we're all on the same page with that.

13 The Court: Yes..

14 Mr. Savage: Then that requires me to talk to Detective
15 Miller which Mr. Bishoff has done this afternoon to insure
16 what was recorded from both today is inconsistent with
17 what was reported in 2001.

18 The Court: Inconsistent?

19 Mr. Savage: Inconsistent. That's correct. And you'll
20 remember that the witness was foggy about some things that
21 she said or didn't say. I'm not trying to prejudge her
22 but I do think that it is incumbent upon me to talk to
23 Detective Miller and this other person Sundi Lance exist
24 or if she is somewhere available I'd certainly like to
25 talk to her as well. But we have tracked down Detective

1 Miller.

2 The Court: So, you can accomplish that over the evening
3 hour?

4 Mr. Savage: Mr. Bishoff?

5 Mr. Bishoff: Yes, Your Honor.

6 The Court: The jury is coming in at 9:30 Mr. Savage, how
7 long do you think that you are going to need to articulate
8 those issues to me?

9 Mr. Savage: I think it will be pretty summary. I mean, we
10 have the incident reports that I've provided to the court
11 that don't mention a lot of what was mentioned so I don't
12 expect it to be a big burden from what Mr. Bishoff tells
13 me that Miller will basically testify that what she
14 testified to today is the first time he's heard it. Is
15 that correct?

16 Mr. Bishoff: That's correct.

17 The Court: So you anticipate that you are going to call a
18 witness tomorrow?

19 Mr. Savage: Yes. Unless we can all agree to what he would
20 say.

21 The Court: I don't think ... after today I don't think
22 that is the way that is going Mr. Savage. Alright. Be
23 ready to go. As I indicated I have something unrelated to
24 this case in the morning so I anticipate I could be here
25 by 9:15. If you all could be here by 9:00 ready to go, I

1 understand you --- I hate to make you all wait, I am going
2 to impose that upon you knowing that I may not be here
3 until 9:15, okay.

4 Mr. Savage: Thank you, Your Honor.

5 The Court: The jury and the message for the jury is to
6 call back after 6:00. Any problem with him remaining out
7 on bond?

8 Mr. Hilton: The State has no objection as long as the
9 bondsman is okay with that.

10 The Court: Okay. And we have signed that Order?

11 Mr. Savage: I have two letters. I don't know. What's the
12 status of the Order do you know?

13 Speaker: He's in Columbia.

14 Mr. Savage: Mr. Smith, Ernest Smith is in Columbia and he
15 ask, I think if his sister sign the bond, is that correct?
16 He's here?

17 The Court: Mr. McCombs, we have selected a jury, please
18 stand, sir.

19 Mr. McCombs: (Complies)

20 The Court: I am going to allow you to remain out on bond
21 under the same terms and conditions. We are going to
22 begin trial no later than 9:30 in the morning, do you
23 understand that, sir?

24 Mr. McCombs: Yes, Your Honor.

25 The Court: If you do not appear for the trial, I am going

1 to continue without you. Do you understand what that
2 means?

3 Mr. McCombs: I do, Your Honor.

4 The Court: If you choose not to appear I am going to issue
5 a bench warrant, do you understand what that means?

6 Mr. McCombs: I do, Your Honor.

7 The Court: And if you choose not to appear when you are
8 picked up on the bench warrant I am going to hold you in
9 contempt of court before we even address any other issues,
10 do you understand what that means?

11 Mr. McCombs: I do, Your Honor.

12 The Court: What time are you going to be here tomorrow?

13 Mr. McCombs: I will probably be here at 8:30.

14 The Court: All right. Mr. McCombs. Same terms and
15 conditions. Thank you gentlemen.

16 **(Tuesday, March 6, 2012)**

17 Mr. Savage: Thank you, Judge.

18 The Court: Alright.

19 Mr. Savage: Judge, thank you for the time for the break.

20 I have consulted with my client and family members
21 including three daughters and other family members, and
22 explained what I thought was an appropriate resolution,
23 and I estimated what the potential would be if the case
24 ended at this point in time, and my client has decided to
25 move forward.

1 The Court: Alright.

2 Mr. Savage: Thank you, Judge.

3 The Court: Alright, and you have one additional witness?

4 Mr. Savage: Yes, we do.

5 The Court: Thank you.

6 Mr. Savage: Detective Miller, please.

7 Mr. Hilton: Your Honor, if I may before we get started
8 with this witness and he may take a seata. I know that
9 there was a sequestration motion made yesterday and I know
10 there is a lot of family and stuff and I just want to make
11 sure that there is no one on the defense witness list that
12 is in the courtroom present for this hearing.

13 Mr. Savage: Thank you.

14 The Court: Just for the record. There are ...

15 Mr. Savage: Nobody is in the courtroom that is intended
16 to testify.

17 The Court: Thank you.

18 Deputy Clerk: Please raise your right hand. State your
19 full name for the record.

20 Detective Miller: Michael David Miller.

21 Deputy Clerk: Do you solemnly swear to tell the truth,
22 the whole truth and nothing but the truth?

23 Detective Miller: I will.

24 Deputy Clerk: Thank you.

25 Proffer Examination of Detective Miller by Mr. Savage:

1 Q: Good morning sir.

2 A: Good morning.

3 Q: We met this morning, but I've known you for quite a
4 number of years.

5 A: Yes sir.

6 Q: Particularly back when you were associated with the
7 sheriffs department here in Dorchester County.

8 A: Yes sir.

9 Q: Can you tell us what role you played with the
10 sheriffs department in the year 2001?

11 A: That year I was assigned as a detective.

12 Q: And what would your duties include?

13 A: Detectives are an investigative unit where I would
14 respond to sometimes crimes in high risk or crimes
15 after the fact to further investigate what had
16 occurred and what we needed to do to bring
17 perpetrators to justice.

18 Q: So if a crime was reported, uniform would respond and
19 you would do the follow up is that fair to say?

20 A: Yeah.

21 Q: And those would include crimes of a sexual nature?

22 A: Yes sir.

23 Q: Did you have occasion on May 28 of 2001 to
24 investigate a reported sexual assault involving Wayne
25 McCombs?

1 A: Yes Sir.

2 Q: And did you actually investigate that case?

3 A: Yes, I was the on call detective on that day.

4 Q: Alright, if you would tell Judge Harrington please,
5 susciently what your role was, what you did to
6 further that investigation.

7 A: What I did was, I responded as the on call detective
8 and went out to the residence of Wayne McCombs and I
9 spoke with him and I spoke with a victim that day,
10 too. When I was talking to the victim it was
11 described to me as an attempted sexual assault and
12 the groping or fondling of the young juvenile in the
13 swimming pool.

14 Q: And as a result of that investigation, you took, you
15 prepared notes and a summary of your interview of the
16 parties involved?

17 A: Yes I did.

18 Q: You interviewed Mr. McCombs as well as, I believe her
19 name is [REDACTED], Jessica [REDACTED].

20 A: Yes.

21 Q: And as a result of your investigation were arrest
22 warrants issued by a magistrate.

23 A: Yes.

24 Q: Did you sign the affidavits that lead to the probable
25 cause for the arrest warrants?

1 A: Detective Miller: Yes.

2 Q: Did you appear before the Dorchester County Grand
3 Jury?

4 A: Yes

5 Q: As a result of your testimony before the Grand Jury
6 were indictments issued?

7 A: Yes.

8 Q: How many arrest warrants? How many indictments?

9 A: Two.

10 Q: Mr. Hilton: And what were they for?

11 A: One was for a lewd act on a minor and the other was
12 for attempted criminal sexual conduct.

13 Q: Now if you can refresh your memory by your notes or
14 you can independently recall and tell us what you are
15 doing, please. Do you know what the basis for the
16 lewd act was?

17 A: My basis for the Lewd Act were the victim had
18 reported to me and I found probable cause to believe
19 that the suspect had groped and fondled the young
20 girl while in a swimming pool. He had, it had been
21 reported to me that he had sucked on her fingers and
22 it had also been reported to me that he attempted to
23 penetrate her vagina, like sticking his hands down
24 the back of her swimming suit at one point.

25 Q: Alright, now. Do you know at what location within the

1 residence or at the street address where those
2 incidents occurred?

3 A: The report about the groping was in the pool as
4 relayed to me on that day. The report of the grabbing
5 the young girls hand and sucking on the fingers was
6 in the kitchen of the residence and the attempt to
7 fondle the vaginal area by entering, or going in a or
8 under a swim suit was in another room of the house
9 where they were on a computer, or something like
10 that.

11 Q: Was there any testimony provided to you by any
12 witness including the accuser, that there were hands
13 stuck down her bathing suit while in the swimming
14 pool?

15 A: That wasn't the report to me on that day.

16 Q: If that had been reported on that day or on a
17 subsequent date before you testified before the Grand
18 Jury would you have so testified before the Grand
19 Jury?

20 A: Yes.

21 Q: And what type of charge would you have insisted on at
22 that point?

23 A: Attempted criminal sexual conduct.

24 Q: So then there would have been two attempted sexual
25 conducts?

1 A: Yes.

2 Q: Tell us between the date of the incident how much

3 time transpired before the arrest warrant?

4 A: Oh I think it was...

5 Q: Approximately.

6 A: A day or two, a week maybe. I think a week.

7 Q: And the time between the incident date and the time

8 you testified for the Grand Jury, before the Grand

9 Jury?

10 A: The Grand Jury was --- it doesn't have the date on

11 here. It was true billed August 2, 2001.

12 Q: Okay, okay so the incident dates in May? So you had

13 the month of June and the month of July. And I'm

14 assuming during that time you are still the Chief

15 Investigator?

16 A: I was the active investigator on that case, yes.

17 Mr. Savage: Kindly answer any questions that the

18 prosecution may have.

19 The Court: Mr. Hilton.

20 Mr. Hilton: Thank you, Your Honor.

21 **Cross Proffer Testimony of Detective Miller by Mr. Hilton:**

22 Q: Detective Miller you had the opportunity to meet with

23 Mr. Savage last night?

24 A: This morning.

25 Q: This morning. And did you talk to him last night?

1 Detective Miller: No.

2 Mr. Savage: You didn't talk to him last night at all?

3 Detective Miller: I talked to one of the investigators.

4 Mr. Savage: Okay but you met with somebody from the
5 defense, didn't you?

6 Detective Miller: Yes.

7 Mr. Savage: And they went over some paperwork with you?

8 Detective Miller: Yes.

9 Mr. Savage: Okay. And in that paperwork did they show you
10 a copy of the forensic interview?

11 Detective Miller: No.

12 Mr. Savage: Okay. They only showed you a copy of the
13 report? Is that correct?

14 Detective Miller: Yes.

15 Mr. Savage: And even in that report that you made back on
16 May 27, 2001, report of Corporal Simmon, which as the
17 detective you would of incorporated into your
18 information, is that right?

19 A: Yes.

20 Q: And in that report, as well, it says inside a
21 backyard pool where the subject became very
22 aggressive in touching.

23 Mr. Savage: That's hearsay. He can only testify to what
24 his entry was not some third party If they want to
25 bring in a third party we wouldn't object.

1 The Court: I will allow it.

2 Mr. Hilton: Thank you, Your Honor.

3 Q: Did you have the opportunity to see that?

4 A: Which part, Corporal Simmons?

5 Q: It's actually Corporal Simmons report that you would
6 of made part of your investigation. It says while at
7 this residence and inside a backyard pool the subject
8 started to become very aggressive in touching,
9 feeling, and holding the victim in a manner in which
10 made her very uncomfortable. Did you see that in
11 there? And you may not remember from 2001.

12 A: Okay. yes. I see that in there.

13 Q: That's in there?

14 A: Yeah, I see it.

15 Q: And as part of the investigation do you send children
16 for a forensic interview or did you back in 2001?

17 A: Yeah.

18 Q: Alright, and what's the purpose of that?

19 A: It is to obtain, if at all, any further descriptions
20 of the incidents. Forensic interviews are conducted
21 by people with more knowledge on how to gain more
22 information if this is what's going to be dilvuged by
23 someone of a young age. We use the Low Country
24 Children's Center.

25 Q: Okay, and the purpose of the forensic interview is to

1 get out more detailed information, is that correct?

2 A: Correct.

3 Q: And that's by trained professionals?

4 A: Yes.

5 Q: People who are specifically trained in interviewing
6 children, is that right?

7 A: Yes.

8 Q: And as law enforcement officers back in 2001 as well,
9 ya'll are obviously trained in interviewing children,
10 but there is specific training that goes along with
11 sexual abuse, is that right?

12 A: Yes.

13 Q: Alright, and a forensic interview was done in this
14 case, is that right?

15 A: Yes.

16 Q: Okay, and did you have the opportunity to look over
17 that forensic interview before you testified here
18 today?

19 A: Yes, this morning.

20 Q: Okay. And in that forensic interview, did she
21 disclose to the forensic interviewer that the conduct
22 happened in the pool? That he touched her on her
23 vagina under her bathing suit? All that kind of
24 stuff. Did she testify to that in the forensic
25 interview?

1 A: The words, the wording in the interview looks like
2 there is more detail than that.

3 Q: Much, much more detail in the forensic interview, is
4 that correct?

5 A: Yes.

6 Q: And that's the purpose of the forensic interview,
7 right?

8 A: Yes.

9 Mr. Hilton: Thank you. Now, no further questions.

10 The Court: Mr. Savage?

11 Redirect proffer testimony of Detective Miller by Mr.

12 Savage:

13 Q: Detective Miller, do you have any first hand
14 knowledge of that interview with the forensic?

15 A: No sir.

16 Q: Did you look at the video?

17 A: No.

18 Q: Did the solicitor tell you there was a video and give
19 you an opportunity to look at it?

20 A: No sir.

21 Q: So the testimony that you have for the court today,
22 that you have first hand knowledge of is your
23 interview of this young lady?

24 A: Yes.

25 Q: And in that interview she did not tell you that she

1 was assaulted in the swimming pool by two hands going
2 down her bathing suit and touching her vagina?

3 A: That is correct. She did not tell me that.

4 Q: And your appearance before the Grand Jury happened
5 months after whatever other interviews some third
6 party may of made?

7 A: Yes.

8 Q: You had that knowledge, but you testified only that
9 the clothing was touched of this child in the
10 swimming pool. That's what you told the Grand Jury.

11 A: Yes.

12 Mr. Savage: No further questions.

13 The Court: Mr. Hilton?

14 Mr. Hilton: No further questions, Your Honor.

15 The Court: You may step down. Thank you. May he remain in
16 the courtroom?

17 Mr. Hilton: He may.

18 The Court: Do you plan on calling him...

19 Mr. Savage: It depends, Your Honor. He has, I know where
20 he is. I have his phone number.

21 The Court: Well I was going to let him stay in the
22 courtroom if he wished. Please, the rules of sequestration
23 has been evoked if he will remain outside of the
24 courtroom. Thank you. Any additional witnesses Mr. Savage?

25 Mr. Savage: Noot on that issue, Your Honor.

1 The Court: Any additional argument Mr. Hilton?

2 Mr. Hilton: With regard to 404(b), is that what ...

3 The Court: Yes.

4 Mr. Hilton: Well, I do have somewhat of an argument. In
5 that Mr. Savage has made a big issue with the
6 argument and with regard to Detective Miller about
7 essentially the credibility of Jessica [REDACTED]. Keep in
8 mind he has been convicted and when I made an
9 objection yesterday he stood up and said I believe
10 Ms. [REDACTED]. We don't have any doubt that she is not
11 telling the truth. So I'm not sure what he is trying
12 to accomplish by calling up Detective Miller and
13 imputing her credibility with regard to the statement
14 which she made back in 2001 shortly after this
15 happened to the forensic interviewer. The fact that
16 she didn't give a detailed disclosure to law
17 enforcement is by design. The design is to send them
18 to this forensic interviewer where they are further
19 examined. So in regard to Detective Miller's
20 testimony I'm not real sure what Mr. Savage was
21 trying to accomplish by that. Thank you.

22 The Court: Alright, Mr. Hilton. One of my major concerns
23 in this analysis is the length of time that has
24 transpired between the first incident in 2001 and the
25 incident that we're on trial for today. What is your

1 compelling argument?

2 Mr. Hilton: First of all, this is a balancing test and so
3 you balance the similarities verses the
4 dissimilarities. I submit to the court that both
5 these incidences are very similar and so any
6 remoteness in time may be a factor but that is
7 certainly outweighed by these extreme similarities.
8 Secondly, this is not a novel issue for the court and
9 I mentioned yesterday in State verses Hubner. That
10 was a case where fourteen years prior. It was a ...

11 The Court: In that case Mr. Hilton wasn't there more than
12 one single incident with each victim? Wasn't there a
13 pattern of continued conduct?

14 Mr. Hilton: There was, but again that pattern doesn't make
15 it something different than what it is. That, again,
16 in this case is a similarity.

17 The Court: But you're asking me to admit this evidence
18 and this common scheme of plan, correct?

19 Mr. Hilton: That's correct.

20 The Court: And so wouldn't that factor into admission
21 because there had been more contact between each
22 victim and the defendant?

23 Mr. Hilton: I respectfully don't think that would make a
24 bit of difference. In that they, in that this is how
25 he operates. It's a one time thing with each victim

1 and he got, you know, both victims had the wherewith
2 all to report the conduct and stop it. I don't know
3 what would of happened if they didn't report, but we
4 can't punish them for not or for coming forward. And
5 so the fact that they came forward...

6 The Court: That wasn't my question was it Mr. Hilton?

7 Mr. Hilton: I think the question was how they, it wasn't a
8 pattern of conduct. So no it wasn't a pattern of
9 conduct, but it was a type of conduct that was
10 extremely similar in both circumstances, both in 2001
11 and 2009. And I think that that balancing test. The
12 fact that they are so similar outweighs any sort of
13 remoteness in time and I think that the Hubner case
14 supports that.

15 The Court: In the line of cases that you cited wasn't that
16 one of the only cases that the span of time between
17 the incidences was more than two or three years?

18 Mr. Hilton: I believe it was, but that doesn't mean that
19 the 404(b) evidence is somehow limited to a two year
20 time frame. I mean here you have a fourteen year case
21 and in this particular case that we're at bar on is
22 only an eight year time gap between the two. And one
23 other thing that I will point out to the time gap in
24 being a factor for the court to consider. The
25 defendant is up in age and so while this is not

1 something that happened in younger years and eight
2 years is eight years I understand that, but him being
3 an older defendant eight years, you know, the
4 difference between sixty-two and seventy is not all
5 that much difference. And so I think there would be a
6 much stronger argument if he were much younger in
7 committing this kind of conduct and there was a long
8 gap in between, but in both cases he is still an old
9 man molesting young girls and the court obviously
10 knows all the similarities between the two cases.

11 The Court: Alright, any additional argument Mr. Savage?

12 Mr. Savage: I would just like the court to take notice
13 that I'm two years older than he was in 2001 and I
14 don't consider myself an old man. But Judge,
15 here is the problem. We are looking at
16 similarities without looking at the conduct in
17 every case including Hubner there was a pattern
18 of conduct involving the victims. The State has
19 not shown any case at all where they are two
20 isolated incidences. I don't know how far you
21 want me to go Judge, or to argue or not. I would
22 like to take a quick review of the law, if that
23 would be okay with you, but...

24 The Court: I know the law Mr. Savage.

25 Mr. Savage: We don't believe that there is a common scheme

1 or plan. You can't take two isolated incidences and
2 try to make that a scheme or plan and that's what you
3 have to address before you get to the remoteness. I
4 believe the remoteness weighs in favor of the
5 defendant and then you get into the similarities. I
6 think what the State has done, is they have jumped
7 the gun. They are talking about similarities and
8 commons before they consider whether or not it's a
9 common scheme or plan. They have decided that Mathis
10 and Kurtman(sic) and I read from both the connection
11 between a prior bad act and the crime must be more
12 than just a general similarity. A common scheme or
13 plan concerns more than the commission of two similar
14 crimes. Common scheme or plan evidence in criminal
15 sexual conduct cases will be admitted on a
16 generalized basis only where there is a pattern of
17 continuous illicit conduct. State versus Wallace,
18 which they cite and argue that's the abuse that went
19 on from the seventh grade thru high school a
20 progressive sexual encounter. So there was a pattern
21 of conduct between the victim and the defendant
22 similar to the pattern of conduct over years between
23 the third party reporting it under 404(b). The court
24 in that case termed it a progressive course of abuse.
25 Certainly not an isolated incident. They cite ---

1 this is the one where the mother took advantage of
2 her daughter, where they were continuing progressive
3 acts over a long period of time. The course of
4 conduct that began with the touching and progressed
5 with digital penetration. The court in that case
6 said each of the instances established by a patten of
7 escalating abuse which ultimately was classed as
8 digital penetration of the victim. Both class being
9 Wallace relied on McClellan which talks about the
10 continued illicit intercourse. Kurtman(sic) talks
11 about the six or seven year pattern of escalated
12 abuse by the victim. The State versus Taylor. The
13 most recent one, last years case. The preacher up in
14 Murrells Inlet with a young boy camping. Where there
15 is a pattern of continuous misconduct that is
16 commonly found in sex crimes. That pattern supplies
17 the necessary connection to support the existence of
18 a plan. Presumably this is so because the same
19 evidence establishes the continuous nature of the
20 assault, which generally suffice to prove the
21 existence of the common scheme or plan as well. So
22 what we have here are two singular isolated incidents
23 that do not, can not based on those facts create a
24 pattern of conduct. And the conduct I think, then we
25 get into the similarities and dissimilarities. I

1 don't know whether or not you want to hear argument
2 on that, but I think the State yesterday chose to
3 confine the 404(b) proffer to the incidences that
4 happened in the pool. In the first case the child was
5 encouraged to get into the pool. The child was kissed
6 in a lewd and lascivious manner. All those specifics
7 of the act that we discussed yesterday are all
8 dissimilarities that would go to a plan or a scheme.
9 I would repeat, but the court heard them over and
10 over again, but I say we don't even get to that. We
11 don't even get to the similarities we get to the lack
12 of continuos conduct in the eight year intervening
13 factor. Thank you, Your Honor.

14 The Court: Mr. Hilton?

15 Mr. Hilton: I think the answer to case law is real simple.

16 First of all, the cases that Mr. Savage sites the
17 facts are a continuing course of conduct, but that's
18 not what the law requires. And it's addressed right
19 in Wallace although not a paragraph of that one
20 topic, but it says in here, I'm reading straight from
21 Wallace is says, "Although, not a complete list, in
22 this type of case a trial court should consider the
23 following factors when determining whether a close
24 degree of similarity between the bad act and the
25 crime charged." They use singular terms there for a

1 reason because it doesn't have to be a plurality. It
2 doesn't have to be a series of conduct, and they go
3 on to say, "A close degree of similarities
4 establishes the required connection between the two
5 acts, the two acts, and no further connection must be
6 shown for admissibility." There is no case law that
7 requires there to be a pattern. There is a case law
8 that says that 404(b) evidence is generally used in
9 those types of cases. that it is commonly used in
10 those types of cases, but there is no limitation on
11 that and that's the States position on that. The
12 similarities I'm not even going to address again. I
13 just think that's clear.

14 The Court: Alright, I have listened to the testimony. The
15 arguments of counsel and I have reviewed the pretrial
16 brief. I have read the cases that you have cited. I
17 must determine whether or not the evidence of the
18 prior conviction or the evidence because we are at a
19 disadvantage in this particular instance because we
20 do not have a copy of the transcript. My
21 understanding is it was attempted to be obtained, but
22 could not. So we are unclear as to exactly what act
23 it was that Mr. McCombs plead guilty to on the ABHAN
24 as a result of the victim [REDACTED]'s accusation in
25 2001. I have found that the evidence, if admissible,

1 would be relevant, than I must make a determination
2 of whether it would be under 404(b), whether it would
3 be admissible as a common scheme or plan, in which
4 the State has indicated that is what it intends to
5 proceed under. The Court must look at whether the
6 admission of the evidence of the 2001 incident is
7 logically relevant to the crime that we are here for
8 today. The charges are substantially the same. As the
9 State pointed out several times the victims were both
10 female. The victim, the alleged incidents occurred at
11 the defendant's home in the pool. The similarities at
12 that point become unclear and it becomes confusing
13 based upon the testimony that was given by Ms.

14 [REDACTED] and then the detective that has testified
15 today. I agree with the State that the analysis and
16 purpose of the forensic interview is to fully
17 articulate and develop the story and the allegations,
18 and so I can understand why there may be some
19 discrepancy between what the victim testified to, or
20 indicated to the detective and what was disclosed. I
21 am concerned that there, as the analysis unfolds one
22 of the factors from Wallace is the use of coercion or
23 threats. Victim [REDACTED] said there was no threats given
24 in the pool. Victim [REDACTED] said that he forced her and
25 threatened her to get into the pool. The relationship

1 between the victim and the perpetrator is the same.
 2 The perpetrator, the victims in both cases were
 3 friends. They were invited to swim over there at his
 4 pool. The victim [REDACTED] did testify that the defendant
 5 was drinking. The victim in [REDACTED] testified that she
 6 was not sure, and did not know if he had been
 7 drinking. I must weigh the similarities against the
 8 dissimilarities and if the similarities outweigh the
 9 dissimilarities the Bad Act evidence is admissible,
 10 if the similarities outweigh the dissimilarities.
 11 Then I must do a 403 balancing test if I find that
 12 the proof is clear and convincing. Based upon my, as
 13 I stated previously, I do feel that the
 14 dissimilarities outweigh the similarities as
 15 testified to. I do find that even assuming that the
 16 similarities would outweigh the dissimilarities the
 17 remoteness in time under the 403 balancing test makes
 18 it more prejudicial than probative. I am denying the
 19 request for the 404(b) analysis with the exception
 20 for the record Mr. Hilton. Anything further?
 21 Mr. Hilton: Nothing from the State regarding that matter.
 22 The Court: Alright, Mr. Savage, anything further
 23 regarding that?
 24 Mr. Savage: No, Your Honor. Could, Your Honor, tell me
 25 what the schedule would be this morning with the)

1 Jury?

2 The Court: I would like to get it started we are behind
3 schedule. I do know that it's not necessarily the
4 attorney's fault, but we are behind schedule.

5 Mr. Savage: It's just, I mean ...

6 The Court: I'm sorry?

7 Mr. Savage: That ruling, perhaps Mr. Hilton and I would do
8 well to spend a little bit of time together.

9 The Court: And I understand what you are asking for Mr.
10 Hilton, but are you requesting a short recess?

11 Mr. Hilton: I am requesting a short recess. Yes, Your
12 Honor.

13 The Court: Alright, you let me know. We will go ahead and
14 take a short break. I'm going to tell the Jury that
15 we will get started in ten minuets. Will that be
16 sufficient time?

17 Mr. Hilton: Thank you, Your Honor.

18 (Court break was taken)

19 Bailiff: All rise, Court is in session.

20 The Court: Thank you, be seated. I understand that the
21 State has an announcement?

22 Mr. Hilton: We do, Your Honor. In light of the ruling on
23 the Lyle evidence and 404(b) the State would intend,
24 absent some reconsideration the State would attend to
25 appeal that ruling.

1 The Court: Alright, I will consider that as a motion to
2 reconsider. Your motion to reconsider my ruling on
3 404(b) is denied.

4 Mr. Hilton: Thank you, Your Honor.

5 The Court: And with that I am going to release the Jury.

6 Mr. McCombs you are out on the same terms and
7 conditions of your bond. Do you understand what that
8 means?

9 Mr. McCombs: The same thing you told me yesterday, Your
10 Honor?

11 The Court: Well you're actually before, you came to court
12 you were on bonds. You are still on the same terms
13 and conditions of your bond. Is that correct? The
14 State is not seeking to increase the bond or change
15 the terms or conditions, is that correct?

16 Mr. Hilton: That is correct. The bond will stay the same.

17 The Court: Alright, thank you. Good luck to you Mr.
18 McCombs. Thank you. Alright, we're at ease.

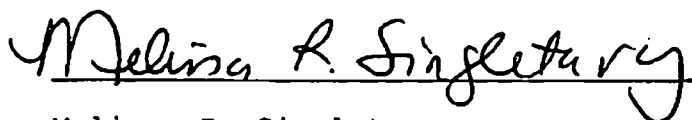
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CERTIFICATE

This is to certify that the hearing in State vs. Wayne Daniel McCombs, consisting of One Hundred Fifty-Seven (157) pages is a true and correct transcript of the testimony given after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 7th day of July, 2012.

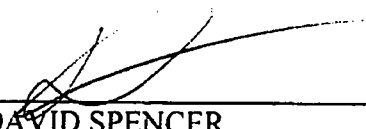


Melissa R. Singletary
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

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ATTORNEYS FOR APPELLANT

April 15, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Dorchester County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Appellant,

vs.

WAYNE DANIEL MCCOMBS,

Respondent.

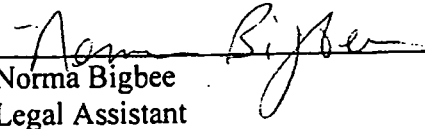
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Record on Appeal** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Andrew J. Savage, III, Esquire
15 Prioleau St.
Charleston, SC 29402

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

This 15th day of April, 2013.


Norma Bigbee
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Appellant,

vs.

WAYNE DANIEL MCCOMBS,

Respondent.

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in suppressing the prior bad act to which McCombs previously pled guilty, because the trial court overlooked the significant similarities between the current charge and the prior bad act, relied on insignificant dissimilarities, and misapplied the balancing test between the probative value of the evidence and the danger of unfair prejudice.

STATEMENT OF THE CASE

Respondent McCombs was indicted for lewd act on a minor. 2009-GS-18-1493. The case was called for trial on March 5, 2012 before the Honorable Kristi L. Harrington. Several pre-trial matters were heard that day and the day following, including the State's motion in limine to admit a prior bad act. Judge Harrington excluded the prior bad acts. The jury was not sworn. The State appealed pursuant to State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1989). This initial brief follows.

STATEMENT OF FACTS

During the motion in limine, the State presented testimony from the victim of the prior bad act, Jessica, and the victim of the current charge, Kiara. McCombs called the investigator from the prior bad act, Detective Miller, as a witness.

Jessica was eleven years old and in fifth grade around 2001 when she went with her friend Joshua to his grandparents' house for a party held in their backyard pool. Joshua's grandfather is Appellant McCombs. Both children and adults were at the party.

This was the first time Jessica met McCombs. Although Jessica did not initially go in the water, McCombs told her if she did not get in the pool, she could not be at his house. On cross-examination, Jessica testified she was sure he was joking but she took it differently at the time. McCombs was already in the water when she started swimming. She wore a two-piece bikini bathing suit. McCombs engaged her in casual conversation, unrelated to sexual contact. McCombs guided her around in the water by her waist. McCombs focused his attention on her and not anyone else. Then he stuck his finger under her two piece bathing suit and felt her vagina, as he kept talking to her. She testified there was no penetration. Jessica recalled that McCombs had been drinking. She left the pool and McCombs followed her into the kitchen where other children were. Jessica was nervous and biting her nails. McCombs told her to stop and sat her on his lap. She followed other children into the computer room, and McCombs, in turn, followed her in there. McCombs fondled her again in the computer room, sticking his hands down her pants from behind. On cross-examination, she testified that he also stuck his fingers in her mouth. Jessica did not recall whether McCombs asked if she was

mad at him. ROA. pp. 5-11; pp. 21-22; pp. 28-29. The solicitor clarified that he was not seeking to introduce any subsequent conduct that occurred outside the pool. ROA. p. 78, lines 9-17. McCombs pled guilty to Assault and Battery of a High and Aggravated Nature based on the charges from the incident. ROA. p. 79.

McCombs called Detective Michael Miller as a witness at the motion hearing. Detective Miller testified that Jessica reported that McCombs groped her in the pool, that he sucked on Jessica's fingers in the kitchen, and that he attempted to fondle her vagina in another room. Detective Miller presented to the grand jury charges of lewd act and assault with intent to commit criminal sexual conduct (ACSC). Detective Miller testified at the motion hearing that if Jessica had said McCombs stuck his hand down her swimsuit, he would have charged McCombs with an additional count of ACSC. However, on cross-examination by the solicitor, Detective Miller agreed that part of his original investigation included a report by Corporal Simmons indicating "while at this residence and inside a backyard pool the subject started to become very aggressive in touching, feeling, and holding the victim in a manner which made her uncomfortable."¹ Detective Miller referred Jessica to the Low Country Children's Center for a forensic interview. He testified the purpose of a forensic interview was so the interviewer could obtain more detailed information from the victim. Detective Miller agreed the forensic interview was more detailed than what he was told when he interviewed Jessica. ROA. pp. 85-93.

¹ ROA. p. 91, lines 5-11.

Kiara was over at McCombs' house on August 1, 2009, for her grandmother's birthday party, which McCombs let Kiara's family hold at his house. This party was attended by both adults and children, and both adults and children were in the pool. Kiara was eight or nine years old at the time. Kiara lived in the same neighborhood and knew McCombs. McCombs came in the pool and kept asking her the same set of questions, such as her favorite subject at school. Kiara was more interested in swimming. Some adults were drinking alcohol at the party. Kiara did not remember if McCombs was drinking.² McCombs remained focused on Kiara and at some point put his hand in her two-piece bikini swimsuit and touched her on the vagina after positioning her on his lap in the shallow end of the pool. He kept talking to her about school while this happened. She testified on direct that she did not know if the touching was purposeful, but she thought it was. She then tried to reach a concrete area on the side of the pool as McCombs was pushing harder on her vagina. On cross-examination, she further explained: "The only reaction that I had was I wanted to hurry up and get on the concrete before he hurt me." ROA. pp. 50-59, p. 64, lines 12-14.

The trial court made the following ruling when finding that the prior bad act was not admissible:

Alright, I have listened to the testimony. The arguments of counsel and I have reviewed the pretrial brief. I have read the cases that you have cited. I must determine whether or not the evidence of the prior conviction or the evidence because we are at a disadvantage in this particular instance because we do not have a copy of the transcript. My

² However, the solicitor noted that the State had a photograph of McCombs with a beer. ROA. p. 75, pp. 19-23.

understanding is it was attempted to be obtained, but could not. So we are unclear as to exactly what act it was that Mr. McCombs plead guilty to on the ABHAN as a result of the victim [Jessica's] accusation in 2001. I have found that the evidence, if admissible, would be relevant, than I must make a determination of whether it would be under 404(b), whether it would be admissible as a common scheme or plan, in which the State has indicated that is what it intends to proceed under. The court must look at whether the admission of the evidence of the 2001 incident is logically relevant to the crime that we are here for today. The charges are substantially the same. As the State pointed out several times the victims were both female. The victim, the alleged incidents occurred at the defendant's home in the pool. The similarities at that point become unclear and it becomes confusing based upon the testimony that was given by [Jessica] and then the detective that has testified today. I agree with the State that the analysis and purpose of the forensic interview is to fully articulate and develop the story and the allegations, and so I can understand why there may be some discrepancy between what the victim testified to, or indicated to the detective and what was disclosed. I am concerned that there, as the analysis unfolds one of the factors from Wallace is the use of coercion or threats. [Kiara] said there was not threats given in the pool. [Jessica] said that he forced her and threatened her to get into the pool. The relationship between the victim and the perpetrator is the same. The perpetrator, the victims in both cases were friends. They were invited to swim over there at his pool. [Jessica] did testify that the defendant was drinking. [Kiara] testified that she was not sure, and did not know if he had been drinking. I must weigh the similarities against the dissimilarities and if the similarities outweigh the dissimilarities the Bad Act evidence is admissible, if the similarities outweigh the dissimilarities. Then I must do a 403 balancing test if I find that the proof is clear and convincing. Based upon my, as I stated previously, I do feel that the dissimilarities outweigh the similarities as testified to. I do find that even assuming that the similarities would outweigh the dissimilarities the remoteness in time under the 403 balancing test makes it more prejudicial than probative. I am denying the request

for the 404(b) analysis with the exception for the record . . .

ROA. p. 102, line 14 - p. 104, line 20.

ARGUMENT

The trial court erred in suppressing the prior bad act, to which McCombs previously pled guilty, because the trial court overlooked the significant similarities between the current charge and the prior bad act, relied on insignificant dissimilarities, and misapplied the balancing test between the probative value of the evidence and the danger of unfair prejudice.

The trial court erred in suppressing the prior bad act committed by McCombs because the trial court failed to take into account the abundant similarities of the two offenses and relied on insignificant dissimilarities in finding that a common plan or scheme did not exist. Further, the trial court abused its discretion in failing to properly weigh the probative value of the prior act versus the danger of unfair prejudice. Although occurring seven years apart, in both the prior bad act and the current charge, McCombs put his hand down the bikini bathing suit of his victim underwater and touched their vagina during a party at the same place, the pool at his house, and attempted to mask the deviant act by talking casually to his victim while other people were around. Both were neighborhood children of the same gender and were approximately the same age.

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993). However, prior bad acts may be admissible when they establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. State v. Lyle, 125 S.C. 406, 118 S.E.809 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense; and its probative value clearly outweighs its

prejudicial effect. State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000).

“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.” State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE; State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)).

Analysis of a prior bad act begins under Rule 401, SCRE. The Court must first determine if the prior bad act is relevant under this rule. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). Once determining the evidence is relevant, the trial court must determine whether the bad act meets the exception of Rule 404(b), SCRE under South Carolina jurisprudence. Id.

Under Rule 404(b), evidence of common scheme or plan may be found admissible. “Such evidence is relevant because proof of one is strong proof of the other.

When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity.” Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278 (citation omitted). “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Id., 384 S.C. at

433, 683 S.E.2d at 278.

The “rationale of the exception is that the evidence is admissible if it tends to show a common scheme or plan, and the close similarity of the charged offense and the previous act[s] enhances the probative value of the evidence so as to overrule the prejudicial effect.” State v. Rogers, 293 S.C. 505, 507, 362 S.E.2d 7, 8 (1987) (citing State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) and State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979)) *overruled on other grounds by* State v. Schumpert, 312 S.C. 502, 435 S.E.2d 835 (1993).

In Wallace, the Supreme Court noted that although not a complete list, the trial court should consider the following factors to determine if there is a close degree of similarity between the crime charged and the bad act: “(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.” Wallace, 384 S.C. at 433-34, 683 S.E.2d at 278.

In the instant case, the victims were females of similar ages – nine and eleven years old. They were both neighborhood children. Since the incidents were only seven years apart, McCombs was of similar age when he committed both acts and was much older than his victims. The location was the same location, McComb’s swimming pool. Jessica was beckoned into the pool by McCombs, with what in retrospect to Jessica was a joke rather than a threat that she had to leave if she did not swim. Kiara was eager to swim and did not need persuasion from McCombs. Neither were threatened or coerced

not to tell. The manner of occurrence was the same: both were subjected to digital touching on the vagina with skin to skin contact underneath their bikini bathing suits. In both cases, McCombs continued speaking to the child during the illicit touching, perhaps either as a cover for his conduct or to reassure the child that nothing wrong was happening to her.

In Blanton, the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. This Court found the testimony admissible, noting the following:

All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible.

Blanton, 316 S.C. at 32, 446 S.E.2d at 439.

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman's home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman's home. The victim and two other women each testified that the abuse began shortly after they arrived at Hallman's farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman's penis. The events in each case took place in the

bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the farm at four years old and was made to rub Hallman's penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

In finding the prior bad acts admissible, the Supreme Court noted the following:

The prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of the abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the same manner under similar circumstances.

Id., 298 S.C. at 175, 379 S.E.2d at 117.”

Similarly, the Supreme Court found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in prosecution for similar acts against the youngest daughter because the “experiences of each daughter parallel that of her sisters . . .” McClellan, 283 S.C. at 392, 323 S.E.2d at 774. Specifically, the Supreme Court noted: “[T]he initial attack occurred around age twelve; Appellant entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to “Honor thy Father”].” Id.

In the instant case, numerous factors common between the crime charged and the prior bad act are present: (1) victims were females of approximately the same age; (2) the

abuse occurred at the same residence; (3) the abuse occurred at the same pool; (4) the abuse occurred during a party of some type, and where other people were present (perhaps for plausible deniability); (5) both the victims were neighborhood children; (6) both were singled out from the group of other children by McCombs; (7) both were touched underneath their two-piece bikini bathing suits; (8) the touching occurred underwater; and (9) McCombs continued to talk to the victims while the abuse occurred, apparently as a cover while he committed the deviant acts.

In contrast, the dissimilarities relied on by the trial court are insignificant. McCombs was drinking during the commission of the prior bad act, but may or may not have been drinking in the charged act. This does not establish a dissimilarity at all, only speculation as to a dissimilarity. Further, it is not a significant dissimilarity even if it had been established. The second alleged dissimilarity is that McCombs told Jessica she would have to go home if she did not swim, which the trial court took as a threat. However, Jessica indicated that in retrospect, she thought he was joking. Since Kiara was already in the pool, no "threat" or persuasion was necessary. So these two alleged dissimilarities lack any significance to outweigh the significant similarities of two nearly identical occurrences.

Jessica's testimony was clear, even if there was some attempt by defense counsel to impeach her with her statement to police. Jessica either disagreed with defense counsel, or did not recall the answer to defense counsel's questions concerning the statement or his interpretation of the statement. The statement was never admitted as evidence. It appears the trial court was relying more on defense counsel's questions and

a statement that was never admitted into evidence instead of Jessica's actual testimony. Jessica never wavered on her testimony that McCombs did in fact stick his hand down her bathing suit and touched her vagina while they were in the swimming pool. Note that the trial court implicitly found Jessica's testimony as a whole was clear and convincing, as the ruling for suppression did not include a finding that the State did not meet this standard.

Detective Miller's testimony provided speculation as to why he might not have charged ACSC for the pool incident, but he agreed there was more detail in the forensic interview than in his own interview of the victim and that the pool incident was disclosed early on to law enforcement. So Detective Miller's testimony is insufficient to unseat the established similarities in the prior bad act to the charged conduct.

Further, the trial court misapplied the law when it found that the probative evidence did not outweigh the prejudicial value under Rule 403, SCRE, based on the remoteness in time between incidents. Remoteness in time between prior bad acts alone is not dispositive. Blanton, 316 S.C. at 32, 446 S.E.2d at 438. The prior bad acts in Blanton occurred seven to eight years before the charged act. In Hallman, as noted in Blanton, the first prior bad acts occurred seven years prior to the first acts committed against the victim. In State v. Hubner, 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005), fourteen years passed between the prior bad act in Maine with a different victim and the charged conduct. The Court of Appeals reversed the conviction and sentence based on dissimilarities in conduct, but the Supreme Court reversed the Court of Appeals opinion based on its concurrent opinion in Wallace, despite the fourteen year gap. State v.

Hubner, 384 S.C. 436, 683 S.E.2d 279 (2009).

In the instant case, the trial court erred in applying the time difference to the Rule 403 analysis rather than the Rule 404(b) analysis, and then further erred in considering the gap in isolation from the other Rule 404(b) factors, in contrast to the dictates of Blanton. See also State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980) (finding on the facts of that particular case, the similarities between the charged conduct and the subsequent act was diminished when the time frame of the offenses are considered).

As noted by the Connecticut Supreme Court: “Even a relatively long hiatus between charged and uncharged misconduct, however, is not, by itself, determinative of the admissibility of common plan or scheme evidence . . . especially when there are distinct parallels between the prior misconduct and the charged misconduct.” State v. Jacobson, 930 A.2d 628, 633 (Conn. 2007) (citations omitted).

The North Carolina Supreme Court noted: “[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case. . . . The purpose underlying the evidence also affects the analysis. Remoteness in time is less important when the other crime is admitted because its modus operandi is so strikingly similar to the modus operandi of the crime being tried as to permit a reasonable inference that the same person committed both crimes.” State v. Bekelheimer, 726 S.E.2d 156, 160 (N.C. 2012) (internal quotations and citations omitted). Analysis of remoteness was done in that case under Rule 404(b) before the North Carolina Supreme Court assessed the trial court’s Rule 403 analysis. Id.

In Demmert v. State, 565 P.2d 155 (Alaska 1977), the Alaska Supreme Court

found that a seven year gap between the charged and uncharged conduct was properly admitted, concluding as follows:

. . . Demmert was nearly twenty-nine at the time of his prior misconduct. The act leading to his conviction occurred when he was thirty-six. Thus, both incidents involved lewd acts performed with young boys, by a fully mature adult. Also, both acts were committed in a similar manner, under almost identical circumstances. Given these considerations, we are of the opinion that the passage of time did little to lessen the probative value of the evidence complained of.

Demmert, at 158.

The Minnesota Supreme Court announced its preferred approach to issues of remoteness as follows: “the preferred approach is for the trial court to focus on the closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi.” State v. Washington, 693 N.W.2d 195 (Minn. 2005) (quoting State v. Frisninger, 484 N.W.2d 27, 31 (Minn. 1992)).

The Eighth Circuit Court of Appeals declared: “We apply a standard of reasonableness, as opposed to a standard compromising an absolute number of years, in determining whether a prior offense occurred within a relevant time frame for purposes of Rule 404(b).” United States v. Clark, 668 F.3d 568, 574 (8th Cir. 2012) (internal quotations and citation omitted). In finding the prior bad act admissible, the Eighth Circuit found: “Given the strong similarities in kind between the two acts, the approximately seven-year period between the prior act and the conduct alleged in this case did not render the identity theft conviction too remote for proper consideration.” Id.

In the instant case, the trial court erred by analyzing the effect of the seven year

interval in isolation, as opposed to judging it in tandem with the obvious similarities between the prior act and the charged case. The two acts were so similar that they represent the same modus operandi and the seven year lapse of time does not lessen the probative value of this evidence.

Further, the trial court simply failed to conduct a proper balancing test under Rule 403, SCRE, resulting in an abuse of discretion. Under Rule 403, evidence that is relevant may still be excluded when “its probative value is substantially outweighed by the danger of unfair prejudice.” “Probative means tending to prove or disprove.” State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012) (citing Blacks Law Dictionary 1323 (9th ed. 2009), internal quotations omitted). “Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.” Id. “The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case.” Id.

The probative value of evidence must, of course, be weighed against the danger of unfair prejudice. In Collins, speaking on the meaning of prejudice, this Court observed the following:

Prejudice that is ‘unfair’ is distinguished from the legitimate impact all evidence has on the outcome of a case.

Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.

Id., 398 S.C. at 207, 727 S.E.2d at 757 (internal quotations omitted). Thus, this Court

concluded in Collins: “All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.” Id. (quotations and citation omitted, emphasis in the original).

In finding that the trial court abused its discretion in admitting graphic photographs into evidence, this Court found as follows: “The record in this case, however, shows that the trial court did not independently analyze the probative value of the photos. Therefore, the trial court did not properly exercise its discretion.” Id., 398 S.C. at 213, 727 S.E.2d at 760 (noting that the trial court simply asked the prosecution’s expert to confirm if the photographs would aid the expert and then accepted the expert’s conclusory response).

In the instant case, the trial court erred, because as in Collins, the trial court failed to make any evaluation of probative value of the prior bad act testimony and only made a conclusory evaluation of prejudice solely on the time between the current charge and the prior bad act. This error amounts to an abuse of discretion.

Accordingly, it is appropriate to reverse the trial court’s *in limine* ruling. Henry, supra (reversing the trial court’s pre-trial suppression of prior bad acts against victim’s sister where the attacks consisted of a number of common elements). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

As the Supreme Court stated in McClellan,: “It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that

presented by this evidence.” McClellan, 283 S.C. at 392, 323 S.E.2d at 774.

In the instant case, the trial court simply overlooked the significance of extremely similar occurrences and erroneously relied on insignificant dissimilarities in finding the lack of a common scheme or plan; and further, it failed to adequately conduct a proper balancing test to evaluate the probative value of the evidence and the limited danger of unfair prejudice. These errors resulted in the trial court overlooking the clear evidence of a common scheme or plan under the plain meaning of the exception. Accordingly, the trial court’s pretrial ruling should be reversed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the lower court's ruling on the admissibility of the prior bad act be reversed and remanded for further proceedings.

Respectfully submitted,

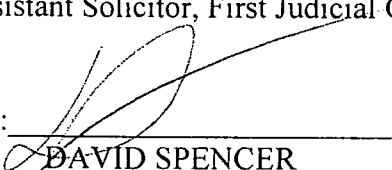
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April 29, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Appellant,

vs.

WAYNE DANIEL MCCOMBS

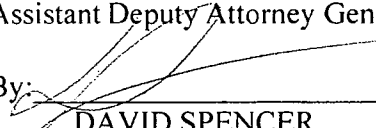
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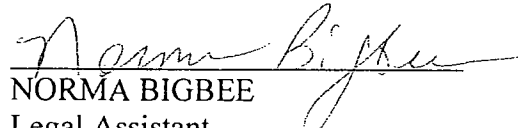
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I, Norma Bigbee, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

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Respondent.

Appellate Case No.: 2012-209947

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in excluding from evidence at trial a single, isolated alleged prior act of sexual misconduct with a different minor that occurred eight years before the charged conduct.

STATEMENT OF THE CASE

The State has set forth the Statement of the Case, including the facts, and Respondent Wayne Daniel McCombs need not repeat that statement. It is important, however, to clarify several facts.

The only prior act evidence at issue is the single alleged incident that occurred in the pool between McCombs and Jessica in 2001. The subsequent conduct after McCombs and Jessica left the pool and went into the computer room was not sought to be introduced into evidence by the State and is not at issue. (R. 78, lines 8-19)

In regard to the charges brought as a result of the previous incident, McCombs pleaded guilty to Assault and Battery of a High and Aggravated Nature. (R. 71, line 2) Such conviction, however, according to the testimony of Detective Michael Miller, who investigated that incident, clearly appears to be based on McCombs's conduct with Jessica in the computer room. (R. pp. 89-94) Detective Miller understood and testified before the grand jury that charged McCombs in the prior matter, that the incident in the pool involved only the lewd act of "groping or fondling" of Jessica

over her swimsuit by McCombs in the pool. (R. pp. 86-88, 93-94) The sexual battery charge was based on the conduct that occurred in the computer room. (R. pp. 87-89) Jessica's testimony before the trial court in this case was different from what she told Detective Miller at the time of the incident. Based on the testimony before the court and the available record from the prior conviction (no transcript of that matter was available), the trial court found that the State had to prove the prior misconduct by clear and convincing evidence rather than being able to rely on the conviction. (R. pp. 103-104)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN EXCLUDING FROM EVIDENCE AT TRIAL A PRIOR ALLEGED BAD ACT INVOLVING A SINGLE, ISOLATED TOUCHING INCIDENT WITH A DIFFERENT MINOR THAT OCCURRED EIGHT YEARS BEFORE THE CHARGED OFFENSE.

An appellate court is bound by the trial court's factual findings unless clearly erroneous. *State v. Kirton*, 381 S.C. 7, 22, 671 S.E.2d 107, 114 (Ct. App. 2008); *State v. Lee*, 399 S.C. 521, 526, 732 S.E.2d 225, 228 (Ct. App. 2012). The appellate court does not reevaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. *Kirton*, 318 S.C. 7, 671 S.E.2d 107; *Lee*, 399 S.C. 521, 732 S.E.2d 225.

The admission or exclusion of evidence is left to the sound discretion of the

trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *Kirton*, 381 S.C. at 23, 671 S.E.2d at 114. The trial judge has considerable latitude in ruling on the admissibility of evidence, and his decision should not be disturbed absent prejudicial abuse of discretion. *Id.* at 24, 671 S.E.2d at 114. An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. *Id.* at 23, 671 S.E.2d at 115.

A trial judge has particularly wide discretion in ruling on Rule 403 objections. *Lee*, 399 S.C. at 527, 732 S.E.2d at 228. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. [The appellate court is] obligated to give great deference to the trial court's judgment." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (2003).

In this case, the trial court clearly did not abuse its discretion in excluding from trial under Rules 404(b) and 403, SCRE evidence of the prior alleged bad act that occurred in 2001.

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 embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator.

Kirton, 381 S.C. at 26, 671 S.E.2d at 116; *see State v. Lyle*, 125 S.C. 406, 118 S.E.

803 (1923); Rule 404(b), SCRE. Only the exception for "common scheme or plan" is at issue here. The State made clear that it moved to admit the alleged prior act in the swimming pool based solely on the "common scheme or plan" exception to the exclusion of prior act evidence under Rule 404(b). (R. p. 75)

As explained in *Kirton*, if not the subject of a conviction, proof of prior bad acts must be clear and convincing:

When considering whether there is clear and convincing evidence, this court is bound by the trial judge's findings unless they are clearly erroneous. *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct.App.2003). The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. *Id.* at 329, 580 S.E.2d at 192.

381 S.C. at 26, 671 S.E.2d at 116. In addition, even if the prior bad act evidence is clear and convincing and falls within one of the exceptions to exclusion, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant, the evidence must be excluded. *Id.*; see Rule 403, SCRE.

When considering whether there is clear and convincing evidence of other bad acts, the appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *Kirton*, 381 S.C. at 26, 671 S.E.2d at 116. The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate her veracity. *Id.* at 26-27, 671 S.E.2d at 116.

Kirton explained the "common scheme or plan exception" as follows:

"A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect. *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995). The degree of remoteness between the other crimes and the one charged is one factor to be considered in determining the connection between them. *Id.* As the similarity becomes closer, the more likely the evidence will be admissible. *State v. Aiken*, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996). "The acid test of admissibility is the logical relevancy of the other crimes." *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); *see also State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983) (finding common scheme or plan exception requires more than mere commission of two similar crimes by the same person). When a criminal defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan. *State v. Weaverling*, 337 S.C. at 471, 523 S.E.2d at 792-793.

Id. at 27, 671 S.E.2d at 117. As *Kirton* stated, the common-scheme-or-plan exception is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit acts between the same parties. *Id.* The court then reviewed prior cases addressing prior bad act evidence in child sexual abuse cases, most of which involved continuous illicit acts, as opposed to distinct, isolated acts, thus establishing a common scheme or plan.

In *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), the court explained that the process of analyzing bad act evidence begins with Rule 401, SCRE, which

requires the trial court to determine whether the evidence is relevant, i.e., whether it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

The court then explained that when determining whether prior bad act evidence is admissible as common scheme or plan,

the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. See *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

A close degree of similarity establishes the required connection between the two acts and no further "connection" must be shown for admissibility.

Id. at 433-34, 683 S.E.2d at 277-78. As discussed in *Kirton*, however, "[t]he degree of remoteness between the other crimes and the one charged is one factor to be considered in determining the connection between them." 381 S.C. at 27, 671 S.E.2d at 117.

Kirton also emphasized that the case law analyzing such evidence in sexual abuse cases and those allowing admitting such evidence "do not lower the bar for admissibility under *Lyle* simply because sexual crimes are involved." *Id.* at 31, 671 S.E.2d at 119.

Regardless of the nature of the charges facing the defendant, there must be evidence that the defendant employed a common scheme or plan in the commission of the crimes. Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well. In *Weaverling* and *McClellan*, the sheer volume of repeated occurrences, together with the close similarities in the assaults, evidenced a pattern of continuous illicit conduct. Accordingly, these cases fall squarely within the plain meaning of common scheme or plan evidence. *McClellan*, 283 S.C. at 392, 323 S.E.2d at 774 (stating it would be difficult to conceive of evidence more within the common scheme or plan exception); *Weaverling*, 337 at 469, 523 S.E.2d at 791 (stating the pattern of sexual abuse represented "quintessential common scheme or plan evidence").

Id. at 31-32, 671 S.E.2d at 119.

In this case, the trial court properly ruled that the prior single incident eight years earlier did not establish a common scheme or plan and was not admissible under Rules 404(b) and 403. The remote prior incident and the offense charged were merely

two isolated acts against different individuals with only superficial similarities, most common to sexual abuse in general. When discussing the similarities and dissimilarities of the incidents, the trial court initially expressed concern about whether the prior bad act was established by clear and convincing evidence, observing that a transcript of the proceeding pertaining to the prior incident was not available and it was not clear what occurred in the pool, due to the discrepancies between the prior victim's testimony before the court and the testimony of the detective who had interviewed the victim in 2001 when the incident occurred. (R. pp. 102-103.) Thus, the court observed that other than that "the victims were both female . . . [and] the alleged incident occurred at the defendant's home in the pool," the "similarities at that point became unclear and it becomes confusing" based on the difference between the testimony of the victim and that of the detective. (R. p. 103)

Detective Miller testified that the victim had told him that McCombs only "groped" her in the pool, while in her testimony before the trial court in this matter, the victim claimed McCombs stuck his finger under her two-piece bathing suit and felt her vagina. Thus, while not expressly ruling that the prior act was not established by clear and convincing evidence, the issue of proof as to what occurred in the pool concerned the court.

The trial court properly analyzed the similarities and dissimilarities as required by the court in *Wallace*. The court found that the incidents were similar in that both

victims were female and the incidents occurred at the Defendant's home in the pool, but stated that the similarities at that point were unclear because of the discrepancies between Jessica's testimony before the court and her statements to Detective Miller just after the incident occurred. (R. p. 103) The court observed that both victims were "friends" of McCombs's, apparently in the sense that the victims were invited to the pool by a friend or relative of McCombs's. (R. p. 103-104)

The court found that the incidents were more dissimilar, however. The court observed that coercion was one of the *Wallace* factors and the court was concerned that with regard to the current offense, McCombs did not coerce or threaten the victim to get in the pool, while in the prior incident, there was such coercion. (R. p. 103) The court also observed that in the prior incident, McCombs had been drinking, but the victim of the offense now charged did not know if he had been drinking. (R. p. 104)

The trial court also stated to the prosecutor that one of the "major concerns in this analysis is the length of time that has transpired between the first incident in 2001 and the incident that we're on trial for today. What is your compelling argument?" (R. pp. 95-96) Thus, the court obviously was initially applying the remoteness factor first to the Rule 404(b) analysis, and the question about a "compelling argument" was apparently a reference to *State v. Fonseca*, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009), *aff'd*, 393 S.C. 229, 711 S.E.2d 906 (2011), cited in McCombs's motion in

limine, which excluded prior act evidence under similar circumstances, finding that the State provided "no compelling argument of any similarities between the two occurrences, or any argument to overcome the fact that the incidents are remote in time." *Id.* at 649, 681 S.E.2d at 4 (footnote omitted).

Based on its analysis under Rule 404(b) as required by the case law, the trial court concluded that the dissimilarities outweighed the similarities and therefore the evidence was inadmissible under Rule 404(b) as common scheme or plan evidence. (R. p. 104) The court further ruled that even assuming the evidence would be admissible under Rule 404(b), its probative value was outweighed by its unfair prejudice and therefore was inadmissible under Rule 403's balancing test. (R. p. 104.)

Contrary to the State's contention, the trial court correctly applied the law to the facts in ruling that the evidence was not admissible. The court properly found that two single isolated incidents against different minors that occurred eight years apart and involved only superficial, general similarities did not establish a common scheme or plan or, further, that the prior act's probative value was substantially outweighed by the danger of unfair prejudice. The case law fully supports this conclusion.

Kirton, Wallace, and many other cases cited in the State's brief, as well as in most cases pertaining to prior act evidence in prosecutions of sexual misconduct with minors, the prior acts involved a continuing course of conduct, often with the same victim or related victims, such as other daughters or stepdaughters rather than a single,

isolated prior and current act with different victims.

For example, *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984), cited by the State, involved a continuing pattern of sexual abuse against each of the defendant's three daughters, and the similarities included some interesting behavior such as giving each the same explanation for his conduct and quoting the same biblical verse to them. Obviously, the facts and circumstances at issue here can in no way be compared to those in *McClellan*.

By contrast, cases involving facts more like those at issue here hold that the evidence is inadmissible. For example, in *Fonseca*, 383 S.C. 640, 681 S.E.2d 1, the court reversed the defendant's conviction for committing a lewd act on a minor, based on the erroneous admission of prior bad act evidence occurring two years earlier involving the same minor. The defendant was charged with committing a lewd act on the victim, the defendant's wife's younger sister, when the defendant was alone with the victim in a room of his house. The prior bad act evidence also involved a lewd act of a slightly different nature by the defendant on the victim when they were alone on the couch in his house. The court held that the prior incident did not show a common plan or scheme, finding that the State provided "no compelling argument of any similarities between the two occurrences, or any argument to overcome the fact that the incidents are *remote in time*. Accordingly, the State's argument is without merit." *Id.* at 649, 681 S.E.2d at 4 (emphasis added) (footnote omitted). The court

noted that the State claimed "that the fact that both of the incidents occurred in Appellant's marital home while his wife was in the other room, demonstrates that the Appellant had a common scheme or plan to attack the victim while his wife was not present or was in the other room." *Id.* at 649 n.2, 681 S.E.2d at 5 n.2. It is noted that in offering the "well-reasoned opinion" of the court of appeals, the supreme court also stated that the court of appeals "anticipated our decision in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009)." 393 S.C. at 229, 711 S.E.2d at 906; *see also State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987) (testimony by victim's sister regarding other abusive conduct by the defendant did not tend to show a common scheme where the only connection between the testimony of the two daughters was that the defendant touched them, and the acts occurred 10 years apart), *overruled on other grounds by State v. Schumpert*, 312 S.C. 502, 506 n.1, 435 S.E.2d 859, 862 n.1 (1993); *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) (trial court erred in admitting alleged sexual assault into evidence under common-scheme-or-plan exception even though it involved the same victim and both assaults occurred at defendant's residence; dissimilarities, including fact that unlike the charged incident, defendant threatened the victim following uncharged conduct; in addition, prior conduct involved single incident rather than pattern of continuous conduct, and prior act occurred four or five years earlier).

The cases cited by the State in support of admitting the evidence are

distinguishable. In *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter on several occasions. The prior act evidence involved testimony of two other females who testified that seven to eight years earlier, they were also sexually abused by the defendant. The abuse of all three minors involved requests both for the performance of cunnilingus and fellatio. With little analysis, the court held that the prior act evidence was admissible. The lack of analysis in *Blanton* makes it difficult to determine the court's reasoning. In any case, the similar alleged acts in that case were much more specific and similar than in this case and involved more than single, isolated events.

In *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989), although the prior acts occurred seven years earlier than the charged abuse against the defendant's stepdaughter, the prior acts, as well as the charged abuse, involved multiple acts and a continuing course of illicit sexual abuse over years against three of the defendant's former stepdaughters. The abuse in all the instances commenced in exactly the same manner under similar circumstances and bore such close similarity that the probative value of the prior act evidence clearly outweighed its prejudicial effect. Obviously in a case such as this, involving a single, isolated prior act, the remoteness of that act is a much more important consideration than when the prior acts involve multiple, continuing acts over the course of years and involve several foster children and more exact similarities. See also *State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009)

(also involving charges and prior acts of a continuing nature that occurred over a period of time and progressed in similar ways, which were much more egregious than those involved here; thus, although the acts were 14 years apart, remoteness of prior acts less important), *rev'g* 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005).

The foregoing authority also supports the trial court's concern over the remoteness of the prior isolated act in this case. Where the prior act and current act involve single, isolated acts with different victims rather than acts of a continuing nature, such remoteness between them is even more significant, both under the Rule 404(b) and 403 analyses. The State contends that "the trial court erred in applying the time difference [between the acts] to the Rule 403 analysis rather than the Rule 404(b) analysis, and then further erred in considering the gap in isolation from the other Rule 404(b) factors, in contrast to *Blanton*." (Initial Br. of Appellant 12.) Such contention is without merit.

In *Kirton*, the court stated that under the Rule 404(b) analysis, the degree of remoteness between the other crimes and the one charged is one factor to be considered in determining the connection between them, i.e., the relevance or probative value of the evidence, 381 S.C. at 27, 671 S.E.2d at 117. The remoteness of the prior act evidence is also clearly relevant to the Rule 403 balancing test weighing probative value against danger of unfair prejudice. As with the Rule 404(b) analysis, the more remote the evidence the less probative value and the more unfair

prejudice it will have. *See, e.g., Kirton*, 381 S.C. 7, 671 S.E.2d 107; *State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000) (under Rule 403, danger of unfair prejudice substantially outweighed probative value given remoteness—several years—in time of events; such remoteness in time made the evidence "so prejudicial" that it should have been excluded); *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 583 (1999) (remote thefts inadmissible; the temporal connection between prior thefts and charged crime was too attenuated for admissibility under *Lyle*).

Thus, it is clear that contrary to the State's contention, the trial court did not find that the probative value of the evidence was substantially outweighed by its unfair prejudicial effect due solely to the remoteness of the prior act. Remoteness was just one factor the court looked at in applying the Rule "403 balancing test" in making the determination that the evidence was "more prejudicial than probative." (R. p. 104) The trial court also correctly applied the remoteness factor in its Rule 404(b) analysis.

As the foregoing demonstrates, the trial court correctly applied the law and its discretion in ruling the prior act evidence inadmissible, and such ruling should not be reversed on appeal. As the court in *Lyle* instructed, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected." 125 S.C. at 417, 118 S.E. at 807; *Kirton*, 381 S.C. at 32, 671 S.E.2d at 119 (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807); *see*

also State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993) (stating the defendant must be given the benefit of the doubt regarding the introduction of common scheme testimony where the admissibility was a close question), *cert. dismissed as improvidently granted*, 316 S.C. 563, 451 S.E.2d 392 (1994). This was hardly even a close question, given the circumstances. Therefore, the trial court's pretrial ruling should be affirmed.

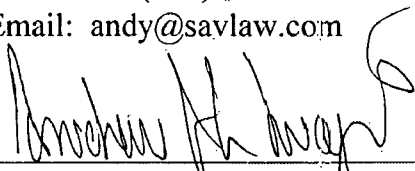
CONCLUSION

For all the foregoing reasons, the trial court's ruling excluding the prior act evidence should be affirmed.

Respectfully submitted,

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Attorney for Respondent

Charleston, South Carolina

May 3, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Appellant,

vs.

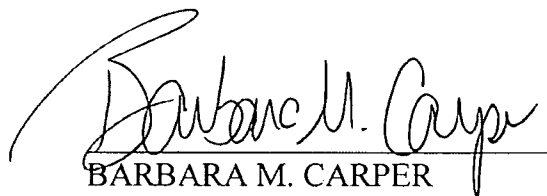
WAYNE DANIEL McCOMBS,

Respondent.

Appellate Case No.: 2012-209947

CERTIFICATE OF SERVICE

I, Barbara M. Carper, certify that this **Final Brief of Respondent on Appellant** complies with Rule 211(b), SCACR.


BARBARA M. CARPER

Charleston, SC
May 3, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Kristi L. Harrington, Circuit Court Judge

THE STATE,

Appellant,

vs.

WAYNE DANIEL McCOMBS,

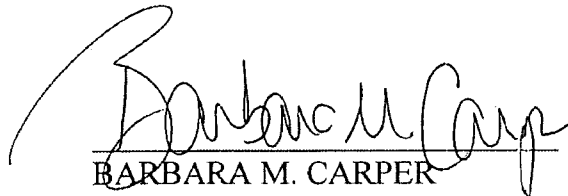
Respondent.

Appellate Case No.: 2012-209947

PROOF OF SERVICE

I, Barbara M. Carper, certify that I have served the within **Final Brief of Respondent on Appellant** by depositing two copies of the same in the U.S. mail, postage prepaid, addressed to:

David Spencer, Esquire
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BARBARA M. CARPER



ALAN WILSON
ATTORNEY GENERAL

February 13, 2013

VIA HAND DELIVERY

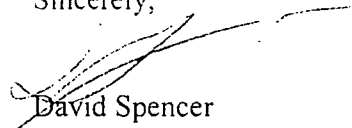
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State of South Carolina v. Wayne McCombs**
Appellate Case No: 2012-209947

Dear Ms. Kitchings:

Please be advised I will not be filing an Initial Reply Brief of Appellant which was due today. An extension was requested due to my being out of work for medical reasons and after reviewing the Initial Brief of Respondent I have decided not to do a reply brief. Per my calculations the Record on Appeal will be due on or before March 15, 2013. If this is not correct please let me know.

Sincerely,


David Spencer
Assistant Deputy Attorney General

DS/nb

cc: Thomas J. Rode, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Wayne McCombs, Respondent.

Appellate Case No. 2012-209947

Appeal From Dorchester County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5265
Heard February 4, 2014 – Filed August 20, 2014

REVERSED AND REMANDED

Attorney General Alan Wilson and Assistant Deputy
Attorney General David A. Spencer, both of Columbia;
Solicitor David Michael Pascoe, Jr., of Orangeburg; and
Assistant Solicitor Russell D. Hilton, of Ridgeville, for
Appellant.

Andrew John Savage, III, and Jonathan Scott Bischoff,
II, both of Savage Law Firm, of Charleston, for
Respondent.

WILLIAMS, J.: In this criminal appeal, the State argues the circuit court erred in finding evidence of Wayne McCombs' prior bad act was not admissible in his trial for committing a lewd act on a minor. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

McCombs was indicted for committing a lewd act on a minor. The case was called for trial on March 5, 2012. During a pretrial hearing to address the State's motion in limine to admit evidence of a prior bad act, the State presented testimony from a prior victim ("Jessica"), the detective who investigated the prior bad act, and the victim whom McCombs was on trial for molesting ("Victim").

Jessica was the first witness called to testify at the pre-trial hearing. She testified that in 2001, when she was eleven years old, she went with her friend Joshua, McCombs' grandson, to McCombs' house for a pool party. Jessica stated she had not met McCombs prior to the party. According to Jessica, she did not initially get into the water, but McCombs told her if she did not get in the pool, she could not be at his house. Jessica testified that in hindsight she was sure he was joking, but she interpreted it differently on the day of the incident. According to Jessica, once she was in the pool, McCombs guided her around in the water by her waist and stuck his finger under her two-piece bathing suit and felt her vagina. Jessica stated McCombs talked to her while he was touching her but not about the touching. Jessica recalled that McCombs had been drinking at the time of the incident. Jessica left the pool, and McCombs followed her into the kitchen and sat her on his lap. Jessica subsequently went into the computer room, and McCombs followed her. Jessica testified McCombs stuck his hands down her pants from behind and touched her vagina in the computer room. On cross-examination, Jessica testified McCombs also stuck his fingers in her mouth. Jessica reported the incident, and McCombs was charged with committing a lewd act on a minor and assault with intent to commit criminal sexual conduct (ACSC). McCombs pled guilty to assault and battery of a high and aggravated nature (ABHAN) in July 2002.

Detective Miller, the investigator assigned to Jessica's case, was also called to testify at the pretrial hearing. Detective Miller stated that after the incident, Jessica reported McCombs groped her in the pool, sucked on her fingers in the kitchen, and attempted to fondle her vagina in the computer room. According to Detective Miller, Jessica did not report that McCombs stuck his hands under her bathing suit in the pool. He testified that if she had reported that McCombs stuck his hand under her bathing suit in the pool, he would have charged McCombs with an additional count of ACSC.

Victim also testified at the pretrial hearing. She testified that on August 1, 2009, when she was nine years old, she was at McCombs' house for her grandmother's birthday party. Victim stated that she lived in the same neighborhood and knew

McCombs. Victim testified she was in the pool with McCombs when he put his hand under her two-piece bathing suit and touched her vagina. According to Victim, McCombs was talking to her about school during the incident. Victim stated she tried to reach a concrete area on the side of the pool as McCombs was pushing harder on her vagina. She testified she did not know if the touching was purposeful, but she thought it was. Victim did not remember if McCombs was drinking at the time of the incident.

At the hearing, the State moved to admit the prior bad act involving Jessica based on the common scheme or plan exception to the exclusion of prior bad act evidence under Rule 404(b), SCRE. The circuit court found the evidence of the prior bad act was inadmissible, ruling:

[Because] I have found that the evidence, if admissible, would be relevant, . . . I must make a determination of whether it would be under 404(b), whether it would be admissible as a common scheme or plan, in which the State has indicated that is what it intends to proceed under. The court must look at whether the admission of the evidence of the 2001 incident is logically relevant to the crime that we are here for today. The charges are substantially the same. As the State pointed out several times[,] the victims were both female. . . . [T]he alleged incidents occurred at the defendant's home in the pool. The similarities at that point become unclear and it becomes confusing based upon the testimony that was given by [Jessica] and then the detective that has testified today. I agree with the State that the analysis and purpose of the forensic interview is to fully articulate and develop the story and the allegations, and so I can understand why there may be some discrepancy between what the victim testified to, or indicated to the detective and what was disclosed. I am concerned that there, as the analysis unfolds one of the factors from [*Wallace*¹] is the use of coercion or threats. [The victim] said there was no threats given in the pool. [Jessica] said that he forced her and threatened her to get into the pool. The relationship between the victim and the perpetrator is the same. The

¹ *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

perpetrator, the victims in both cases were friends. They were invited to swim over there at his pool. [Jessica] did testify that the defendant was drinking. The victim . . . testified that she was not sure, and did not know if he had been drinking. I must weigh the similarities against the dissimilarities and if the similarities outweigh the dissimilarities the Bad Act evidence is admissible, if the similarities outweigh the dissimilarities. Then I must do a 403 balancing test if I find that the proof is clear and convincing. Based upon my, as I stated previously, I do feel that the dissimilarities outweigh the similarities as testified to. I do find that even assuming that the similarities would outweigh the dissimilarities the remoteness in time under the 403 balancing test makes it more prejudicial than probative. I am denying the request for the 404(b) analysis

The State appeals pursuant to *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993).²

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the circuit court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

² Pursuant to *State v. Henry*, a pretrial order suppressing evidence that significantly impairs the prosecution of a criminal case is directly appealable. 313 S.C. at 107-08, 432 S.E.2d at 490.

LAW/ANALYSIS

The State argues the circuit court erred in finding McCombs' prior bad act was inadmissible because the similarities outweigh the dissimilarities. We agree.

To admit evidence of prior bad acts, the circuit court must first determine whether the proffered evidence is relevant. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the circuit court finds the evidence is relevant, the court must then determine whether the bad act evidence is admissible under Rule 404(b) of the South Carolina Rules of Evidence. *Id.* Rule 404(b) 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 embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. *See* Rule 404(b), SCRE.

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. . . .

When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the [circuit] court's factual findings unless they are clearly erroneous.

Clasby, 385 S.C. at 155, 682 S.E.2d at 895 (citations and internal quotation marks omitted). "If the [circuit court] concludes there is clear and convincing evidence that the defendant committed the uncharged acts, he or she must determine whether the prior acts fall within the common scheme or plan exception." *Id.* at 155, 682 S.E.2d at 896.

"Evidence of other crimes, wrongs, or acts is admissible to show a common scheme or plan when a 'close degree of similarity [exists] between the crime charged and the prior bad act.'" *State v. Taylor*, 399 S.C. 51, 59, 731 S.E.2d 596, 601 (Ct. App. 2012) (quoting *State v. Gaines*, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008)). "When determining whether evidence is admissible as [a] common scheme or plan [under Rule 404(b)], the [circuit] court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *Wallace*, 384 S.C. at 433, 683 S.E.2d at 277-78. "A close degree of similarity exists when the

'similarities outweigh the dissimilarities.'" *State v. Scott*, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) (quoting *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278). When determining whether a close degree of similarity exists, the circuit court "should consider all relevant factors." *Taylor*, 399 S.C. at 59, 731 S.E.2d at 601.

In *Wallace*, our supreme court listed several factors for the circuit court to consider when determining whether there is a close degree of similarity between the prior bad act and the charged crime in cases involving the sexual abuse of a minor:

- (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator;
- (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

384 S.C. at 433-34, 683 S.E.2d at 278.

In *State v. Hubner*, 362 S.C. 572, 585, 608 S.E.2d 463, 469 (Ct. App. 2005), *rev'd*, 384 S.C. 436, 683 S.E.2d 279 (2009), the court of appeals reversed the circuit court's decision to admit prior bad act evidence after determining the similarities were insufficient to support the admission of the evidence. In *Hubner*, the court of appeals considered the following similarities: (1) the perpetrator inappropriately touched both girls and (2) the girls were the same age when they were abused. *Id.* The court of appeals also considered the following dissimilarities: (1) the location of the abuse; (2) the relationship between the victim and the perpetrator; (3) the use of coercion or threats; and (4) the type of sexual battery. *Id.* at 585-86, 608 S.E.2d at 469-70. Additionally, the acts in *Hubner* occurred fourteen years apart from each other. *Id.* at 584, 608 S.E.2d at 469. In reversing the circuit court, the court of appeals held the events occurred "under different circumstances, at different times, in different places, and in different ways." *Id.* at 586, 608 S.E.2d at 470 (quoting *State v. Berry*, 332 S.C. 214, 219, 503 S.E.2d 770, 773 (Ct. App. 1998)). However, our supreme court reversed the court of appeals. See *State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009). Citing to *Wallace*, our supreme court found the court of appeals erred in reversing the circuit court's admission of the prior bad act evidence. *Id.* at 437, 683 S.E.2d 280.

Based on Jessica's testimony, we find the following similarities exist between the prior bad act and the charged crime: (1) the female victims were approximately the same age; (2) the abuse occurred in the pool at the same residence; (3) the abuse

occurred during a party; (4) both victims were neighborhood children; (5) both victims were touched underneath their bathing suits; (6) the touching occurred underwater; and (7) McCombs continued to talk to the victims while the abuse occurred.

Detective Miller testified that Jessica reported McCombs groped her in the pool, sucked on her fingers in the kitchen, and attempted to fondle her vagina in the computer room. Although Detective Miller's testimony differs from Jessica's testimony, we find his testimony still presents the following significant similarities: (1) both victims were young females; (2) both victims were neighborhood children; (3) both victims were abused at the same residence; (4) both victims were groped in the swimming pool; (5) both victims were attending a pool party at McCombs' house; and (6) both victims were inappropriately touched in the vaginal area. Based on Jessica's and Detective Miller's testimonies, we find the events occurred under similar circumstances, in similar places, and in a similar manner.

In contrast, the circuit court considered two dissimilarities: (1) McCombs' use of threats or coercion and (2) McCombs' consumption of alcohol prior to inappropriately touching the girls. Jessica testified that she initially felt coerced into getting into the pool, but she later testified that she was "sure he was joking." Victim did not report the use of any threats or coercion. Regarding McCombs' consumption of alcohol, Jessica testified McCombs was drinking during the commission of the prior bad act, but Victim could not remember if McCombs had been drinking prior to inappropriately touching her. We find these dissimilarities to be insubstantial. Upon review of the factors and in light of our supreme court's holdings in *Wallace* and *Hubner*, we find the circuit court erred in finding the dissimilarities outweighed the similarities. We find a close degree of similarity exists between the prior bad act and the charged crime, and the evidence of the prior bad act should have been admitted under Rule 404(b).

After ruling the evidence should not have been admitted under Rule 404(b), the circuit court found the admission of the prior bad act evidence was more prejudicial than probative under Rule 403 of the South Carolina Rules of Evidence due to the dissimilarities and the "remoteness in time" between the acts. We disagree.

"Once bad act evidence is found admissible under Rule 404(b), the [circuit] court must then conduct the prejudice analysis required by Rule 403, SCRE." *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278. Under Rule 403, "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant."

Wallace, 384 S.C. at 435, 683 S.E.2d at 278-79. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Scott*, 405 S.C. at 505-06, 748 S.E.2d at 245 (quoting *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013)).

The circuit court does not necessarily err when it permits testimony about a bad act occurring many years prior to the charged crime. *Id.* at 504, 748 S.E.2d at 244; *State v. Tutton*, 354 S.C. 319, 332 n.5, 580 S.E.2d 186, 193 n.5 (Ct. App. 2003) ("Remoteness in time, however, is not dispositive."); *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994) ("That the alleged acts perpetrated against the two witnesses occurred some seven to eight years prior to the alleged molestation of [the victim], is not alone dispositive."). In fact, evidence of prior bad acts that occurred many years before the charged crime is often admissible to prove a common scheme or plan. *Scott*, 405 S.C. at 504, 748 S.E.2d at 244; see *Blanton*, 316 S.C. at 33, 446 S.E.2d at 440 (holding the circuit court properly admitted testimony regarding a bad act that occurred seven to eight years before the charged crime).

In the instant case, the probative value of Jessica's testimony outweighs the danger of unfair prejudice. As previously discussed, the similarities between the charged crime and the prior bad act outweigh the dissimilarities. Additionally, the temporal remoteness between the two acts does not bar the admission of the evidence of the prior bad. Although the incidents occurred eight years apart, we believe the probative value of the prior bad act outweighs the danger of unfair prejudice. Accordingly, we find the circuit court erred in denying the admission of McCombs' prior bad act.

CONCLUSION

Based on the foregoing, we find the circuit court erred in denying the admission of evidence of McCombs' prior bad act. Accordingly, we reverse and remand for further proceedings consistent with this decision.

REVERSED AND REMANDED.

KONDUROS, and LOCKEMY JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

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SC Court of Appeals

THE STATE,

PETITIONER,

V.

WAYNE MCCOMBS,

RESPONDENT.

Appeal from Dorchester County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5265

Heard February 4, 2014 – Filed August 20, 2014

PETITION FOR REHEARING

Pursuant to Rule 221(a) SCACR, counsel for Wayne McCombs respectfully petitions this Court for rehearing. Rehearing is proper because the Court of Appeals failed to properly apply the standard of review consistent with prior appellate court precedent of this state and disproportionately focused on the number of similarities between the two incidents, thus eviscerating Rule 404(b) SCRE and the common law rule against propensity evidence in violation of the holding in *State v. Lyle*, 126 S.C. 406, 118 S.E. 809 (1923).

Standard of Review

In reversing the trial court's decision to exclude the 404(b) evidence in this case, this Court ignored and failed to consider the great deference South Carolina appellate courts have long given trial courts' rulings on admissibility of evidence. "An appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (citing *Easley v. Cromartie*, 532 U.S. 234 (2001)). As held in *State v. Taylor*, 401 S.C. 104, 113, 736 S.E. 2d 663, 667 (2013), "[o]ur appellate courts must only reverse when there is *clear* error . . ." (emphasis in original)

Furthermore, "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed *only in exceptional circumstances*. [The appellate court is] obligated to give great deference to the trial court's judgment." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (2003) (emphasis added). There are no exceptional circumstances involved in this case that warrant reversing the trial court's decision. This Court is obliged to look at the entire record and not merely the trial court's statements immediately preceding its final ruling. As our appellate courts have repeatedly said, the trial judge is the one who is in the best position to judge the credibility of the witnesses. A closer look reveals the trial court found the evidence inadmissible based on *all* of the evidence presented because to do otherwise would have been unfairly prejudicial to McCombs; the trial court properly recognized that to allow the weak 404(b) propensity evidence to be admitted at his trial under circumstances where two isolated incidents are only connected through only the most superficial of similarities and where the two incidents further lacked the close connection necessary for admissibility would violate the

fundamental fairness contemplated by our rules and our common law. As such, the trial court did not commit error or abuse its discretion when it suppressed the proposed 404(b) evidence.

But rather than extend the proper deference required under the overwhelming weight of our standard of review precedent, this Court engaged in a re-evaluation of the evidence by placing undue emphasis on similarities it felt were important and discrediting the dissimilarities the trial court found important. This is the exact type of analysis the clear error standard of review specifically prohibits. It is a long-standing principle that “the appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge’s ruling is supported by *any* evidence.” *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 114 (Ct. App. 2008) (emphasis added) (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (*see also State v. Scott*, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013) (holding that appellate courts recognize that the trial judge has considerable latitude in ruling on the admissibility of evidence and will not disturb such ruling absent a *prejudicial* abuse of discretion) (emphasis added)). The trial court in this case sufficiently articulated its reasoning for excluding the evidence and supported its decision with adequate evidentiary support after engaging the in the balancing test required by our state’s 404(b) precedent. The trial court found the similarities were too vague and superficial to warrant admissibility. This Court could only conclude that the trial court acted in error under the circumstances by wholly substituting its evaluation of the totality of the circumstances for that of the trial court’s; this is error that should be corrected on rehearing.

Additionally, it does not appear from this Court’s ruling the trial court was given *any* latitude – never mind the considerable latitude afforded under the standard of review – in

analyzing the rationale for its decision. In a case involving 404(b) evidence not directly connected to a conviction, where the only connections to the crime charged are superficial similarities that are not logically connected or linked to one another, this Court would have to find an exceptional error of law or abuse of discretion to overturn the lower court's ruling, especially when the alleged victim of the misconduct for which McCombs was on trial testified his conduct might well have been inadvertent. This Court is urged to reconsider its decision and appropriately apply the standard of review. As stated in *Lyle*, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected." 125 S.C. at 417, 118 S.E. at 807; *see also State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) (holding there must be some connection between the two crimes – something more than two similar crimes committed by the same person – and any doubt about the connection the evidence should be excluded). The trial court did not clearly perceive the required connection, or the logical relevancy, between the two alleged crimes and properly ruled the 404(b) evidence was inadmissible. Its explanation was more than sufficient under our state's long-standing, well-established standard of review guidelines.

Disproportionate Focus on Similarities is Improper under South Carolina 404(b) Precedent

This Court erred in focusing exclusively on the similarities between the 404(b) incident and the alleged incident for which McCombs was on trial, thus eviscerating the protections of 404(b). Rule 404(b) is a rule of exclusion, not inclusion. Admissibility must only be authorized in limited, unique circumstances to protect the integrity of both the Rule

itself, and the long-standing common law prohibition of propensity evidence.¹ This Court's order gives inordinate significance to the *Wallace* factors and applies them incorrectly to the facts in this case in light of the breadth of 404(b) precedent in this state. *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). These factors are merely guiding factors to consider in the 404(b) analysis under common scheme or plan rather than an exclusive checklist that must be followed. As stated in *Wallace*, "we emphasize these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence." *Id.* at 434, 683 S.E.2d 275, 278. This Court's opinion treats the *Wallace* factors as if they are the *only* factors to be considered and incorrectly applies them in a checklist-like fashion. *Wallace* never suggested that these factors be applied exclusively, as is reflected by the breadth of our state's 404(b) precedent and the fact that *Wallace* did not specifically overturn any of the 404(b) common scheme or plan cases decided since the *Lyle* decision was decided nearly one hundred years ago. The fundamental issue in the 404(b) analysis under the common

¹ "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Old Chief v. United States*, 519 U.S. 172, 181, 117 S.Ct. 644, 650-51 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-19 (1948) (internal citations and footnotes omitted)).

scheme or plan exception is the logical connection between the two crimes – not just the number of similarities versus the dissimilarities.

Moreover, while this Court has duly given great deference to the Supreme Court's decision in *Wallace*, the holdings of that decision must be viewed in light of the vast body of common law regarding *Lyle* evidence in order to be properly understood and applied. Counsel urges this Court to revisit its decision in this case based on the holdings of *Lyle* and not the misapplication of the *Wallace* opinion. First, *Wallace* is an outlier in the *Lyle* jurisprudence, particularly when applied as here. While there is some validity to considering similarities between crimes when analyzing admissibility of 404(b) evidence under the common scheme or plan exception (and only under this exception), simply using this principle as the sole guiding factor in determining admissibility falls woefully short of the required analysis. This Court's opinion fails to take the analysis one step further, as required, and find the logical connection between the two alleged crimes while keeping in mind the well-established common law rule against admission of propensity evidence. When this Court considers the full breadth of our state's 404(b) precedents and the protections against unreliable, highly prejudicial evidence those precedents provide, this Court should follow the majority of cases whose application would prevent against the introduction of the evidence the State seeks here to admit – single, isolated incidents with no logical connection between them. Simply stated, allowing the introduction of evidence of prior bad acts that are merely "more similar than different" truly eviscerates 404(b) and imperils the reliability and fairness of criminal trials. The State should first be required to answer two questions. First, which exception is the other crime being admitted to prove? Second, why is the admission of the other crime essential to prove an element of the crime

the state is trying? Only when both of these questions are answered can this court conduct a proper balancing of prejudice versus probity.

Lyle also proscribes the methodology used by this Court in finding the 404(b) evidence admissible. Merely looking at the *quantity* of similarities between the two alleged crimes is an oversimplification of the proper analysis for admissibility of propensity evidence. Under the common scheme or plan exception to 404(b), there must be some logical connection between the two crimes, not merely that the two crimes have more similarities than dissimilarities. As stated in *Lyle*, there must be some “logical relevancy” between the 404(b) evidence and the crime charged. *Lyle*, 125 S.C. at 417, 118 S.E. at 807. Simply highlighting the superficial similarities between the two alleged crimes does not establish the logical relevancy or close connection that precedent requires for admissibility.

In *Tutton*, regarding the common scheme or plan exception, this Court advised:

For the purposes of analyzing evidence of prior misconduct under the common scheme or plan exception, we believe it is crucial to distinguish similarities that merely link the two crimes from those similarities that tend to paint the broader, more relevant picture. ...where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common scheme or plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test. The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations.*

354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) (emphasis in original). A closer look at the 404(b) cases reveals that a common scheme or plan within the context of sexual abuse cases truly means some pattern of continued and connected illicit misconduct rather than unconnected, isolated incidents with superficial similarities as is the case here with

McCombs. In *State v. Scott*, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013), the facts involved four sisters who were repeatedly abused over time under similar conditions in a similar manner by their father, evidencing the close degree of similarity required for admissibility. In *Taylor*, a classic example of a case involving grooming, the facts involved the same type of continued illicit conduct with the same victim over the course of just nine months under nearly identical circumstances. 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2011). In each case, the facts proved the perpetrator was strategic, calculating and organized in performing the illicit conduct on his victims – each had a common scheme or plan for carrying out the abuse. Proof of the prior misconduct in those cases *clearly* proves the subsequent illicit conduct for which the defendant was on trial – not merely because there are more similarities than dissimilarities, but because in each case the two crimes were logically connected through a nexus where proof of one tends to prove the other. Such a connection is clearly absent in this case.

Contrary to the directives of *Lyle*, this Court puts undue emphasis on superficial similarities such that its ruling is in clear violation of the longstanding rule against propensity evidence. Few factual scenarios come closer to running afoul of the longstanding rule against propensity evidence than this case, where there are two isolated incidents separated by nearly a decade and linked only by superficial similarities that demonstrate no meaningful or logical connection. When elements of the crime are included in the similarities, then virtually all crimes of a similar nature would be admissible. This is exactly what *Lyle* intended to prohibit.

Finally, in both cases it can easily be argued there are more similarities than dissimilarities when looking at all of the facts, but being able to do so should not make the

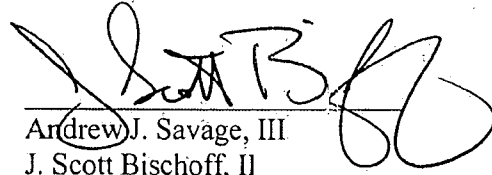
prior illicit conduct, the 404(b) evidence, admissible because this is exactly what the rule against propensity evidence is designed to protect regardless of the type of crime. As stated in *Kirton*, “the bar for admissibility under *Lyle* [is not lowered] simply because sexual crimes are involved.” 381 S.C. 7, 31, 671 S.E.2d 107, 119 (Ct. App. 2008) (quoting *State v. Tutton*, 354 S.C. 319, 328-329, 580 S.E.2d 186, 191). This Court’s rational for reversing the trial court in this case suggests otherwise, and therefore, counsel for McCombs urges this Court to reconsider its decision and find the trial court properly excluded the 404(b) evidence in this case.

Conclusion

Because the trial court properly engaged in the balancing test by weighing similarities versus dissimilarities of the 404(b) evidence and the alleged misconduct for which McCombs was on trial, the trial court did not commit error. Nor was the analysis preceding the trial court’s ruling clearly erroneous. As such, the trial court’s decision to suppress the weak 404(b) evidence should have been affirmed. For these reasons, this Court should reconsider its opinion in light of the clear error standard of review and the well-established 404(b) principles mentioned herein.

Accordingly, Petitioner Wayne McCombs respectfully requests this Court grant his Petition for Rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "ASB", is written over a horizontal line.

Andrew J. Savage, III
J. Scott Bischoff, II
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(843) 720-7470
Attorneys for the Respondent

This 3rd day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

SEP 03 2014

Appeal from Dorchester County
Kristi Lea Harrington, Circuit Court Judge

SC Court of Appeals

THE STATE,

PETITIONER,

V.

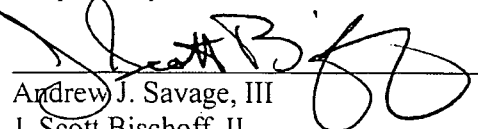
WAYNE MCCOMBS,

RESPONDENT

CERTIFICATE OF SERVICE

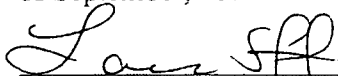
The undersigned attorneys hereby certify that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David A. Spencer, Esquire, at 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of September, 2014.

Respectfully submitted,


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Attorneys for the Respondent

SWORN TO BEFORE ME this 3rd day
of September, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 12/12/2023

The South Carolina Court of Appeals

The State, Appellant,

v.

Wayne McCombs, Respondent.

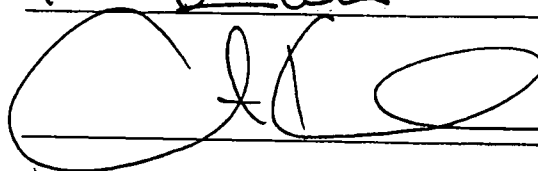
Appellate Case No. 2012-209947

ORDER

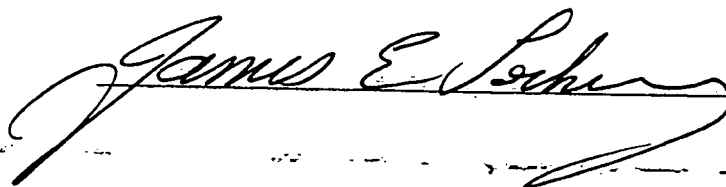
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____

J.

_____

J.

_____

J.

Columbia, South Carolina

cc:

Andrew John Savage, III, Esquire

David A. Spencer, Esquire

Jonathan Scott Bischoff, II, Esquire

FILED

September 18, 2014