

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

RECEIVED

NOV 13 2014

S.C. Supreme Court

THE STATE,

Respondent,

vs.

WAYNE DANIEL MCCOMBS,

Petitioner.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

140 N. Main Street, Suite 102
Summerville, SC 29483
(843) 871-2640

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

ARGUMENT

 The Court of Appeals correctly found that 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 prejudice6

CONCLUSION..... 18

STATEMENT OF ISSUE ON APPEAL

The Court of Appeals correctly found that 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).

The Court of Appeals reversed Judge Harrington's ruling and remanded for further proceedings consistent with its ruling. State v. McCombs, 410 S.C. 90, 762 S.E.2d 744 (2014).

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 (Victim). 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 Petitioner 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.

Victim was over at McCombs' house on August 1, 2009, for her grandmother's birthday party, which McCombs let Victim's family hold at his house. This party was attended by both adults and children, and both adults and children were in the pool. Victim was eight or nine years old at the time. Victim 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. Victim was more interested in swimming. Some adults were drinking alcohol at the party. Victim did not remember if

¹ ROA. p. 91, lines 5-11.

McCombs was drinking.² McCombs remained focused on Victim 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 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

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

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. [Victim] 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. [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 with the exception for the record . . .

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

ARGUMENT

The Court of Appeals correctly found that 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.

McCombs complains that the Court of Appeals erred in finding the trial court abused its discretion in not allowing testimony from McCombs' prior victim, Jessica. McCombs also argues that State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) was wrongly decided. This latter argument requires a significant rewriting of history, as Wallace was not a departure from this Court's established case law as alleged by McCombs, but instead a correction of an erroneous standard used in the Court of Appeals. Further, the Court of Appeals correctly noted that the trial court relied on insignificant dissimilarities in finding that a common plan or scheme did not exist, while ignoring markedly similar conduct between the charged act and prior bad act.

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 victims underwater and touched their vagina during a party at the same place, his pool, 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. In an Orwellian turn of phrase,³ McCombs attempts to label the similarities as

³ "The Ministry of Peace concerns itself with war, the Ministry of Truth with lies, the Ministry of Love with torture, and the Ministry of Plenty with starvation. These contradictions are not accidental, nor do they

“insignificant.” However, the conduct occurring during a pool party at McCombs’ house with neighborhood children while adults were present is not an insignificant similarity, but a remarkably similar, shared experience that results in proof of Jessica’s victimization being proof of Victim’s. This is the design of common scheme or plan under Rule 404(b), SCRE that existed long before Wallace was decided.

However, Wallace was a correction of a misstated standard of review employed by the Court of Appeals for a short time, and it constitutes an affirmation of this Court’s prior precedent rather than a departure. Wallace, 384 S.C. at 434, 683 S.E.2d at 278 n.5 (noting the Court of Appeals relied on State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) which “took an overly restrictive view of **our** case law” (emphasis added)).

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,

result from ordinary hypocrisy: they are deliberate exercises in doublethink.” George Orwell, 1984.

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. Victim 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. The Court of Appeals 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, this 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, this 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, this 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 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 Victim 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 counsel’s interpretation of the statement that was never admitted as evidence. 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 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 Court of Appeals astutely noted that Detective Miller's testimony generally bolstered Jessica's claims, noting Detective Miller confirmed the following:

(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.

McCombs, at 99, 762 S.E.2d at 749.

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. Frisinger, 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.”

“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.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). “All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.” Id. (citation and quotation marks omitted, emphasis in the original).

In the instant case, the trial court erred because it failed to make any evaluation of probative value of the prior bad act testimony and only made a conclusory evaluation of prejudice based 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, the petition for writ of certiorari should be denied. Should this Court grant certiorari, Respondent would respectfully request permission to brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

and

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 13, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

The Honorable Kristi L. Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

WAYNE DANIEL MCCOMBS,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Jonathan Scott Bischoff, II, Esquire
15 Prioleau St.
Charleston, SC 29402

This 13th day of November, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

NOV 13 2014

S.C. Supreme Court

November 13, 2014

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State of South Carolina v. Wayne Daniel McCombs
Appellate Case No: 2014-002194

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: J. Scott Bischoff, Esquire (2 copies)
Trisha Allen, (1 copy)