

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

SC Court of Appeals

Joseph Derham Cole, Sr., Circuit Court Judge

Indictments Nos. 2012-GS-23-06500, 2012-GS-23-06502, 2014-GS-23-00008A,
2014-GS-23-00009A

The State of South Carolina Respondent,

v.

Norman Quinton Hunt Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN FINDING THE TESTIMONY OF TELENA BURROW WAS ADMISSIBLE UNDER RULE 404(B) OF THE SOUTH CAROLINA RULES OF EVIDENCE AND RULE 403?

STATEMENT OF THE CASE

Norman Quinton Hunt was arrested on May 21, 2012 in Greenville County, South Carolina and charged with Criminal Sexual Conduct with a minor, victim under the age of 11 years first degree, Lewd Act upon a Child and other charges not relevant to this appeal.

Mr. Hunt was subsequently indicted by the Grand Jury of Greenville County for Criminal Sexual Conduct first degree – 2012GS2306500, Lewd Act upon a Child – 2012GS2306502 based upon warrants from May of 2012 and Criminal Sexual Conduct with a minor, victim under the age of 11 years, first degree – 2014GS2300008A and Criminal Sexual Conduct with a minor, victim 11 to 14 years of age, second degree – 2014GS2300009A which were direct presentments.

He was convicted of all charges and sentenced to life on Criminal Sexual Conduct first degree, thirty years on Criminal Sexual Conduct first degree, fifteen years on Lewd Act upon a child, and twenty years on Criminal Sexual Conduct second degree.

This appeal of all the convictions was timely filed and served.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THE TESTIMONY OF TELENA BURROW WAS ADMISSIBLE UNDER RULE 404(B) OF THE SOUTH CAROLINA RULES OF EVIDENCE AND RULE 403 OF THE SOUTH CAROLINA RULES OF EVIDENCE.

The State moved to have the jury hear the testimony of Telena Burrow, the victim from a previous conviction of Mr. Hunt's. On February 16, 1988 Mr. Hunt pled guilty to Criminal Sexual Conduct with a Minor. Ms. Burrow was the victim in that manner.

The State alleged evidence of the prior bad act was admissible under the common scheme or plan exception to the exclusion of prior bad act evidence under Rule 404(b), SCRE, and more probative than prejudicial under the Rule 403, SCRE, balancing test.

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. *State v. Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 278.

It is impossible to know what specific facts Judge Cole considered and weighed in making his decision as his ruling (transcript p. 293, l. 2 - p. 296, l.9), while it mentions the factors the court is to consider, does not make any specific factual findings concerning any of the factors set out in *Wallace* (*State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009)) or any other factors the court may have deemed relevant to its findings. There is only a recitation of the pertinent factors, a statement that the judge considered "... the record in that respect" (transcript p. 294, l. 13) and his rulings on the objections pursuant to Rule 404(b), SCRE, and Rule 403, SCRE.

Considering the factors set out in *Wallace* for the circuit court to consider based on the testimony of the alleged victim and Telena Burrows:

- (1) The alleged victim was aged 5 – 12 when the abuse is alleged to have occurred (transcript p. 91, l. 10-13); Ms. Burrow was around 11 (transcript p. 279, l. 19-23),
- (2) The alleged victim is the grand-daughter of Mr. Hunt, his son's daughter (transcript p. 90, l. 20-24); Ms. Burrow is his daughter (transcript p. 276, l. 17-20),
- (3) The locations of the abuse alleged by the alleged victim were the house (transcript p. 91, l. 15), his work (transcript p. 101, l. 4-6), the garage at his home (transcript p. 121, l. 22-24) and in his vehicles (transcript p. 103, l. 9-12); Ms. Burrows testified the locations were the house, work and a motel (transcript p. 282, l. 7-10),
- (4) Neither the alleged victim nor Ms. Burrow testified to any coercion or threats,
- (5) The alleged victim testified that Mr. Hunt's actions included touching her on the outside of and under her clothes (transcript p. 94, l. 2-8 and p. 100, l. 22 – p. 101, l. 3), oral sex (transcript p. 94, l. 12), touching him (transcript p. 96, l. 24 – 25) and making her watch porn videos (transcript p. 120, l. 22); Ms. Burrows testified the alleged victim would touch her breasts and private area on the outside of and under her clothes (transcript p. 280, l. 1-12), and have sexual intercourse with her (transcript p. 283, l. 23-24).

Age -The listing above, while it points out some of the dissimilarities does not highlight all of them. For instance the ages of the two overlap by only a year and the abuse of the alleged victim began at a

much younger age. That may be misleading though because Ms. Burrow did not come into the alleged victim's life until the age of 9 (transcript p. 278, l. 1-15) so he did not have the opportunity to abuse her until age 9. No abuse began, however, until she was 11 (transcript p. 279, l. 4-5). According to the alleged victim the abuse began not the first weekend she visited but almost immediately after (transcript p. 93, l. 16-23) and she went to his home almost every weekend (transcript p. 92, l. 12-15).

So in considering the age of the victims not only are their ages dissimilar when the abuse occurred even considering Ms. Burrow was not introduced to Mr. Hunt at as early an age as the alleged victim, the abuse did not begin at the same pace for each with a long period without abuse while Ms. Burrow lived with Mr. Hunt and an alleged immediate start with the alleged victim even though she was only visiting on weekends.

Relationship – the alleged victim is Mr. Hunt's grand-daughter. Ms. Burrow is his daughter.

Location - Ms. Burrow testified abuse occurred at the house, work and a motel. She did not allege the abuse took place in the garage or in a car. She testified the work location was South Carolina Tractor and Equipment on Laurens Road on a weekend when there was no one around (transcript p. 282, l. 11-18). While the transcript is unclear it appears the testimony may have been indicating any incident at his work occurred once.

The alleged victim did not testify to any abuse at a motel. Her testimony was Mr. Hunt worked at Van Lines and she would go to work with him and wait until everyone got off when the abuse would occur in his cubicle.

While at first glance saying each person testified about abuse taking place at his work sounds similar when the court considers that Ms. Burrow's recounting sounds like it may have been a limited occurrence but is certainly clear that anything that occurred at his work was done while there was no one around to see her or interact with her on a weekend yet the alleged victim spends many summer days visible to all other employees, available to speak and interact with them where they might have noticed any improprieties in the relationship, not hidden in anyway (transcript p. 101, l. 11 - p. 102, l. 2) with the allegation being she was abused after hours in a cubicle even though others could easily have come back in the building and there was security on the premises (transcript p. 142, l. 23 – p. 143, l. 22) the dissimilarity becomes evident as none of those factors existed in Ms. Burrow's testimony. So while 'at work' are the common words the situations described by them are dissimilar in many ways....different companies in different locations, number of times at each location, manner in which the child was hidden or shut off from others or not, and the likelihood of discovery immediately after hours at a business employing 50-100 people and security.

Ms. Burrow did not testify about any abuse occurring in the garage or any viewing of pornography. The alleged victim testified of watching pornographic movies and being abused in the garage (transcript p. 120, l. 24-p. 121, l. 16).

Ms. Burrow did not testify about any abuse occurring in the car or truck. The alleged victim testified at length about abuse in the car or truck at several locations and while the vehicle was moving on various roads in Greenville County and Spartanburg County. While the vehicle was in motion the alleged victim

alleged abuse including oral sex (transcript p. 104, l. 10-14). She alleged the vehicle was being driven on roads including Woodruff Road (transcript p. 105, l. 22-24). While parked the alleged abuse took place in Greenville at two Wal-Marts (transcript p. 106, l. 23-24 and transcript p. 107, l. 2-3), Haywood mall (transcript p. 107, l. 7-11) and an old garage near Bloom on Woodruff Road (transcript p. 107, l. 12 – p. 108, l. 2). In Spartanburg County abuse is alleged to have occurred at Spartanburg Mall (transcript p. 110, l. 3-7). These acts involving the car and truck were alleged to have been numerous and to have occurred in many locations. Ms. Burrow did not testify about any acts in a moving or parked vehicle.

While Ms. Burrow testified the locations were house, work and motel, the alleged victim never mentions a motel, describes a different scenario completely at a different workplace, and lists the garage and vehicles which Ms. Burrows does not.

Threats/coercion - There was no testimony of threats or coercion alleged by either witness. The solicitor argued that the absence of coercion or threats was a similarity, that the defendant's means of gaining acquiescence from both victims was force of his personality (transcript p. 290, l. 6-12). Aside from the fact there was no testimony to establish what the 'force of his personality' is, his argument points out one of the slippery slopes of utilizing an analysis of similar/dissimilar. When the court sets out factors to consider and when those factors are not present a party argues that absence of what the court said to look for makes a similarity. So when the court says, as it has in analyzing cases of this sort, that the use of coercion or threats may be a factor that would highlight a close degree of similarity between the prior bad act and the charged crime when neither is present one party wants to argue that the absence of what the court said to consider becomes an element to consider and makes the testimony of the prior bad act more likely. Following that 'logic' if no similarities were found in the testimony the evidence should come in without question.

It cannot be a point of similarity that there were no threats or coercion used in either case. While that may not make the cases dissimilar it cannot be utilized to support admission of the testimony.

Manner of occurrence – Both the alleged victim and Ms. Burrow testified about inappropriate touching by Mr. Hunt. From there their descriptions are completely dissimilar. Previously mentioned is the difference in the start of the alleged abuse – the alleged victim's immediately, Ms. Burrow's not for a year or more.

Ms. Burrow testified that she was only at his work on the weekend when no one was around but the alleged victim was brought during the day when she could interact with the employees and security. Further Ms. Burrow testified that the abuse took place while Mr. Hunt's wife was out of the house at work (transcript p. 281, l. 21-23). There is nothing in her testimony to indicate anyone was present during any abuse. The alleged victim testified that the abuse would happen while his wife was in the house (transcript p. 93, l. 5-15) or would come home (transcript p. 120, l. 10 – 19). She also testified that her brother Cory would be with them in the truck or car while abuse was occurring (transcript p. 104, l. 15 – p. 105, l. 11) and was at home at least once when it occurred as he walked in on them (transcript p. 118, l. 23 – p. 119, l. 10).

So the manner in which the abuse was hidden with Ms. Burrow, no one around or in the home or workplace, is missing completely with the alleged victim when the abuse is alleged to have occurred in

a vehicle with her brother and in the home with Mr. Hunt's wife there or at a workplace where she knew the other people and security. The lack of secretive behavior on the part of Mr. Hunt rose to the level, according to the alleged victim, of having her perform oral sex on him in a moving vehicle with family in the car on the way to Dollywood (transcript p. 111, l. 18 – p. 112, l. 6) and to having her straddle him when Mr. Hunt picked up the alleged victim and her brother (transcript p. 106, l. 7-13).

Ms. Burrow testified that Mr. Hunt abused her by touching and by forced intercourse (transcript p. 279, l. 6-8). Ms. Burrow described that "...he did go all the way and it hurt, and I cried and I bled." (transcript p. 284, l. 6-8). There was no testimony about touching Mr. Hunt's penis or oral sex.

The alleged victim testified that Mr. Hunt had her touch his penis (transcript p. 96, l. 24-25 and p. 98, l. 14-18) and p. 102, l. 7-9), perform oral sex on him (transcript p. 94, l. 12 and p. 103, l. 3-8 and p. 104, l. 10-14), and watch pornographic movies (transcript p. 120, l. 22 – p. 121, l. 14). Ms. Burrow did not allege any of these acts.

The alleged victim alleged Mr. Hunt took photos of her vagina and breasts (transcript p. 112, l. 21 – p. 113, l. 21) although no photos were introduced at trial. Ms. Burrow did not claim she was ever photographed.

The alleged victim alleged that Mr. Hunt did not have intercourse with her and that when he tried and it hurt her and she would cry he would stop (transcript p. 99, l. 3-9), virtually the exact opposite of Ms. Burrow's testimony that he did not stop no matter that it hurt and she cried and bled.

The dissimilarities in the factors outlined in Wallace (State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009)) outweigh the similarities and the testimony of Ms. Burrow should not have been allowed.

Prior to turning to the Rule 403, SCRE, analysis the court must undertake after finding evidence is admissible under Rule 404(b), SCRE, this court should consider that the second element of the foundation for evidence to be admissible under Rule 404(b) - that the State articulate the logical connection between the other act and one of the five purposes listed as exceptions to the rule that prior bad act evidence is inadmissible (State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) – does not exist here.

The State must explain how evidence of the other act will assist the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue of the case, it demonstrates how the jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. See State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009).

The exception under which the court allowed Ms. Burrows testimony is completely stated as 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. Past the similar/dissimilar analysis above these crimes are alleged to have occurred much more than a decade apart. The alleged victim was not born when the case

involving Ms. Burrow arose. The evidence introduced by the State did not tend to establish a common scheme or plan as it would be impossible to scheme or plan about a person not even in existence. And the idea that the scheme was to wait a decade and a half and then become involved in a crime with someone not yet born is ridiculous. The testimony was introduced solely to show propensity to act in conformity with, unfair prejudice that has traditionally not been allowed.

That consideration, whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. *State v. Smith*, 391 S.C. 353, 705 S.E.2d 491(Ct. App. 2011) is the crossover point to Rule 403, SCRE..

In this case the solicitor's argument was that since the prior conviction was introduced pursuant to the prosecution of indictment 2012GS2306500 alleging a violation of South Carolina Code section 16-3-655(A)(2) the factor of unfair prejudice was removed (transcript p. 285, l. 17-25). There is no authority for that position and it flies in the face of the rules.

Rule 404(b), SCRE, would require as its first element that "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892, 895 (2009). The admission of the prior conviction satisfies the first element of Rule 404(b), SCRE, but not the second and does not relieve the court of conducting a Rule 403 analysis.

While the temporal remoteness between the two acts does not bar the admission of the evidence of the prior bad act (*State v. McCombs*, Op.No. 5265, Ct. App. Filed August 20, 2014), the non-existence of the alleged victim should. This is not an armed robber later robbing a store not in existence at the time of his first robbery as it is reasonable to project other retail establishments might exist or come into existence to be robbed. To project that a child, even more specifically, a granddaughter, a granddaughter that would be available to be abused, will come into existence in the future is not reasonably likely and needs to be included in the weighing of probative value.

The State was permitted to introduce Mr. Hunt's prior conviction and that had prejudicial effect but that was done under a statute setting out a prior conviction or registry on the sex offender registry as an element to be proven by the State. Generally no party is permitted to go behind the prior conviction and elicit testimony about the conviction which 'speaks for itself'. The court could have instructed the jury that the admission of the prior conviction was solely to establish an element of one of the indictments and was not to be used for any purpose other than that, specifically not to be used as substantive evidence of guilt on that or any other charge. The limit that could have been placed on the prejudice of the prior conviction was lost once the court allowed Ms. Burrow to testify.

To have a victim of a prior conviction testify was crushing to Mr. Hunt's defense. Without that testimony the case would have turned on Ms. Hunt's testimony of having been abused for years in some of the most highly traveled parts of Greenville County and some of the most visible places in that county and Spartanburg County with her brother in the vehicle with no physical evidence of assault, no photographs of her, no pornography seized from Mr. Hunt and no witnesses other than her brother who did not completely support her testimony. With it the State was able to argue "The third point of

corroboration we have is a witness who testified this morning, Telena Burrow." (transcript p. 328, l. 17-18) and go on to argue that if he did it to her he did it to the alleged victim. Cross-examination of Ms. Burrow was virtually impossible as Mr. Hunt had pled guilty and no transcript and extremely limited records of the police investigation or statements were available. It was impossible to know if Ms. Burrow was changing what she had previously testified to or provided to the police in a statement.

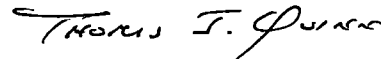
The prejudice of Ms. Burrow's testimony was far greater than the admissibility of Mr. Hunt's conviction and had no greater probative value for the jury.

The court should not have allowed Ms. Burrow's testimony under Rule 404(b), SCRE, or Rule 403, SCRE. The prejudicial effect of allowing that testimony denied Mr. Hunt a fair trial and was not harmless error.

CONCLUSION

For the reasons stated, this court should reverse the judgment of the circuit court.

Respectfully submitted,



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November 7, 2014



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June 2, 2015

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SC Court of Appeals

RE: State v. Norman Quinton Hunt – Appellate Case 2014-001092

Dear Ms. Kitchings,

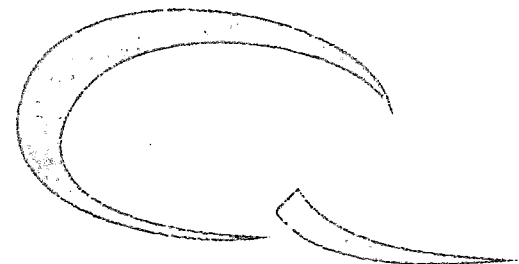
Enclosed please find a copy of the Initial Brief of Appellant redacted to comply with the April 15, 2014 Order of the South Carolina Supreme Court, along with proof of service, for filing in the above-referenced appeal. I have made no other changes to the brief so please note that the office address listed on the brief has changed to 109 Laurens Road Building 4 Suite D Greenville, SC 29607.

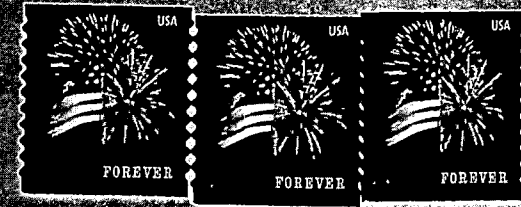
Very Truly Yours,

A handwritten signature in cursive script that reads "THOMAS J. QUINN".

Thomas J. Quinn
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TJQ/msj
Enclosures





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