

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

S.C. Supreme Court

J. C. Nicholson, Circuit Court Judge

2010-GS-10-07730

2010-GS-10-07731

Appellate Case No. 2013-000179

State of South Carolina Respondent,

v.

Venancio Diaz Perez Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court commit reversible error under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and Rules 403 & 404(b), SCRE, by allowing introduction of unrelated prior bad acts with a different minor and by excluding evidence of prior bad acts from the same witness that did not conform to the accuser's testimony?
- II. Did the Trial Court commit reversible error under Rules 403 & 611, SCRE, and the Confrontation Clause by refusing to allow the Appellant to fully cross-examine the mother of the State's Lyle witness about the visa she received, with the assistance of the Solicitor's office, because she was the mother of a crime victim?
- III. Was the Trial Court's imposition of maximum, consecutive sentences after the accused's refusal of an off-the-record plea offer vindictive and a violation of the accused's due process rights, when the Trial Court supports its decision with evidence that was not objective, relevant, reliable, and trustworthy?

STATEMENT OF THE CASE

On July 15, 2010, Appellant Venancio Diaz Perez was arrested for Criminal Sexual Conduct with a Minor ("Minor 1"). (R. p. 12). He was formally indicted for Criminal Sexual Conduct with a Minor ("CSC")¹ and Lewd Act on a Minor ("Lewd Act")² on November 8, 2010. (R. pp. 10, 16). The cases were tried together January 14-18, 2013, before Judge J.C. Nicholson in Charleston County, South Carolina. (R. p. 18). The State was represented by Deborah Herring-Lash and Jennifer McCoy of the Charleston County Solicitor's Office, and Perez was represented by Andrew Grimes and Christina Parnell of the Charleston County Public Defender's Office. (R. p. 18).

The jury acquitted Perez of CSC, but did find him guilty of the lesser-included offense of Assault and Battery of a High and Aggravated Nature ("ABHAN")³ and Lewd Act. (R. pp. 9, 15, 553-54) The Court sentenced Perez to ten years imprisonment for the former, and fifteen years imprisonment for the latter. (R. pp. 8, 14, 554-56). The Court ordered these sentences to be served consecutively. (R. pp. 8, 14, 554-56). Perez served his Notice of Appeal on January 25, 2013. (R. p. 6-7).

¹ S.C. Code § 16-3-655(A) (Supp. 2010).

² S.C. Code § 16-15-140 (Supp. 2010).

³ State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000).

ARGUMENT

Appellant Venancio Diaz Perez is entitled to a new trial. The State bolstered their case with the unnecessary and inadmissible propensity evidence of another minor accuser. The Trial Court then refused to allow Perez to investigate the bias of this accuser's mother, who, like the victim's mother, was seeking legal status in exchange for this testimony. Finally, the Trial Court punished Perez with maximum, consecutive sentences because he refused the plea offer made by the Trial Court. These errors, jointly and independently, demand that this Court reverse and remand this action to the Court of General Sessions for a new trial.

I. The Trial Court committed reversible error in admitting Minor 2's highly prejudicial testimony of prior bad acts.

Perez's arrest arises out of the allegations of Minor 1, who was being babysat by his wife, Angelica Carmona at the couple's trailer (later house) in North Charleston. (R. pp. 10-13, 16-17, 134, 432, 434, 438-39). In the course of trial, the State sought to introduce the testimony of Minor 2, another minor female cared for by Carmona who accused Perez of similar, and worse, acts that the State refused to prosecute.⁴ (R. p. 552). Though Minor 2's testimony was subject to a limiting instruction (R. p. 249), her testimony hopelessly tainted any hope Perez had for a fair trial and merits a reversal by this Court.

⁴ Perez and Carmona had a daughter roughly the same age as the Minors; Charleston County Department of Social Services conducted an investigation of possible abuse of this child, and found no proof of abuse. (R. p. 447).

A. Evidence of prior bad acts – law.

Generally, evidence of prior crimes or bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending 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 person charged with the present crime. See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923); Rule 404(b), SCRE. For the common scheme or plan exception to apply, a close degree of similarity or connection between the prior bad act and the crime charged is necessary. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). The connection between the prior bad act and the charged crime must be more than just a similarity, as a common scheme or plan concerns more than just the commission of similar crimes; some connection between the crimes is necessary. Id. Under the common scheme or plan exception, there must be a close degree of similarity or connection between the prior bad act and the crime charged which enhances the probative value of the evidence so as to outweigh its prejudicial effect. State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997). Lyle demands that the defendant be given the benefit of the doubt where this connection is not clearly perceived. State v. Tutton, 354 S.C. 319, 327, 580 S.E.2d 186, 190 (Ct. App. 2003).

If the prior bad act is not the subject of a conviction, the trial court must first determine if clear and convincing evidence exists of the act. State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). This determination is reviewed under a “clearly erroneous” standard. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). After determining clear and convincing evidence supports a finding the defendant committed a

prior bad act, the court must determine whether the evidence falls within the common scheme or plan exception. Tutton at 326, 580 S.E.2d at 190. This determination is a matter of law reviewed *de novo*. Id. at 326-27, 580 S.E.2d at 190.

The South Carolina Supreme Court has set forth the following non-exclusive factors when determining whether there is a close degree of similarity between the bad act and the crime charged in a sexual abuse case: (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. 428, 433-34, 683 S.E.2d 275, 277-78 (2009).⁵

Lyle requires the proponent of common scheme or plan evidence to answer a simple threshold question: What is the common scheme or plan evidence offered to prove? If the answer is some key fact, such as identity, then, the court should proceed with a similarity analysis. If the answer is that common scheme or plan evidence is *only* offered to show the crimes are similar, then the court need proceed no further, because what is really being offered is inadmissible character evidence. If all that the common scheme or plan proves is that the defendant committed an act in the past and that makes it more likely he committed the charged crime, then the evidence is nothing more than character and propensity evidence trying to sneak around Rule 404(a), SCRE, through Rule 404(b)'s back door. Without asking this basic first question, there is no logically

⁵ The Appellant does not believe these factors, and the Supreme Court's decision in Wallace, are consistent with the holdings of Lyle, but this is an argument for the Supreme Court. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 12 (2nd ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

consistent way to differentiate inadmissible propensity evidence from admissible common scheme or plan evidence; otherwise, the exception that is 404(b) swallows 404(a)'s rule.

The Supreme Court recognized the need to return to the basic reasoning of Lyle in State v. Fonseca, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011). The Supreme Court adopted the Court of Appeals' decision as its own in this opinion. Id. Fonseca recognized the "thin disguise" of character evidence costumed in the threadbare garb of motive, intent, or common scheme or plan evidence in a child sex case. State v. Fonseca, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009).

South Carolina appellate courts have examined situations that clearly fit the mold of a "scheme or plan". In State v. McClellan, a father began abusing each of his daughters about the time they reached age 12. 283 S.C. 389, 323 S.E.2d 772 (1984). The father would enter their bedroom late at night, waking them, and taking one of his three daughters to his bedroom. Id. There he would explain the Biblical verse that children are to "Honor thy Father", and would also indicate he was teaching them how to be with their husbands. Id. In State v. Weaverling, an uncle engaged in a grooming scheme with his nephew. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999). The accused in Weaverling showed pornographic materials to the child repeatedly while performing oral sex upon him, which occurred over 100 times. Id. In both of these cases, it is clear that the prior bad acts are introduced not for proof of propensity to commit crimes, but for the inference that the defendant "developed a criminal scheme and employed that scheme." Tutton at 331, 580 S.E.2d at 192.

B. Lyle hearing testimony.

Because the State wished to introduce testimony of alleged misconduct with Minor 2, the Trial Court conducted a hearing pursuant to State v. Lyle prior to trial, where the Minors presented the following testimony:

Minor 1 (victim)

(1-a) Minor 1 testified that once when she went inside her babysitter's trailer to retrieve a PlayStation Portable ("PSP") from Perez's daughter's room, Perez approached her, pulled her into a closet, and digitally penetrated her vagina. (R. pp. 29-30).

(1-b) Minor 1 testified that once when went inside her babysitter's trailer to retrieve a PSP from Perez's daughter's room while the family was at a food truck, Perez approached her, pulled her into a closet, and digitally penetrated her anus. (R. pp. 31-32).

(1-c) Minor 1 testified that once when her friends were inside the babysitter's trailer pretending to be singers in front of the television ("playing like superstars"), Perez exposed his penis to her. (R. pp. 33, 51-52).

(1-d) Minor 1 testified that once at the babysitter's house,⁶ Perez asked Minor 1 to assist him in repairing a wall. After repairing the wall, Perez refused to allow Minor 1 to leave and touched her breasts and vagina and bit her on her breast. (R. pp. 33-34, 50-51).

(1-e) Minor 1 testified that once at the babysitter's house, Perez chased her in an attempt to "touch" her and forced her to hide under the bed from him. (R. pp. 35, 52).

⁶ Carmona originally lived in a trailer, but eventually moved to a house in North Charleston. (R. pp. 13, 32, 139, 202).

(1-f) Minor 1 testified that once she went inside the babysitter's house playing hide-and-seek and decided to hide in a closet. Minor 1 testified that Perez was in that closet and that he grabbed her and touched her vagina. (R. pp. 35-36, 53-54).

(1-g) Minor 1 testified that Perez would attempt to bribe her with money. (R. pp. 49-50).

Minor 2 (Lyle witness)

(2-a) Minor 2 testified that once she fell asleep watching High School Musical at the babysitter's house and Perez touched her vagina. (R. pp. 62-63).

(2-b) Minor 2 testified that once Perez touched her vagina and anus in a bedroom near the kitchen of the babysitter's house. (R. p. 63). However, under cross-examination, Minor 2 admitted that she alleged that Perez had either vaginal or anal intercourse⁷ with her in her initial forensic interview. (R. pp. 73-75, 85-86). In cross-examination, it became apparent in her initial forensic interview she stated Perez had threatened her with a knife to perform these acts. (R. pp. 85-86).

(2-c) Minor 2 testified that Perez threatened her ("he'll keep being mean to me") to keep her quiet about his acts. (R. p. 64). However, under cross-examination it became apparent that in her initial forensic interview she stated that Perez had threatened her with a knife. (R. pp. 75, 86).

(2-d) Under cross-examination, Minor 2 testified that Perez did *not* attempt to bribe her with gifts. (R. pp. 78, 93).

⁷ It is worthwhile to note that Minor 2 would have been approximately eight years old at this time. (R. pp. 13, 229, 504). Presumably, such an act would have left injury that would have been noticeable by medical personnel, as State's witness Dr. Anne Abel testified that a larger object would likely cause more damage. (R. p. 353). However, the State chose not to go forward with a prosecution for these acts. (R. p. 552).

(2-e) Under cross-examination, Minor 2 testified that Perez did *not* attempt to bite her. (R. p. 78).

(2-f) Under cross-examination, Minor 2 testified that Perez did *not* attempt any untoward acts while she was playing games with other children. (R. p. 80).

(2-e) Under cross-examination, Minor 2 testified that Perez “touched” her when she was helping him repair a doorknob. (R. pp. 80-81).

The Trial Court found that under Wallace, that there was a close degree of similarity between the bad acts and those accused of Perez, specifically finding a similarity in: (1) the ages of the Minors, (2) the relationship between the Minors and Perez, (3) the location of the alleged abuse, (4) “the manner of the occurrence, such as type of sexual battery”. (R. pp. 113-14). The Trial Court further found under Rule 403, SCRE, that this testimony was more probative than prejudicial. (R. p. 114). The Trial Court also excluded any testimony of Minor 2 regarding her allegations of intercourse with Perez.⁸ (R. p. 114).

C. Trial testimony.

Minor 1 (victim)

Minor 1 was called first as a witness. With some notable exceptions, her trial testimony was largely consistent with her Lyle hearing testimony:

(1-a) Minor 1 testified that once when she went inside her babysitter’s trailer to retrieve a PlayStation Portable (“PSP”) from Perez’s daughter’s room, Perez approached her, pulled her into a closet, and digitally penetrated her vagina. (R. pp. 140-41). This was substantially similar to her Lyle hearing testimony. (R. pp. 29-30).

⁸ The State nonetheless presented this evidence to the Trial Court during sentencing. (R. p. 552).

(1-b) Minor 1 testified that once when went inside her babysitter's trailer to retrieve a PSP from Perez's daughter's room while the family was at a food truck, Perez approached her, pulled her into a closet, touched her vagina and anus without penetration. (R. pp. 141-42). This differed from her Lyle hearing testimony, where she testified that Perez digitally penetrated her anus. (R. pp. 31-32).

(1-c) Minor 1 testified that once when her friends were inside the babysitter's trailer pretending to be singers in front of the television ("playing like superstars"), Perez exposed his penis to her. (R. pp. 147-49). This was substantially similar to her Lyle hearing testimony. (R. pp. 33, 51-52).

(1-d) Minor 1 testified that once at the babysitter's house, Perez asked Minor 1 to assist him in repairing a wall. After repairing the wall, Perez refused to allow Minor 1 to leave and touched her breasts and vagina and bit her on her breast. (R. pp. 150-51). This was substantially similar to her Lyle hearing testimony. (R. pp. 33-34, 50-51).

(1-e) Minor 1 testified that once at the babysitter's house, Perez chased her in an attempt to "touch" her and forced her to hide under the bed from him. (R. p. 155). This was substantially similar to her Lyle hearing testimony. (R. pp. 35, 52).

(1-f) Minor 1 testified that once she went inside the babysitter's house playing hide-and-seek and decided to hide in a closet. Minor 1 testified that Perez was in that closet and that he grabbed her and touched her vagina and anus. (R. pp. 152-53). This differed from her Lyle hearing testimony, where she testified that Perez only touched her vagina. (R. pp. 35-36, 53-54).

(1-g) Minor 1 testified that Perez would attempt to bribe her with money to allow him to continue touching her. (R. p. 156). This was substantially similar to her Lyle hearing testimony. (R. pp. 49-50).

Minor 2 (Lyle witness)

Minor 2 testified several days later, and was offered subject to the Trial Court's restriction that Minor 2's allegations of intercourse were to be excluded. (R. p. 226). Her testimony differed greatly than that proffered at the Lyle hearing:

(2-a) Minor 2 testified that once she fell asleep watching High School Musical at the babysitter's house and Perez touched her vagina ("top privates"). (R. pp. 235-36). This was substantially similar to her Lyle hearing testimony. (R. pp. 62-63).

(2-b) Minor 2 testified that once Perez touched her vagina and anus in a bedroom near the kitchen of the babysitter's house. (R. pp. 233-35). Minor 2 *did not* testify that Perez had intercourse with her in this encounter, nor did she testify that he had threatened her with a knife to make her enter this bedroom, as she did in her forensic interview. (R. pp. 85-86).

(2-c) Minor 2 testified that Perez threatened her ("he'll do something bad to me") to keep her quiet about his acts. (R. pp. 238-39). Minor 2 *did not* testify that Perez threatened her with a knife, as she did in her forensic interview. (R. pp. 75, 86).

(2-d) Minor 2 *did not* testify that Perez attempted to bribe her with gifts.

(2-e) Minor 2 *did not* testify that Perez attempted to bite her.

(2-f) Minor 2 *did not* testify that Perez attempted any untoward acts while she was playing games with other children (e.g. hiding in a closet while they were playing hide-and-seek).

(2-e) Minor 2 *did not* testify that Perez “touched” her when she was helping him repair a doorknob, as she did in the Lyle hearing. (R. pp. 80-81).

Perez renewed his objection to this testimony, but this objection was overruled and the Trial Court issued a limiting instruction to the jury. (R. pp. 240, 249). Perez subsequently moved for a mistrial.⁹ (R. p. 468).

D. There is no evidence of any criminal scheme or plan.

The State presents no logical connection between the abuse of Minor 1 and Minor 2 that evidences any criminal scheme or plan. The only similarity¹⁰ between the abuse is that it occurred; there is no evidence of grooming (as in Weaverling) and no evidence of a plan to abuse the Minors (as in McClellan). The differences of the testimony of the Minors further reinforce a lack of scheme or plan:

- a) Minor 1 alleged abuse at the babysitter’s trailer and house, while Minor 2 only alleged abuse at the house.
- b) Minor 1 did not allege Perez threatened to keep her quiet, while Minor 2 did make this allegation.
- c) Minor 1 alleged that Perez attempted to bribe her with gifts, while Minor 2 made no such allegation.
- d) Minor 1 alleged that Perez bit her during the commission of one of his acts, while Minor 2 made no such allegation.

⁹ This motion was made on January 17, 2013, (two days later), but the Trial Court acknowledged that this issue was preserved for appeal. (R. p. 468)

¹⁰ The Trial Court excluded Minor 2’s allegations of intercourse with Perez. (R. p. 114). While this exclusion was justified by the Trial Court by citing Wallace, Perez believes that such a redaction of the testimony is impermissible, as set forth by the Court of Appeals in Wallace. See State v. Wallace, 364 S.C. 130, 141, 611 S.E.2d 332, 338 (Ct. App. 2005) (“The law should not permit a trial judge to make similar that which is different by redacting a part of the testimony.”).

The only relevant similarities in this case are the ages of the Minors and the fact they took place at a babysitter's house. The lack of connection between these two acts is exactly the situation where Lyle demands that a defendant be given the benefit of the doubt.

The admission of Minor 2's testimony was not harmless and has caused Perez significant prejudice. Much like in Tutton, the evidence against Perez consisted of the Minors' accusations against him. Tutton at 334, 580 S.E.2d at 194. Also like Tutton, there was no medical evidence of abuse, and Perez denied the accusations made against him. Id. Without the testimony of Minor 2, there is not overwhelming evidence of Perez's guilt, especially in light of the fact that the jury acquitted Perez of CSC with Minor 2's testimony admitted and the questions of Minor 1's truthfulness. (R. pp. 205, 460-61).

The Trial Court's limiting instruction (R. p. 249 ll. 1-15) could not cure the prejudice to Perez's defense. It does not provide sufficient detail on what exactly constitutes a "common scheme or plan" and omits important language clarifying this exception found in Tutton ("...part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred...").

Accordingly, the testimony of Minor 2, even in the edited and limited form presented to the jury, does not provide proof of any plan or scheme to perpetuate abuse of the Minors; its prejudice to Perez's defense warrants reversal of the Trial Court and a new trial.

II. The Trial Court committed reversible error in excluding evidence of witness Amanda Maldonado's potential bias.

The mothers of Minor 1 and Minor 2, who were both undocumented immigrants at the time of Perez's arrest, both received assistance from the State in preparing applications for U Visas, which both women received because of their daughters' cooperation with the State. The Trial Court limited cross-examination of Minor 2's mother regarding her U Visa application and her immigration status; this was important evidence of bias and its exclusion violates Perez's rights under the Confrontation Clause and merits him a new trial.

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); U.S. Const. amend. VI; U.S. Const. amend. XIV. "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses § 560a (1957)); see also Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

A U Visa ("U nonimmigrant status") legalizes the status of an undocumented immigrant who "...been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity..." 8 C.F.R. § 214.14(b)(3). Such a *quid pro quo* transaction is a powerful indicator of bias on the part of a witness, and other courts have recognized its importance. In State v. Valle, the lower court excluded the victim's testimony regarding her seeking and obtaining a U Visa as a

victim of crime. 298 P.3d 1237, 1240 (Or. Ct. App. 2013) (en banc). The Oregon Court of Appeals reversed and remanded for a new trial, finding that:

...[the victim] had applied for a U visa on the ground that she was a victim of abuse. From that testimony alone, a jury could infer that [the victim] had a personal interest in testifying that she had been abused. Simply put, [the victim] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.

Valle at 1243.

Alejandra Jimenez, mother of Minor 1, testified that the City of North Charleston Police Department's Victim Advocate told her about the possibility of her obtaining a U Visa and assisted her with preparing the application. (R. pp. 213-14, 220-22, 227-28). The Victim Advocate also testified that she encouraged Jimenez to apply and that the Solicitor's office signed off on Jimenez's application. (R. pp. 296-97, 300-302). However, the Trial Court excluded any testimony from Amanda Maldonado, mother of Minor 2, regarding her immigration status and her U Visa pursuant to Rule 403, SCRE, Rule 611, SCRE, and State v. Jenkins, 322 S.C. 360, 474 S.E.2d 82 (Ct. App. 1996).¹¹ (R. pp. 259-60, 265-66). Maldonado's proffered testimony indicates that her U Visa was also encouraged and facilitated by the Solicitor's office. (R. pp. 263-65).

The jury that decided Perez's fate was *not* aware that *both* Alejandra Jimenez, mother of Minor 1, and Amanda Maldonado, mother of Minor 2, would not be legal residents of the United States but for the U Visas the State was helping them obtain. Maldonado applied, with the encouragement and assistance of the State, for an opportunity to legally stay in this country on the basis that her daughter had been abused.

¹¹ The Trial Court refers to State v. Jenkins as "State v. Jennings" in the record. (R. p. 265).

Based on this fact, a jury could reasonably infer that she had a personal interest in making certain her daughter testified in a manner consistent with her application for that opportunity. See Valle at 1243. However, the Trial Court excluded all of Maldonado's testimony related to her immigration status and her efforts to obtain a U Visa. (R. pp. 260, 265). There was no physical evidence of Perez's alleged misconduct with the Minors, and DSS found no abuse occurred with his daughter (R. pp. 353, 390, 447). The jury had a right to know that Maldonado was receiving assistance from the State in exchange for her daughter's testimony; it would have been a powerful closing argument to point out that *all* testimony against Perez was "bought and paid for" by the State via U Visas.¹² The exclusion of this critical and highly relevant testimony prevents Perez from fully confronting the witnesses against him and mandates that this Court reverse the Trial Court and remand for a new trial.

III. The sentence imposed by the trial court was vindictive and violated Perez's due process rights.

A criminal must be sentenced based on the crime he was convicted of, not a crime he was acquitted of. Further, a criminal defendant must never be punished for exercising his right to a jury trial. Unfortunately, the Trial Court violated both of these proscriptions and Perez is entitled to, at a minimum, resentencing before another judge.

A. The Trial Court impermissibly punished Perez for exercising his right to a jury trial.

It is a due process violation to punish a person for exercising a protected statutory or constitutional right. State v. Higgenbottom, 344 S.C. 11, 14-15, 542 S.E.2d 718, 720

¹² This is especially relevant in light of the allegations of dishonesty on the part of the Minors. (R. pp. 205, 460-61).

(2001). A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See Alabama v. Smith, 490 U.S. 794 (1989); Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). The South Carolina and United States Constitutions grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury. U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

The sentencing judge's mere disavowal of considering the defendant's assertion of his right to a jury trial is insufficient to avoid reversal in South Carolina, without an otherwise appropriate basis appearing in the record. In State v. Brouwer, despite the trial judge's comments that he would never punish someone for exercising his or her right to a jury trial, the majority opinion found the trial judge improperly considered that fact during sentencing, "especially since the record fail[ed] to reflect an otherwise appropriate basis for Brouwer's disparate sentence." 346 S.C. 375, 388, 550 S.E.2d 915, 922 (Ct. App. 2001); cf. North Carolina v. Pearce, 395 U.S. 711, 726 (1969) ("whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear... so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."); Higgenbottom (A defendant's due process rights are violated when, in response to the defendant's motion for reconsideration and without any reasons on the record, the judge increases his sentence.). However, any basis for the court's sentence placed on the record by the judge must be based on "relevant, reliable and trustworthy" evidence. State v. Gullledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997).

Perez was sentenced to fifteen years for his conviction for Lewd Act and ten years for ABHAN. (R. pp. 8, 14, 554-56). These were the maximum sentences for each crime, and the Trial Court ordered Perez to serve them consecutively, thus effectively sentencing him to twenty-five years in prison. (R. pp. 8, 14, 554-56). Following the imposition of this sentence, the following colloquy took place between the Trial Court and Perez's trial counsel:

Defense Counsel: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.

Trial Court: I'm sorry, what now?

Defense Counsel: We object to the sentence being run consecutively as being vindictive and punishing Mr. Perez for going to trial. I think there were -- and this is where I'm a little reluctant to go into detail but we did have -- I think I have to, to preserve Mr. Perez's rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas --

Trial Court: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record. I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.

Defense Counsel: Yes, sir.

Trial Court: That's what I told you.

Defense Counsel: Yes, sir.

Trial Court: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?

Defense Counsel: Yes, sir.

Trial Court: Because if it is it's the last time I will speak with you without a court reporter present.

Defense Counsel: I apologize. But, yes, sir. I think I have to.

Trial Court: Pardon? It was not an in-camera hearing. I was trying to facilitate the disposition of this case.

Defense Counsel: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.

Trial Court: Pardon?

Defense Counsel: That's an accurate summary of what was said.

Trial Court: Okay. Now, do you want to make a motion on that, what I put on the record?

Defense Counsel: Yes, sir.

Trial Court: What's your motion?

Defense Counsel: That running these sentences consecutively is punishing Mr. Perez for his right to go to trial.

Trial Court: Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty. The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

Defense Counsel: Yes, sir.

Trial Court: All right. Motion denied. Anything else?

Defense Counsel: No, sir.

Trial Court: Thank you very much.

(R. p. 554 l. 7 – p. 556 l. 17).

The Trial Court offered Perez a sentence of ten to fifteen years, and dismissal of his other charges, in exchange for a guilty plea to Lewd Act. (R. pp. 554-55). After this deal was refused, and after the jury returned a verdict finding him not guilty of CSC (but guilty of ABHAN) and guilty of Lewd Act, the Trial Court sentenced him to at total of twenty-five years in prison. (R. pp. 8, 14, 554-56). This scenario on its face smacks of punishment for Perez exercising his right to trial by jury. Apparently recognizing this concern, the Trial Court did attempt to place on the record grounds for its decision (R. p. 556 ll. 5-12), but these grounds are not objective and do not rise to the level of "relevant, reliable and trustworthy" evidence:

First, the Court incorrectly found that there was digital penetration. In order to find a person guilty for CSC of any degree, there must be a finding of “sexual battery”. S.C. Code § 16-3-655 (Supp. 2010). “Sexual battery” is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body...” S.C. Code § 16-3-651(h) (Supp. 2010). Digital penetration is considered sexual battery. (R. pp. 11, 124, 337). The jury made no finding of “sexual battery” (*i.e.* digital penetration) necessary for a conviction for CSC; in fact, it acquitted Perez of this crime. (R. p. 536). The jury instead found Perez guilty of ABHAN, which required no finding of “sexual battery” (*i.e.* digital penetration). (R. pp. 337, 524-25, 536). This is problematic, as the United States Supreme Court has held that any fact that leads to enhancement of a sentence must be proven beyond a reasonable doubt to a jury. Apprendi v. New Jersey, 530 U.S. 466 (2000). Accordingly, it was improper for the Trial Court to consider this finding in sentencing.

Second, the Trial Court incorrectly considered Perez guilty of CSC. The Trial Court stated on the record that it believed Perez to be “guilty of all the charges”, presumably including CSC (which he was acquitted of). (R. pp. 536, 556).

Third, the Trial Court incorrectly considered the criminal status of Minor 1: “The jury has found her [Minor 1] not guilty.” (R. p. 556). Minor 1 was not on trial in this matter, and her innocence or guilt is irrelevant.

Finally, even though the Trial Court previously excluded testimony of alleged intercourse between Minor 2 and Perez, this testimony was brought up by the State during sentencing. (R. pp. 114, 552).

The imposition of a “trial tax” in sentencing, combined with a lack of objective, relevant, reliable, and trustworthy evidence to support the enhanced sentence, merits a new trial, or at the minimum a new sentencing hearing before a different judge.

B. The record reflects evidence of partiality and prejudice on the part of the Trial Court

While sentencing judges are given deference to their decisions, an appellate court may reverse such a decision in the event of a constitutional violation or that the sentencing judge acted with partiality, prejudice, or pressure. Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995). The Trial Court stated on the record that it believed Perez to be “guilty of all the charges”, presumably including CSC, which he was acquitted of. (R. pp. 536, 556). The Trial Court stated on the record that “there was penetration, digital penetration”, when this was an element of CSC, which he was acquitted of. (R. pp. 536, 556). The plea offer (from the Trial Court, not the State) was made off-the-record, in violation of ABA Standards and is evidence of pressure to accept a guilty plea.¹³ The comment: “The jury has found her [Minor 1] not guilty” indicates a

¹³ The off-the-record plea offer by the Trial Court is a violation of ABA Standard 14-3.3(f):

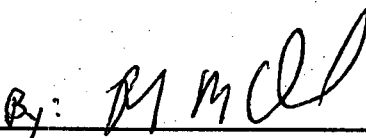
All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981). While this standard is not the law of South Carolina, it is persuasive and instructive. See State v. Blakely, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct. App. 2013). While the Appellant believes that

bias toward the victim, and thus the State. The comment: "...it's the last time I will speak to you without a court reporter present" also indicates bias against the defense. Such prejudice, partiality, and pressure merits at new trial, or at the minimum a new sentencing hearing before a different judge.

CONCLUSION

Critical errors have occurred that have prevented Perez from getting the fair trial he is entitled to under the law. Perez would ask this Court to reverse the Trial Court and remand this action to the Court of General Sessions for a new trial, or at the minimum a new sentencing hearing before a different judge.

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June 10, 2014.

violation of this standard should constitute pressure *per se*, this is an argument that must be made before the Supreme Court. See Toal, *supra*.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

J. C. Nicholson, Circuit Court Judge

Appellate Case No. 2013-000179

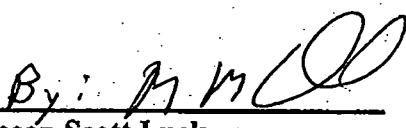
State of South Carolina Respondent,

v.

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The undersigned certifies the Final Brief and Final Reply Brief comply with
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J.C. Buddy Nicholson Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

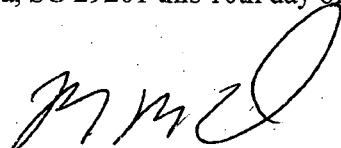
VENACIO DIAZ PEREZ,

APPELLANT

APPELLATE CASE NO. 2013-000811

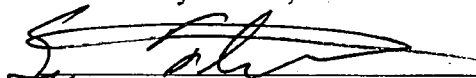
CERTIFICATE OF SERVICE

I certify that a true copy of the Final Brief of Appellant and Final Reply Brief of Appellant in the above referenced case has been served upon Amie L. Clifford, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 10th day of June, 2014.



Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 10th day of June, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions
J.C. Nicholson, Circuit Court Judge

Court of Appeals Case No. 2013-000179

RECEIVED

JUL 23 2015

S.C. Supreme Court

The State of South Carolina,

Respondent,

v.

Venancio Diaz Perez,

Appellant.

Final Brief of Respondent

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STATEMENT OF ISSUES

I.

Did the trial court err in admitting evidence of the other bad acts committed by Appellant against Minor 2 under Rule 404(b), SCRE, when the acts were established by clear and convincing evidence and they were admissible to show the existence of a common scheme or plan and, under Rule 403, SCRE, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice?

II.

Did the trial court err in prohibiting the defense from questioning Ms. M, the mother of Minor 2 about her immigration status and U visa application when it was irrelevant?

III.

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Appellant's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Appellant was convicted and the evidence presented, did the trial court err in sentencing Appellant?

STATEMENT OF THE CASE

Appellant was indicted for the offense of lewd act on a minor (Indictment 2010-GS-10-7731) and criminal sexual conduct with a minor in the first degree (Indictment 2010-GS-10-730). He pled not guilty and proceeded to trial by jury on January 14, 2013. At the conclusion of his trial, the jury found him guilty of lewd act on a minor and assault and battery of a high and aggravated nature, as a lesser-included offense of criminal sexual conduct with a minor in the first degree. The trial court thereafter sentenced Appellant to a 15-year term of incarceration on the lewd act conviction and a consecutive 10 year sentence on the assault and battery of a high and aggravated nature conviction. The trial court also ordered, on the lewd act conviction, that Appellant was to be placed on the Central Registry of Child Abuse and Neglect.

This appeal follows.

ARGUMENT

I.

Inasmuch as the bad acts against Minor 2 were established by clear and convincing evidence and evidence of such was admissible to show the existence of a common scheme or plan, the trial court properly admitted evidence of the other bad acts committed by Appellant under Rule 404(b), SCRE. The evidence was also properly admitted under Rule 403, SCRE, because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. (Issue

I)

Factual Background

After the jury was selected and released for the day, the trial court held a hearing on the State's motion to allow evidence of other bad acts committed by Appellant on Minor 2, who was not the victim in crimes for which Appellant was on trial. During the hearing, the State called both Minor 1 and Minor 2 to testify.

In Camera Hearing – Testimony of Minor 1

Minor 1 testified as to her birthdate. (R. p. 27, lines 19-21; Supplemental List of Redacted Identifiers.) When she was about seven years old, she used to be taken care of by a babysitter, named Angelica, in Angelica's family home. When Minor 1 started going to Angelica's, Angelica lived in a trailer, but she later moved into a house. (R. p. 28, lines 2-6; p. 28, lines 18-23.) Angelica had two daughters, Minor 3 and her younger sister. Living with Angelica's family was a man, who was a friend of her husband. (R. p. 28, lines 7-13.) Minor 1 testified that she did not go to Angelica's anymore because Angelica's husband hurt her. (R. p. 28, lines 14-17.) The first time he hurt her was in the

trailer, and he hurt her more than once in the trailer. (R. p. 28, line 21 – p. 29, line 3.)

Asked to tell the judge about one time he hurt her in the trailer, Minor 1 said that one day while she and Minor 3 were playing outside, Minor 3 talked about getting a PSP, which is a little portable game. Minor 1 then went inside to get her PSP. (R. p. 29, lines 4-14.) Her brother was sleeping on the couch in the living room, and she went into Minor 3's room because that is where she had left her PSP. (R. p. 29, lines 14-17.) As she was sitting on the bed, she was grabbed and taken into the closet. Once inside, without saying anything to her, he put his hands under her clothes and "stuck" his finger inside of her "front private," which she uses to go to the bathroom. (R. p. 29, line 17 – p. 30, line 9.) He let her go and she ran outside to Minor 3 and her younger sister. (R. p. 30, lines 10-13.)

On another occasion, Minor 1 and her two year old brother were inside the trailer. Her brother was sleeping, and Minor 1 was trying to go to sleep. (R. p. 30, lines 14-25; p. 32, lines 7-8.) Minor 3, her younger sister, and their brother went outside to visit the food truck to buy some food. (R. p. 30, line 25 – p. 101, line 4.) Minor 1 then went to get her PSP from the bedroom farthest from the front door when he grabbed her and took her into the closet. Without saying anything, he put his hand under her clothes and touched her on her "behind private." (R. p. 31, lines 7-23; p. 32, lines 9-13.) Frightened, Minor 1 pushed her way out of the closet and ran into the living room to her brother. (R. p. 32, lines 1-6.)

One day, after Angelica's family had moved from the trailer to the house, Minor 3 and her younger sister were playing – doing Karaoke or acting famous – as if they were superstars. Minor 1 was sitting, but Minor 3 tried to convince her to go up to the

television and play along. Minor 1 refused. (R. p. 32, line 17 – p. 33, line 11.) He showed Minor 1 his “private.” (R. p. 33, lines 12-17.)

On another occasion at the house, Minor 1 and Minor 3 were playing with their PSPs when he asked one of them to help him fix the bathroom wall. Minor 1 went into the bathroom to help him. (R. p. 33, line 18 – p. 34, line 3.) He gave Minor 1 a bucket of nails to hold as he worked on the wall. When he finished, Minor 1 tried to leave but could not because he had locked the door. (R. p. 34, lines 4-9.) He then touched her on her breasts with his hands, and he bit her on one of her breasts leaving a little temporary mark. (R. p. 34, lines 9-19.)

On other occasions, he tried to touch her, but did not. (R. p. 34, lines 20-22.) One day, while all of the other children were outside, Minor 1 and her brother were inside. While her brother slept on Minor 3’s bed, Minor 1 lay on it watching the movie, “Toy Story.” He came home while she was watching the movie and chased her. To get away from him, she went under Minor 3’s bed where he could not reach her. (R. p. 34, line 23 – p. 105, line 18.) On another day, Minor 1 and Minor 3 were playing hide and seek. Minor 1, not realizing that he was in a closet, went in there to hide. (R. p. 35, line 19 – p. 36, line 4.) He grabbed her and, with his hands, he touched her, under her clothes, on her skin. (R. p. 36, lines 5-13.)

Eventually Minor 1 told her mother what had happened, and they went to the police station. (R. p. 36, lines 16-20; p. 41, lines 6-9.) An officer, Minna, showed Minor 1 some pictures and told her that one of the pictures was of the man. Minor 1, without anyone telling her which photo to pick, choose photo 3 and, on the back of the photo, wrote that she was “90 percent sure.” (R. p. 36, line 21 – p. 39, line 15.) When she

choose that photo, she said, "I'm pretty sure it's him, number three. He is the father of [Minor 3] and [her younger sister]. He is the babysitter's husband. I'm nine on a scale of ten, of one to ten that's him." (R. p. 39, lines 17-20.)

On cross-examination during the motion hearing, Minor 1 testified that after she went to the police station, she went to see Ms. Jessica. That meeting with Ms. Jessica was recorded on video; during that meeting, she spoke of everything that had happened to her. During her later meetings with Ms. Jessica, she worked on writing a story for her mother and stepfather about everything that had happened to her. (R. p. 39, line 21 – p. 40, line 18; p. 43, lines 19-24.) During one of her meetings with Ms. Jessica, Minor 1 was asked whether Appellant had ever put his finger inside of her and she replied that he had not. Minor 1 explained that she had said that because she was confused about which story Ms. Jessica was talking about. (R. p. 42, line 15 – p. 43, line 18.)

Minor 1 testified on cross-examination that she did not remember the first time she went to Angelica's house to be babysat, but she thought she was out of school and it was in the summer. (R. p. 44, lines 11-20.) Her mother would take her in the morning before she went to work, and her mother would pick her up at night at around 7:00 or 8:00. (R. p. 44, line 21 – p. 45, line 12.) Sometimes Appellant would be at work and not in the home while Minor 1 was there, but usually he came home from work at night before she left. (R. p. 45, lines 13-25.) The things that he did to her, he did after he came home from work. (R. p. 46, lines 1-4.) The second day she was in the home of Appellant and Angelica, Appellant put his finger inside her and started to touch her while they were in the closet. (R. p. 46, line 5 – p. 47, line 2.) He made no threats, and Minor 1 did not remember him making any promises to her. (R. p. 47, lines 3-11.) When this happened,

Minor 3 was outside with her younger sister, but Minor 1 did not know where Angelica was. (R. p. 47, lines 17-24.) The other man who lived in the home, Samuel, was at work. (R. p. 47, line 25 – p. 48, line 6.)

Minor 1 was unable to remember how much time passed between the first and second time Appellant assaulted her. (R. p. 48, line 22 – p. 49, line 7.) But on the second time, Minor 3, her younger sister, and her brother were outside at the food truck. Minor 1's brother was sleeping, and she was trying to sleep when she decided to retrieve her PSP from the family's bedroom. (R. p. 49, lines 8-14.) Appellant did not use any weapons, he did not threaten to use any weapons, and he made no threats to her. (R. p. 49, lines 17-23.) While Appellant sometimes bribed her with money, Minor 1 did not remember him doing so on this occasion. (R. p. 49, line 24 – p. 50, line 6.)

Minor 1 testified on cross-examination these were the only two incidents that happened in the trailer. (R. p. 50, lines 7-14.) She was not sure of the order in which the assaults took place in the house, but the worst thing that happened in the house was when she went in the bathroom to help Appellant and he bit her on her breast leaving a little temporary mark. (R. p. 50, line 13 – p. 51, line 11.) She did not tell her mother until at least a month after that incident. (R. p. 51, lines 12-14.)

She testified further on cross-examination about the incident involving Appellant showing her his private part. At that time, Minor 3 was sitting on the other side of the couch from where Minor 1 was sitting and her younger sister was playing in front of the television. (R. p. 51, line 22 – p. 52, line 12.) She also repeated that during the incident when Appellant was chasing her around the house, she went under Minor 3's bed. Appellant did not touch her on that occasion, but he frightened her. The other children

were outside. (R. p. 52, line 13 – p. 123, line 11.) On the occasion when Minor 1 and Minor 3 were playing hide and seek, she hid in the closet and the man, who was already in the closet, grabbed her. It was not Samuel. Minor 3 was looking for her, but Minor 1 did not know where Minor 3's sister or mother were. (R. p. 53, line 12 – p. 54, line 14.)

The last line of questioning pursued by the defense was about Minor 1's identification of Appellant from the photographic line-up. She testified that Ms. Minna told her that the man who did this to her was in one of the pictures she was going to see. (R. p. 54, lines 18-21.) She then read a form Ms. Minna gave her and initialed it before she was given the pictures to look through. Minor 1 said she identified someone in a picture about 10 minutes after she was given the form to read, and five minutes after she was given the photographs. (R. p. 54, line 22 – p. 56, line 14.) When Minor 1 made the identification, Ms. Minna asked her if she was sure that the man in the picture was the man who assaulted her. Minor 1 said she told Ms. Minna that she was "90 percent sure" that that was him. (R. p. 56, line 15 – p. 57, line 5.)

On redirect examination, Minor 1 explained that when she told the defense attorney that she was thinking about a different story she meant a different time. (R. p. 57, lines 16-19.) Minor 1 also said that Appellant did not go to work every day, that there were times when he was home all day, and she occasionally saw him on Saturdays. (R. p. 57, lines 20-25.) She also said that during the summer, she would be at Angelica's for the whole day. (R. p. 58, lines 1-4.) When asked to explain who she was referring to when she spoke of the man's closet, she said she was talking about Samuel and that the closet was his room. But she also said that the man who came into the closet was not Samuel; it was Appellant. She said that she did not know Appellant's name at the time;

she only recognized him by his face and she knew that he was Minor 3's father. (R. p. 58, lines 5-23.)

In Camera Hearing – Testimony of Minor 2

Minor 2, who was a few weeks shy of her 11th birthday when she testified, said she used to go to a babysitter whose name she cannot remember, but the babysitter had children including Minor 3. (R. p. 59, line 21 – p. 60, line 17.) Minor 2 does not go to that babysitter's anymore, but she does not know why. (R. p. 60, line 20 – p. 61, line 9). A long time after Minor 2 stopped going to that babysitter, she was in a store with her mother when she told her some bad things had happened to her at that babysitter's house, once in the room of another man who lived there and once in the living room. (R. p. 61, line 10 – p. 62, line 16.)

Testifying about one of the occasions, Minor 2 said she was in the living room watching High School Musical Three, and she fell asleep. The man came up behind her and touched her in her front private, but she did not remember if it was on top of or under her clothes. The man said nothing to her. (R. p. 62, line 17 – p. 63, line 13.) On another day, when Minor 2 was in the room by the kitchen at the babysitter's house, the man touched her in her "front privates" and her "back privates." He did not say anything to her, and she did not say anything to him. (R. p. 63, line 18 – p. 64, line 7.) On another occasion, Minor 2 was in the wife's bedroom at the babysitter's house when the man told her that, if she told anyone, he would keep being mean to her, and, if she did not tell anyone, he would stop being mean to her. Minor 2 told no one until she told her mother in the store. (R. p. 64, lines 8-21.)

After telling her mother, Minor 2 and her mother went to a police station and a

police officer showed her some photographs. (R. 64, line 22 – p. 65, line 18.) Before showing her the pictures, a police officer gave her a form. Minor 2 could not read it so the police officer explained what the form said. (R. p. 65, line 6 – p. 66, line 4.) No one told Minor 2 which photo to select. (R. p. 66, lines 5-15.) After looking at the pictures, Minor 2 identified picture four as being of the man who hurt her, and when she identified him she was sure that it was him. (R. p. 66, line 16 – p. 68, line 6.)

On cross-examination, Minor 2 said that she knew that Minor 1 was in court because she says Appellant also did some things to her, but she does not know what she says he did. (R. p. 68, lines 11-25.) Minor 2 said she had not talked to Minor 1 about what Appellant did to her, and did not remember saying anything, about what Minor 1 was saying Appellant had done to her, during her recorded interview at the Lowcountry Children's Center (LCC). (R. p. 69, lines 1-18.) Minor 1 reported what happened to her before Minor 2 ever told anyone what had happened to her. She said that when her mother had asked her if anything had happened to her, she had said no. She did not tell her mother until sometime later, when she was in a grocery store and upset with her mother. (R. p. 69, line 19 – p. 71, line 17.)

Minor 2 was cross-examined extensively about her recorded LCC interview. While she could not remember some of what had happened during the interview and what she had said, she did remember saying that Appellant had touched her more than once, she thought Appellant was in love with her, one time he waited for her to arrive from school, one time his wife was outside, and that one incident occurred in another man's room. She also testified that during the LCC interview she said that one time, at around 1:00 in the middle of the day, Appellant put his penis inside her butt and then he went up

and down once he was inside her. (R. p. 71, line 18 – p. 76, line 14.) Minor 2 said that, during her LCC interview, she said Appellant threatened her to get her to go into the room with him on that occasion, but that he did not threaten her with a knife. She did not remember saying, during her LCC interview, that he used a knife and she could not remember what he threatened her with. (R. p. 75, lines 7-19.) Minor 2 could not remember who was in the house when this happened and thought she was alone in the house with Appellant. But she testified she remembered saying during her LCC interview that other people – the babysitter and her children – were there, but that they were sleeping. (R. p. 76, line 15 – p. 77, line 18; p. 79, lines 14-24.) Minor 2 did not scream out loud when this happened, but cried in silence. (R. p. 77, lines 19-23.)

Minor 2 testified that she did not say anything during her LCC about Appellant bribing her with anything or biting her. Appellant did not bite her on her breast. (R. p. 77, line 24 – p. 78, line 13.) Minor 2 testified that, in addition to the other things she already testified about, Appellant had touched her one day when she was helping him fix a doorknob. (R. p. 80, line 21 – p. 81, line 18.) Appellant did not do anything to her when she was playing games with another child. (R. p. 80, lines 17-20.)

Minor 2 testified a man and a woman showed her the photo line-up, but she did not remember their names. When they showed her the photos, they told her to find the man who had done something wrong to her. She could not remember how long it took or what she said when she identified the man. (R. p. 78, line 25 – p. 78, line 12.)

On redirect, Minor 2 testified that no one else was in the room when Appellant did these things to her. When she said 1:00, she meant when it was light outside. She understood a.m. to be nighttime and p.m. to be in the morning. (R. p. 81, line 25 – p. 82,

line 10.)

In Camera Hearing – Argument and the Trial Court's Ruling

After Minor 1 and Minor 2 testified, the trial court asked the State for the time frame as to when Angelica babysat the two girls. The State informed the court that Minor 1 began going to Angelica's in December 2009 until July 2010, and Minor 2 was at Angelica's from May 2010 to the beginning of July 2010. (R. p. 82, line 18 – p. 83, line 19.)

Defense counsel then told the trial court there were a lot of inconsistencies between Minor 2's testimony during the in camera hearing and what she had said previously. (R. p. 84, lines 4-17.)

- When asked during the hearing if she recalled any of the bad things that Minor 1 had said Appellant had done to her, Minor 2 said no. (R. p. 84, lines 22-25.)
- When asked if she mentioned anything in the LCC interview about things that happened to Minor 1, Minor 2 said no. (R. p. 85, lines 1-3.)
- When asked if she said during the interview that Minor 1 may have been raped by Appellant, Minor 2 said she might remember that. (R. p. 85, lines 4-7.)
- During the LCC interview, Minor 2 said she believed she had been raped by Appellant, but during her in camera testimony she only said that he touched her front and back parts while she was on the bed. (R. p. 85, lines 8-14.)

At that point, the trial court interrupted and said that the State had agreed not to go into that, and the State said that it purposely did not ask Minor 2 about that. (R. p. 85, lines 15-19.) Defense counsel continued to set out what they saw as inconsistencies in Minor 2's testimony.

- When asked if she had ever been threatened in any way, Minor 2 said no, but in the taped LCC interview Minor 2 said that, when Appellant actually penetrated her with his penis, he had a knife in his pocket and used it to threaten and force

her to come into the room. (R. p. 85, line 20– p. 86, line 5.)

- While it may have been cleared up during her *in camera* testimony, Minor 2 was inconsistent about the time of day. In the taped interview, she gave the impression that it happened at night. (R. p. 86, lines 6-10.)

At that point, the State interceded and explained that Minor 2 did not know “a.m.” from “p.m.,” and she thinks “p.m.” means nighttime, but that she does say it happened during daylight so that it is clear that it was 1:00 p.m. (R. p. 86, line 11 – p. 87, line 8.)

Defense counsel continued with their recitation of inconsistencies between Minor 2’s *in camera* testimony and the taped LCC interview.

- When asked during the hearing if she had cried out or screamed, Minor 2 said no and that she had just cried in silence. In the taped interview, she says she screamed out for help and, when asked by the interviewer why no one responded, she said she thought everyone was sleeping. (R. p. 87, lines 10-17.)
- During the hearing, she says she thought she was alone in the house with Appellant, but in the recorded LCC interview she said other people were there, but she thought everyone was sleeping. (R. p. 87, line 18 – p. 88, line 2.)

Defense counsel argued that these inconsistencies, the lack of physical evidence that anything had happened to Minor 2, the delay in reporting, and initial denials showed that the State had not established, by clear and convincing evidence, that Minor 2 had been assaulted by Appellant. And, even if the State had established by clear and convincing evidence that Appellant had committed the acts of Minor 2, defense counsel contended that the evidence was not admissible under Rule 404 (b), SCRE, as evidence of a common scheme or plan because while the evidence may establish that Appellant engaged in inappropriate touching or sexual conduct with the two girls he went about it differently in regard to each. There is no evidence that he pursued the girls or engaged in the improper conduct in the same way or that the conduct itself was even similar. Defense

counsel said that because the ways in which the conduct was allegedly committed were different, the evidence of Minor 2 was improper and inadmissible propensity evidence. (R. p. 88, line 4 – p. 89, line 3; p. 90, line 12 – p. 95, line 3.) The trial court ruled the State had established that Appellant had committed the acts upon Minor 2, which she testified to, by clear and convincing evidence. The trial court said the question was whether the evidence was admissible under Rule 404 (b). (R. p. 92, lines 9-20.) In response to defense counsel's argument, the trial court questioned whether the evidence had established a pattern of conduct – the pattern of abusing girls his wife was babysitting. (R. p. 93, lines 12-19.)

The State responded to the defense's argument as follows.

THE COURT: I was explaining a pattern of availability and taking advantage of the availability of the children. He thinks it's got to be a pattern of actual behavior.

[STATE]: I do not think it is. I think the Wallace case, which is the most recent case, lists several things to look at; the age of the victims – I do have a chart that –

* * *

[STATE]: Your Honor, that's the chart I have, but the one thing as far as the Tutton case, the Wallace case, which is the South Carolina Supreme Court case from 2009, distinguishes and talks about Tutton. If I may, it says, the Court of Appeals in Tutton which appears to require a connection be on a degree of similarity in the details of the crime charged and the bad act evidence we find this interpretation to be an overly restricted view of our case law requiring a connection between the crime charged and the bad act. Evidence is simply that the two be factually similar and do no – and does not add any additional layer of analysis.

So they say that Tutton went too far.

THE COURT: Factually similar is what they say?

[STATE]: They say factually similar, and they list in the Wallace case age, the relationship between the victim and the perpetrator, the location where the abuse occurred, the use of coercion, the manner of occurrence, which is the type of battery.

The Wallace case, like this case, one of the victims there was sexual intercourse, and that was the Lyle victim, and the way the Court said to handle that was to redact the part that had to do with the more egregious behavior, which is why I purposely did not ask this child about the intercourse.

In this case, we have they were both eight and Minor 1 had been nine for about a month. It was the babysitter's husband, so it was the same relationship between the victim and the defendant. It happened in his home in several different areas in his home, the same general time frame. Minor 2's time frame is inclusive in Minor 1's time frame. At different places in his house.

They were both described being fondled on the top and the bottom and Minor 1 described digital penetration. They both – one was watching a Toy Story and one was watching High School Musical and they were laying down and he approached them. It was over and under their clothing. They were both there during this time frame. The relationship was the same.

And, Your Honor, I think that it is extremely similar and for it to be – just to address the propensity argument. If we were trying to get in, for example, a 16 or a 15-year-old girl that he met and assaulted in a different location, or a male that he assaulted, say, that was 13 years old, or if we were trying to get in an assault that occurred from a different relationship at a different time, those would be simply for propensity but this is –

... I have a chart.

* * *

[STATE]: But I think that the Wallace –

THE COURT: So in short, in answering my question about conduct or situations is taking the total circumstances and the similarity in all the circumstances involved in both alleged crimes.

[STATE]: I think you look at all the similarities. The Wallace case listed a few but it said obviously this is not the entire list but those were something to go by.

One of the cases that I described in my brief there were, I think four foster children, and it was a different – lots of different assaults that went on and the Court allowed all of those in because he was the same relationship to those kids. They were there because he was the foster father, and this is very similar in that they were there because this was the babysitter's husband.

THE COURT: Okay.

[STATE]: And there were some differences in the batteries in the Hallmon case also but by and large they were very similar, enough to have shown a pattern, and the case says that similarity establishes the required connection between the two acts.

(R. p. 95, line 4 – p. 98, line 24.)

Defense counsel responded by discussing the five factors set out in the *Wallace* case that the trial court is to consider when deciding the admissibility of other bad acts evidence. Conceding that three of the five factors – age of the victims, the relationship between the victims and perpetrator, and location of the abuse – weigh in favor of the State, defense counsel argued that the use of coercion or threats was not the same with the two girls. Defense counsel also argued the manner of occurrence was not the same because, even though the State was not introducing the act involving intercourse with Minor 2, the manner of the touching of the two girls was different and how Appellant gained access to the girls was different. (R. p. 99, line 13 – p. 101, line 13.)

The State then responded to the defense's argument as follows.

[STATE]: Just to address some of the issues. I think that one of the things I didn't have on the chart because I didn't know that he had actually asked her to help him one time with doing something and touched her vagina. I never

asked her directly as Christina did so I didn't know that but that would be another similarity.

And as far as manipulating Minor 1, most of the time she talked about he didn't manipulate her. He just happened to be there. She says she went in to get her PSP from the bedroom and he was there. Another time she was falling asleep watching a movie. As Minor 2 says, she had fallen asleep watching High School Musical, with Minor 1 it was Toy Story. The other time Minor 1 talks about there was no him manipulating her she went into the closet to hide and he came there.

I think those are similar in that what he did was just take advantage of each situation. I don't know that there was, I'm going to get her in this room. She's in that room and I'm going to take advantage of this, or the other one may be in the room and I'm going to take advantage of this.

I don't think there was this set, you know, getting one alone and not the other. But he did, both of them say, that he touched them on the top and on the bottom privates. And they both say that he touched them on their privates inside of their clothes, and on the outside of their clothes.

The part that is not similar is the – the extent of one, which I think Wallace addresses clearly on how the Court is to handle that, just to not – just to redact that, and that's all I have.

* * *

...What the case law points out is that what you look to decide whether it is more probative than prejudicial is the degree of similarity. The more similar the more probative, and I think that State v. McClellin [sic] talks about courts must weigh probative value of evidence of prior bad acts against the prejudicial effect. Such evidence is inadmissible unless the close similarity of the crimes charged and the previous act enhances the probative value by their similarities.

* * *

...There is a case that says it doesn't have to be necessary, I have that cite, in order for it to be admitted. And I think that it really is – State v. Sweat says to establish material fact or element it need not be necessary to the case in order to be admitted.

It isn't absolutely necessary but my feeling is that when the jury hears that he's babysitting all these children

and they hear from one of them and hear about the other children they are going to make the assumption that there was no other victim, which is an incorrect assumption. It's kind of like a falsity to the jury.

And the case law says that if it is similar then you can use it to prove it. As an example, if he tries to maybe through testimony elicit the fact that this man was always at work so he could not have done these crimes, well that helps

THE COURT: Couldn't you reply to that?

[STATE]: Well, not unless he does it in the closing argument I couldn't.

THE COURT: Okay. All right.

[STATE]: But that's kind of been inferred, and it is probative. It helps in the – to paint the scene, and I guess that's why this line of case law has developed and established because the degree of similarity between one assault and another heightens the probative value of it such that it becomes credible evidence, and I know that it's prejudicial and that is what we have to weigh, and what the courts have said is you weigh that by looking at the similarities.

(R. p. 101, line 25 – p. 105, line 15.)

Defense counsel countered by arguing that the evidence of the other bad acts was unfairly prejudicial because it was not needed by the State to prove its case, it would improperly bolster the State's case, it would introduce an improper emotional element to the case because there would be two young girls coming forward, and it would have an undue tendency to suggest a verdict on an improper basis. Defense counsel stated the defense was that the acts never happened, and that the victim is making it up. Appellant would testify he did not do any of the acts alleged. Defense counsel said that the defense was willing to agree not to make an argument that no other children had been abused or made allegations of abuse. The defense concluded by stating that the evidence heightened the prejudice against Appellant and his ability to get a fair trial. (R. p. 105, line 21 – p.

107, line 22.)

The next morning, the trial court ruled that the proffered evidence, excluding any evidence of Appellant's actual intercourse with Minor 2, would be admissible. The trial court found that, as required by *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), and as set out by the prosecution in their chart marked as Court's Exhibit 1, there was a close similarity between the bad acts against the two girls, the ages of the victims, the relationship between the victim and the perpetrator, the location where the abuse occurred, and the manner in which the abuse occurred such as the type of sexual battery (even if the coercion and threats were not necessarily similar). The court further found that, due to the similarity of the acts, the probative value outweighed the prejudicial effect under Rule 403, SCRE. The trial court said that it would give a limiting instruction as requested by defense counsel. (R. p. 113, line 17 – p. 115, line 25.)

Trial Testimony of Minor 1 and Minor 2¹

Minor 1 testified that back in 2010, when she was nine, she and her one or two year old brother were taken care of by a babysitter, Angelica, at Angelica's home after school and in the summer. When they first started going to Angelica's, Angelica lived in a trailer but she later moved into a house. Living with Angelica in the home were Appellant,² their children, Minor 3 and her siblings, and another man, Samuel. Angelica also took care of other children in the home, most of whom were younger than Minor 1. There was one other girl, Minor 2, who was around the same age as Minor 1. (R. p. 133,

¹ In this section, only their testimony related to the incidents with which Appellant was charged and the other bad acts evidence, including their interviews by law enforcement and the LCC, have been included.

² Minor 1 testified that when Angelica babysat her she was younger and did not know Appellant's name, but she knew it at the time of the trial. (R. p. 137, line 23 – p. 138, line 3.)

line 25 – p. 135, line 9; p. 135, lines 17-21; p. 136, lines 8-12; p. 137, line 20 – p. 138, line 7; p. 139, lines 6-10.) Although Appellant had a job, sometimes he was at home when Minor 1 was there. (R. p. 135, lines 10-18.) Minor 1 testified that she stopped going to Angelica's because her husband hurt her. (R. p. 139, lines 1-5.)

Minor 1 testified that one day at Angelica's trailer, when she went inside the trailer to get her PSP from off the bed in the bedroom shared by Angelica, Appellant, and their two children. (R. p. 136, lines 13-20; p. 139, line 11 – p. 140, line 7.) She did not know that Appellant was in the room until he grabbed her and took her into the closet. Once in the closet, Appellant put his hand under Minor 1's clothes and stuck his finger inside her. It felt awkward. (R. p. 140, line 9 – p. 141, line 15.) On another occasion, Minor 1 and her little brother were inside the trailer while Minor 3 and her younger sister were outside at the food truck. Minor 1 went to get her PSP from the bedroom, and Appellant grabbed her again and took her into the closet where he touched her front and her bottom. (R. p. 141, line 23 – p. 143, line 6.) When it was over, Minor 1 returned to the living room to stay with her little brother, who was sleeping. (R. p. 143, lines 4-6.)

Minor 1 testified that she was sure that it was Appellant, Minor 3's father, who did these things to her. It was not Samuel. (R. p. 146, line 5 – p. 217, line 1.)

Minor 1 testified that, after Angelica and Appellant moved from the trailer into a house, something happened to her there more than one time. (R. p. 147, lines 15-20.) One time Minor 3 and her younger sister were playing as if they were superstars or famous. Minor 1 sat on one side of the couch, Minor 3 sat on the other, and Minor 3's younger sister was in front of the television. Appellant, who was standing near a divider wall where only Minor 1 could see him, stuck out his private. (R. p. 147, line 21 – p.

149, line 18.) On another occasion, Appellant asked her and some of the other kids to help him while he worked on the wall in the bathroom. Minor 1 went to help and he had her hold a bucket of nails. When he finished, Minor 1 tried to leave the room but Appellant had closed and locked the door. Appellant then touched her on her breasts with his hands and mouth; he pulled her blouse up and bit her on her breast. He also used his hands to touch her "front," which is what she uses to go to the bathroom. (R. p. 150, line 1 – p. 151, line 25.) Minor 1 also testified about another time when she, Minor 3, and Minor 3's sister were playing hide and seek. Minor 1 hid in the closet in Samuel's room without realizing that Appellant was inside. Appellant touched her, under her clothes, on her front and her bottom with his hands. She eventually was able to open the door and escape. (R. p. 152, line 9 – p. 154, line 2.) The last abusive act she testified about was one that occurred when everyone except Minor 1 and her brother were outside. While her brother slept, she was watching a movie, "Toy Story." Appellant came into the house and chased her. Minor 1 went under the bed on which her brother was sleeping where Appellant could not reach her. (R. p. 154, line 9 – p. 156, line 4.) Minor 1 said that sometimes Appellant would bribe her by offering her money if she would let him keep touching her, but she never asked for money and he never gave her any money. (R. p. 156, lines 5 – 22.)

After Minor 1 finally told her mother what Appellant had done, she went to the police station where she picked out a photograph of Appellant. Because she did not know his name then, she simply said that that was him and that she was 90% sure that the photo was him, the babysitter's husband and the father of Minor 3 and her younger sister. (R. p. 157, line 15 – p. 161, line 17).

On cross-examination, Minor 1 said that she began going to Angelica's when she was eight, but that she turned nine shortly thereafter. (R. p. 164, line 19 – p. 165, line 3.) She was questioned about who she spoke to about what Appellant did and what she said, differences in what she has said in court, during her interviews, and in her story about what Appellant did. (R. p. 167, line 25 – p. 174, line 22; p. 176, line 2 – p. 179, line 16; p. 180, line 21 – p. 184, line 22.)

Minor 2 testified that she was ten years old. (R. p. 229, lines 19-22.) She said that she used to go to a babysitter's house; in that house, the babysitter lived with her husband, and two daughters. One of the daughters was Minor 3. (R. p. 232, lines 3-18.) When she was at the babysitter's, the husband was home sometimes; sometimes, the babysitter would leave while Minor 2 was there. (R. p. 232, line 22 – p. 233, line 7.) The babysitter's husband touched her in one of the bedrooms in the house, the room near the kitchen that was the other man's room. Minor 2 was on the bed and the man was on top of her; he touched her on her skin – on her "top privates" and her "bottom privates." (R. p. 233, line 8 – p. 235, line 7.) Minor 2 did not say anything to the man, but cried in silence. (R. p. 235, lines 8-13.) On another occasion, she fell asleep on the couch in the living room watching "High School Musical" on television, and the man came from behind and touched her. He touched her on her "top private." He did not say anything and she did not say anything. When he walked away, she got up and went outside. Minor 2 did not know where the babysitter or Minor 3 were when this happened. (R. p. 235, line 16 – p. 237, line 19.)

Minor 2 said that she did not tell her mother what had happened because she was afraid her mother would be angry with her and that the man would do something bad to

her. In the babysitter's room, the man had told her that if Minor 2 told anyone he would do something bad to her, but that if she did not tell anyone, he would leave her alone. (R. p. 238, line 4 – p. 239, line 6; p. 248, lines 10-14.) Minor finally told her mother a year or so later when they were in a store. (R. 239, lines 7-18; p. 248, lines 17-19.)

On cross-examination, Minor 2 testified that she was eight years old when Angelica babysat her. (R. p. 241, lines 23-25.)

At the conclusion of Minor 2's testimony, the trial court gave the jury a limiting instruction on their use of her testimony. The instruction told the jury that they could consider the Minor 2's testimony solely on the issue of common scheme or plan, and that they "must not consider [it] as evidence of the commission of another bad act not the subject of the conviction as proof of the defendant's guilty of the charge we are trying today." (R. p. 249, lines 1-15.)

Argument

On appeal, Appellant contends the trial court erred in admitting the evidence of bad acts committed by Appellant against Minor 2 because there was no evidence of a common scheme or plan to support admission of the other bad acts evidence under Rule 404(b), SCRE. The State strongly disagrees. The other bad act evidence was properly admitted because the evidence supports the trial court's conclusion that there was a close degree of similarity between the crimes charged and the bad act evidence, and that those similarities outweighed the dissimilarities.

There are several steps in the analysis of the admissibility of bad act evidence. The first is that the evidence must be relevant as required by Rule 401, SCRE. *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). The requirement of relevance

means that the evidence must tend to make any fact of consequence more or less probable than it would be without the evidence. Rule 401, SCRE. While evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b). See also *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923). Evidence of a common scheme or plan "is relevant because proof of one is strong proof of the other." *State v. Wallace, supra*.

Where the bad act did not result in a conviction, the State must present clear and convincing evidence of the bad act. *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). An appellate court is bound by the trial court's factual findings related to the existence of clear and convincing evidence of the bad acts unless they are clearly erroneous. *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009). In this case, Appellant has not challenged on appeal the trial court's ruling that the State presented clear and convincing evidence of the bad acts. That ruling is thus the law of the case on that point. See *Kinard v. Richardson*, Op. No. 5192 (S.C. Ct. App. January 29, 2014); *State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012).

The next step in the analysis of the admissibility of bad act evidence offered to show the existence of a common scheme or plan is an analysis of the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity. *Id.*; *State v. Clasby*, 385 S.C. at 155, 682 S.E.2d at 896; *State v. Adams*, 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998); *State v. Blanton*, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994); *State v. McClellan*, 283 S.C. 389, 392, 323

S.E.2d 772, 774 (1984). “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” *State v. Wallace*, 384 S.C. at 433, 683 S.E.2d at 278; *State v. Clasby*, *supra*.

In *State v. Wallace*, *supra*, the Supreme Court set out a non-exclusive list of five factors to be considered by a trial court in determining whether there is a close degree of similarity between the charged crime(s) and the bad act. Those factors are the:

- (1) age of the victims when the abuse occurred;
- (2) relationship between the victims and the perpetrator;
- (3) location where the abuse occurred;
- (4) use of coercion or threats; and
- (5) manner of the occurrence, for example, the type of sexual battery.

Id., 384 S.C. at 433-434, 683 S.E.2d at 278. A close degree of factual similarity between the charged crime(s) and the bad act provides the required connection between the two and no further connection is necessary.³ *Id.*, 384 S.C. at 434, 683 S.E.2d at 278.

Here, the similarities, from both the *in camera* hearing and the testimony in front of the jury, are as follows:

Factor	Minor 1 (Charged Crimes)	Minor 2 (Bad Act Evidence)
Age	8-9	8
Gender	Female	Female
Relationship of Appellant	Babysitter’s Husband	Babysitter’s Husband
Location	Appellant’s Home; Bedroom, Bathroom, and Closet/Bedroom	Appellant’s Home; Bedroom
Setting	When Alone; While Watching Movie, Helping Appellant, or	When Alone; While Watching Movie, Helping Appellant, or

³ To the extent that this Court, in *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) – upon which Appellant heavily relies – has held that there must be some connection beyond a simple finding of factual similarity in the details of the crime(s) charged and the bad act, that holding has been specifically rejected by the Supreme Court in *State v. Wallace*, 384 S.C. at 434, n. 5, 683 S.E.2d at 278, n. 5.

	Playing; When Caretaker Not Present	Playing; When Caretaker Not Present
Time	Various Times of Day; When child separated from other children (or other awake children)	Various Times of Day; When child separated from other children (or other awake children)
Sex Acts/Type of Battery	Fondling/Digital Penetration	Fondling/Intercourse
Fondling	Over and Under Clothes	Over and Under Clothes
Care Giver	In care of Appellant's Wife when occurred	In care of Appellant's Wife when occurred
Timeframe	March 1, 2010 – July 10, 2010	May 1, 2010 – July 1, 2010
Friends	Friends or Friendly with Appellant's Oldest Daughter	Friends or Friendly with Appellant's Oldest Daughter
Coercion	Bribery Mentioned	Threatened with Knife; Threatened with Continuation of Bad Things

There are similarities in the age of the victims when the abuse occurred, the relationship between the victims and Appellant, the location and setting of the abuse; and the types of sexual battery that far outweigh any dissimilarity. The trial court properly admitted the bad act evidence.⁴ *State v. Scott*, 405 S.C. 489, 748 SE.2d 236 (Ct. App. 2013) (both victims around eight years old when abuse started, abuse occurred when Scott was only adult present, abuse occurred when child spent night at Scott's residence, abuse occurred when one child separated from others for extended period, and abuse occurred at bath time); *State v. Atieh*, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012) (similarities, which

⁴ The last step in the analysis on the admissibility of bad act evidence is under Rule 403, SCRE – whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Here, while Appellant argued before the trial court that the evidence failed to survive this test, he has not challenged the trial court's adverse ruling on appeal. The trial court's ruling that the bad act evidence survived the Rule 403 analysis is thus the law of the case on that point. See *Kinard v. Richardson*, *supra*; *State v. Fripp*, *supra*. In addition, the limiting instruction given by the trial court minimized the possibility of any undue prejudice to Appellant. (R. p. 249, lines 1-15.)

far outweighed the differences, included both victim were female, they were aged 16 and 17-18 when the inappropriate touching occurred, both victims were employees of Atieh, the touching all took place at the restaurant primarily around the sink or cooler, no direction coercion or threat, touching for both included similar conduct); *State v. Wallace, supra* (similarities between acts include perpetrator's relationship to victims, abuse beginning at about same age, abuse occurring in family home when mother was absent, and admonishment not to tell because no one would believe them); *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994) (all victims were female, all were approximately same age, each subjected to requests for same type of sex acts, all acts occurred either in Blanton's house or his vehicle, and Blanton took advantage of relationship each victim for sexual gratification); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989) (all victims were foster children of similar age and types of sexual batteries were similar); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984) (both victims were McClellan's daughters, were same age at time of initial abuse, and McClellan gave same explanation for actions).

II.

The trial court did not err in prohibiting the defense from questioning Ms. M, the mother of Minor 2, about her immigration status and U visa application because it was irrelevant. (Issue II)

During the *in camera* hearing on motions held at the beginning of the trial, the defense told the trial court that they had a motion to be allowed to question the victim's mother about her application for a U visa and the prosecution's involvement in that process. (R. p. 109, line 8 p. 110, line 2.) The following colloquy then occurred.

THE COURT: When would it come up, [defense counsel]?
Do I need to go ahead and call the mother and let's go into it now, or is she here?

[STATE]: The mother is here but I also have the victim advocate that actually told the mother about the process, and she is here to explain how that occurred, if the Court wants to hear it.

[DEFENSE]: I think it's undisputed that they go a U-Visa.

[STATE]: Right.

THE COURT: Right.

[STATE]: I don't think they have it yet. They've applied.

[DEFENSE]: And that they are applying for it and [the prosecutor] has wrote a letter to help them.

THE COURT: From what you all told me when we had a bench conference my inclination was it's going to be admissible, it goes to the weight of it, and I don't have any problem with it coming in. You just have to respond to it however you think is appropriate.

...My inclination is to let it in. I mean, from what I understand what you all told me at the bench conference was that when there's a crime being committed they can apply for a visa and it can be granted if the prosecutor request it, that certain requirements got to be met. Your people explained that to the mother and then she applied for the visa and got it.

[STATE]: It wasn't quite that. She didn't want to get it, and the victim advocate kept explaining to her why it was

necessary and even took her to help state the process because she did not want it, but eventually she did. You're right.

THE COURT: And his argument was that's the reason they prosecuted the case, but they didn't know about it then after the case started – but that could be a reason they proceeded with the case. So I think it goes to the weight and sufficiency. I think it's probably admissible and I'll allow it in.

* * *

THE COURT: I'm going to rule that it's admissible, assuming I hear something during the trial, you know, unless something changes. ?

[DEFENSE]: All right.

(R. p. 110, line 3 – p. 112, line 3.)

Testimony of Mrs. J., the Mother of Minor 1, in the Presence of the Jury

Thereafter during the trial, the State called Mrs. J., the mother of Minor 1, as a witness. She testified that, beginning in April 2010, Minor 1 and her brother began going to the home of a babysitter, Angelica, when Mr. and Mrs. J. were working. Mrs. J. had met Angelica because she was a customer of the store in which Mrs. J. worked. (R. p. 201, lines 8 – 25; p. 203, lines 11-23.) At the time Minor 1 began going to Angelica's, Angelica lived in a trailer with her husband, her two daughters, and someone who was visiting with them. (R. p. 202, lines 1 – 17.) One of Angelica's daughters, was the same age as Minor 1 and the two of them got along very well. (R. p. 202, lines 7-14.) Angelica took care of other children in her home, including another girl, Minor 2, who was basically the same age as Minor 1 and Angelica's daughter. (R. p. 202, line 23 – p. 203, line 10.) At some point, Angelica and her family moved from the trailer into a house. (R. p. 202, lines 21-22.)

Sometimes when she dropped the children off at Angelica's and when she would

pick them up, Angelica's husband would be there. Mrs. J. saw him more often when she picked her children up. (R. p. 203, line 23 – p. 204, line 22.)

Minor 2's mother worked with Mrs. J. and she started taking her children to Angelica's after she found out about Angelica from Mrs. J. (R. p. 205, lines 1-12.) One day, when dropping off Minor 1 and her brother, Mrs. J. noticed that Minor 2 was not at Angelica's. When she asked, Minor 2's mother said they were not going there anymore because of "the kids' lies or something in their head." (R. p. 205, lines 13-24.)

Minor 1 stopped going to Angelica's because of a conversation that Mrs. J. had with her on a Sunday afternoon about something happening. (R. p. 206, line 12 – p. 277, line 19.) Mrs. J. asked Minor 1 if someone had touched her, and Minor 1 told her about assaults that had occurred at the babysitter's at different times at different locations at the babysitter's. When Mrs. J. asked Minor 1 why she had not said anything earlier, Minor 1 replied that she was afraid. (R. p. 207, line 20 – p. 208, line 15.)

Mrs. J. testified that before this conversation, she had noticed a change in Minor 1's behavior. She had always been an honor student, but her grades went down "really bad." She was distracted and was not finishing her homework as she had before. She began asking Mrs. J. to sleep with her at night, and she began grinding her teeth such that it could be heard. (R. p. 209, line 14 – p. 210, line 2.)

The day after Minor 1 told Mrs. J. she had been assaulted, Mrs. J. took her to talk to the police. A member of the North Charleston Police Department took them to the Lowcountry Children's Center. (R. p. 210, lines 12-23.) There, Minor 1 was examined by a doctor and then interviewed. (R. p. 210, line 24 – p. 281, line 1.) When they were finished at the Children's Center, they returned to the North Charleston Police

Department so that Minor 1 could look at a photo lineup or pictures. (R. p. 211, lines 7-15.)

Mrs. J. also took Minor 1 to several sessions of counseling with Jessica Credeur, at the Children's Center. (R. p. 211, lines 16-20.) As part of that counseling, Minor 1 prepared a narrative for Mrs. J. Minor 1 kept the narrative in her bedroom for a while, but later gave it to Mrs. J. to keep. (R. p. 211, line 21 – p. 212, line 5.)

At some point in time, Minor 2's mother left a message for Mrs. J. with another employee at the store. When the employee called Mrs. J. with the message, Mrs. J. told her that they would have to go to the police. (R. p. 212, lines 6-18.)

At some point, Mrs. J. went to tell Minna, the North Charleston Police Department victim advocate with whom she had been working that they were planning on moving from the area. At that time, Minna told her about U visas, which were available for victims of crime. (R. p. 212, line 19 – p. 213, line 11.) Mrs. J., who had previously not known about U visas, testified that she did not want to think that she would be gaining anything as a result of what had happened to Minor 1. (R. p. 213, lines 12-18.) However, Minna took her to see a lawyer, and the lawyer explained about how U visas worked and why U visas were allowed. (R. p. 213, lines 19-24.). When asked if she ended up going through with a U visa, Mrs. J. testified, "Yes. We did it. We filed an application later on." (R. p. 213, line 24 – p. 214, line 1.)

On cross-examination, Mrs. J. was questioned in more detail about Minor 1's grades. She said that Minor 1 was distracted and had difficulty in finishing her homework, and they worked really hard to bring her grades back up. (R. p. 214, line 18 – p. 219, line 23.) In response to specific questions from defense counsel, Mrs. J. also

testified that she loved Minor 1, wanted to protect her, did not witness "any of this," and believed her. (R. p. 219, line 24 – p. 220, line 7; p. 228, lines 15-21.)

Mrs. J. was also cross-examined about her entry into the United States and U visas. She testified that she illegally entered the United States in 2000 and, without a U visa, she was subject to deportation. She testified that, with a U visa, she is allowed to stay in the United States. She is also allowed to receive and does receive food stamps. (R. p. 220, line 8 – p. 222, line 3; p. 227, line 17 - p. 228, line 13.)

**Testimony of Mrs. M., the Mother of Minor 2:
In Front of the Jury and In Camera Proffer**

The State also presented the testimony of Mrs. M., who is the mother of two daughters, including Minor 2, and a son. (R. p. 251, lines 18-23.) At the time of the trial, Minor 2 was about to be 11 years old and the younger daughter was about to be six years old. (R. p. 251, line 24 – p. 252, line 2.)

Mrs. M. testified that in 2010 she worked five days a week. Because her husband also worked, her children went to stay with a babysitter, Angelica, in her home. (R. p. 252, lines 9-23; p. 253, lines 14-25.) At that time, in the home with Angelica were her husband and her two daughters. (R. p. 252, lines 24-25.) When Mrs. M. first began taking her children to Angelica's, Angelica lived in a trailer, but later moved into a house. (R. p. 253, lines 9-13.) Mrs. M.'s children went to Angelica's all summer, but stopped because they had bugs in their scalps. (R. p. 253, line 24 – p. 254, line 6.) Sometimes, Mrs. M. saw Angelica's husband in the home. (R. p. 253, line 19 – p. 254, line 4.)

Mrs. M. testified that, at some point after Angelica's husband was arrested, Minor 2, while crying, told her that he had done something to her. She did not want to tell her parents about it. (R. p. 255, lines 5-24; p. 256, lines 5-15.) Prior to this disclosure, Mrs.

M. had noticed a change in Minor 2's behavior – she would become angry easily. (R. p. 255, line 25 – p. 256, line 4.)

On cross-examination, Mrs. M. testified about working with Mrs. J. (R. p. 257, line 15 – p. 258, line 12.) She said that she left a message for Mrs. J. at the store in an attempt to speak to her about what had happened to Minor 1, but that call was made a year afterwards. (R. p. 258, lines 13-25.) Minor 2's disclosure to Mrs. M. took place a little more than a year after the events occurred. (R. p. 259, lines 14-17.)

The following then occurred.

Q. Ma'am, do you have legal status to be in this Country?

A. No.

(R. p. 259, lines 23-25.) At that point, the trial court *sua sponte* called the attorneys up to the bench during which the following colloquy occurred.

THE COURT: I let you go into the visa and the legal status because she was the mother of the victim. I'm not going there with this witness. That has nothing to do with this case. I don't think it has anything to do with bias or anything and we're not going there, okay? I allowed you to do it with the other witness but there's no reason. I'm not going there with this witness, okay?

(WHEREUPON, the sidebar was concluded.)

THE COURT: Please disregard that statement about whether she's legal or illegal in this Country. ...

[DEFENSE COUNSEL]: I have not further questions. Thank you very much.

THE COURT: Now, at the appropriate time if you want to proffer some evidence I'll allow you to do it.

[DEFENSE COUNSEL]: Thank you, Your Honor.

(R. p. 260, lines 3-20.)

On redirect examination, Mrs. M. testified that she tried to reach Mrs. J. at the

store after Minor 2 made her disclosure. (R. p. 260, line 23 – p. 261, line 3.)

After Mrs. M. left the stand, the jury was excused so that the defense could make a proffer of their cross-examination of Mrs. M. on the U visa and her immigration status.

(Rr. p. 261, line 4 – p. 263, line 6.) The following proffer and ruling was then made.

Q. Ms. Maldonado, you've already stated that you don't have legal status to be in this Country?

A. No, I don't have.

Q. Does this mean that you are a risk for deportation or removal?

A. Yes.

Q. And so you have what a U-Visa is?

A. Yes.

Q. And that's a visa that's given to certain victims of crimes or family members?

A. I just heard about this recently. I didn't know before about this kind of visa.

Q. Did someone with the solicitor's office put you in touch with an attorney who was going to help speak to you about this visa?

A. From the solicitor's office, no.

Q. But you were put in touch with someone that was going to help you apply for one of these visas?

A. Yes.

Q. Was it maybe a victim advocate or helper that put you in touch with that attorney?

A. No.

Q. Do you remember how you came across the name of this attorney that is helping you?

A. Can you repeat the question?

Q. Yes, ma'am. Do you remember how you came across the name of the attorney that is helping you apply for this visa?

A. Yes.

Q. And how is that?

A. When we went for her to have her questioning and exam they gave us several information sheets and that was one of them.

Q. And have you applied then for this U-Visa?

A. Yeah, because they recommended that we do it.

Q. Have you applied for any other government benefits like food stamps since you applied for this U-Visa?

A. No.

[DEFENSE COUNSEL]: Your Honor, that's all the questions that I have. That's the only testimony I'd proffer on this?

* * *

THE COURT: Okay. For clarification of the record, during the course of cross-examination the defense counsel asked the question about whether or not the witness was legally in the country or not, illegally in the country, and the Court stopped that testimony based on Rule 403, Rule 611, State vs. Jennings, 474 S.E.2d 812, 1996.

I do not think it has anything to do with this particular witness because there's been no testimony about any charges against her daughter, and I don't think it's – even if it's relevant, it's marginally relevant as to this particular witness. And I allowed you [to] do it with the mother, the victim who is charged in this case but not with this witness.

(R. p. 263, line 9 – p. 265, line 18.)

Testimony of Minna Hosseini

In the presence of the jury later during its case, the State presented the testimony of Minna Hosseini, a Victim Advocate with the North Charleston Police Department. (R. p. 290, lines 2-11.) After testifying as to how she assisted Detective Lacher in this case by showing a photographic line-up to Minor 1 on July 14, 2010 (R. p. 290, line 15 – p. 296, line 5; p. 296, lines 22-23), Ms. Hosseini said that she continued to work with Minor 1 and her family because she assisted with translation and because she explained, among

other things, court procedures and other services provided. (R. p. 296, lines 6-12.)

Ms. Hosseini explained to the jury that a U visa is immigration relief that an undocumented person can apply for, with the assistance of a law enforcement or prosecuting agency, if they are a victim of a designated violent crime. She said that a U visa is not permanent, but has the potential to become permanent; she added that the purpose of a U visa is to ensure that a victim will be around for court. (R. p. 297, line 16 – p. 298, line 4.) Ms. Hosseini testified that Mrs. J. was referred about a U visa on January 21, 2011, and that she spoke to her about it on January 24, 2011. (R. p. 296, line 13 – p. 297, line 3.) She said that she talked to Mrs. J., who did not appear to know about U visas, about the visa because it was Mrs. J.'s right to know about it. (R. p. 297, lines 1-9.) Ms. Hosseini testified that Mrs. J. reacted very emotionally to the idea of a U visa because she did not want to benefit from what had happened to Minor 1, but that Ms. Hosseini encouraged her to apply by telling her that they needed her to be present if Minor 1 was going to be part of the case. Ms. Hosseini also took Mrs. J. to her appointment. (R. p. 297, lines 10-15; p. 298, lines 5-15.)

On cross-examination, Ms. Hosseini was questioned about the absence of any reference in her case notes to Mrs. J. being reluctant to get a U visa. (R. p. – p. 370, line 25.) She then testified that getting a U visa would not automatically result in a person getting a U.S. passport or permanent residency in the United States, but it is a step in the right direction. (R. p. 301, lines 1-14.) Ms. Hosseini explained that, to get a U visa, a person has to submit several pieces of documentation to Homeland Security, including recommendation letters and the certified signature of someone with either a law enforcement agency or prosecuting agency. The signature of a law enforcement agency

or prosecuting agency is required; it helps in the application process, but does not guarantee that a U visa will be issued. The ultimate decision is made by Homeland Security. (R. p. 301, line 15 – p. 302, line 6.)

On redirect, Ms. Hosseini testified that she checked in with Mrs. J. about going to talk to someone about a U visa on January 24, 2011, but that Mrs. J.'s appointment with the attorney to discuss the U visa was not until March 3, 2011. (R. p. 302, lines 15-25.) Ms. Hosseini also testified that her notes of Mrs. J.'s March 3 meeting with the attorney indicate that Mrs. J. was very emotional. (R. p. 303, lines 1-16.)

Argument

Appellant contends the trial court erred in refusing to allow him to question the mother of Minor 2 about her immigration status and the circumstances surrounding her application for the U visa.⁵ The State disagrees. The trial court exercised sound

⁵ The U nonimmigrant status (U visa) was created by Congress in 2000 to strengthen the ability of federal, state, and local governments to investigate and prosecute certain designated crimes (including rape, sexual assault, and abusive sexual contact), to protect victims of those crimes who have suffered substantial mental or physical abuse as a result and who are willing to assist with the investigation and prosecution of the crimes; and (3) to assist law enforcement agencies in better serving victims of crime. <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last viewed February 17, 2014). To apply for U nonimmigrant status, the required form must be submitted by the victim or someone petitioning on the victim's behalf. A valid petition must include the certification, of a federal, state or local government agency investigating or prosecuting a qualifying criminal activity, that the victim has been, is being, or will likely be helpful in the investigation or prosecution of the criminal activity of which he or she was a victim. [http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying for U Nonimmigrant Status \(U Visa\)](http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying%20for%20U%20Nonimmigrant%20Status%20(U%20Visa)) (last viewed on February 17, 2014). A petition may also be submitted for eligible family members to obtain U nonimmigrant status. <http://www.uscis.gov/archive/archive-news/questions-and-answers-qualifying-family-members-u-visa-beneficiaries-may-obtain-lawful-permanent-residence> (last viewed on February 17, 2014). A U visa holder may be eligible to apply for a Green Card if he or she meets certain requirements,

discretion in not allowing the questioning because it was irrelevant.

Evidence must be relevant to be admissible. Rule 401, SCRE. The requirement of relevance means that the evidence must tend to make any fact of consequence more or less probable than it would be without the evidence. *Id.*

“Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness *or by evidence otherwise adduced.*” Rule 608(c), SCRE (emphasis added). “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *State v. Pipkin*, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting *U.S. v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984)). Rule 608(c), SCRE, “preserves South Carolina precedent holding that generally, ‘anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.’ ”

(Emphasis in original.) *State v. McEachern*, 399 S.C. 125, 140-141, 731 S.E.2d 604, 611-612 (Ct. App. 2012). However, evidence that is relevant is still subject to exclusion if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE.

The jury was told that U visas are available for illegal immigrants who are victims of crime. Appellant was fully allowed to cross-examine the mother of Minor 1, the victim in this case, about her application for a U visa. The jury was not told of any

including being physically present in the United States for a continuous period of at least three years while in U nonimmigrant status and not having unreasonably refused to provide assistance to law enforcement since receiving the U visa. [http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying for U Nonimmigrant Status \(U Visa\)](http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Applying%20for%20U%20Nonimmigrant%20Status%20(U%20Visa)) (last visited on February 17, 2014).

charges related to Minor 2. Thus the questions pertaining to Minor 2's mother's immigration status and her application for a U visa were irrelevant, and would actually have introduced confusion into the trial.⁶ The trial court properly disallowed the cross-examination under Rules 401 and 403.

The case relied upon by Appellant, *State v. Valle*, 298 P.3d 1237 (Or. Ct. App. 2013), is factually distinguishable in that the witness in that case the defense sought to question about the U visa was the *actual* victim of the criminal act, (sexual abuse) being prosecuted.

Moreover, the record reveals that Appellant's trial counsel thoroughly cross-examined Minor 1, Minor 2, and their mothers. They brought inconsistencies in what the witnesses had said at different time to light. There was, therefore, other impeachment evidence presented by the defense and, if there were any error in the exclusion of this line of questioning, it would be harmless beyond a reasonable doubt.

⁶ And for this reason, this limitation of cross-examination did not unfairly prejudice Appellant and does not constitute reversible error. See *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991).

III.

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Appellant's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Appellant was convicted and the evidence presented, there was no error in the sentences issued.

(Issue III)

The jury returned their verdict finding Appellant guilty of lewd act upon a minor, not guilty of first degree criminal sexual conduct with a minor, and, as a lesser-included offense of first degree criminal sexual conduct with a minor, guilty of assault and battery of a high and aggravated nature. (R. p. 535, line 14 – p. 536, line 7; p. 537, lines 11-19.)

Thereafter, the defense argued for a sentence of time served (918 days) was appropriate given:

- the lack of prior criminal record,
- the fact that this conduct was so contrary to his past conduct,
- the fact that he was a hard worker and has worked hard to provide for his family,
- the fact that he and his children love and will miss each other,
- the fact that he was a family man who put his concern for his friends and family above his own,
- the fact that he has carried himself well and showed a great deal of restraint, self-control and kindness since his arrest,
- his imminent deportation back home to Mexico as a result of the convictions,
- the risk of harm to which he will be subjected in prison as a convicted child molester, and
- the fact that Appellant's beautiful family would be wrecked by his conviction and sentence.

(R. p. 540, line 21 – p. 546, line 9; p. 550, lines 6-24.) Defense counsel also argued that,

because there were no specific findings by the jury, the trial court should, under *Apprendi v. New Jersey*, assume the jury only found the least serious possible acts necessary to convict Appellant of lewd act upon a minor to have been proved. (R. p. 546, lines 10-24.)

The trial court then heard from Mrs. J., who spoke about the impact Appellant's assaults upon her daughter and her. She talked about Minor 1's nightmares and counseling, as well as about her guilt over not only placing Minor 1 in Appellant's home where she was assaulted and her failure to see what was going on, but also her guilt about recommending Angelica and another little girl being assaulted as a result. (R. p. 551, line 5 – p. 552, line 2.) The Assistant Solicitor then addressed the trial court. Telling the Court that Minor 2's family did not wish to speak, she said that Appellant was already receiving an extreme advantage because she would be dismissing the first degree criminal sexual conduct with a minor and lewd act indictments involving Minor 2 because she was not capable of testifying about those acts at another trial. (R. p. 552, lines 5-13.) The Assistant Solicitor then asserted that, while the defense had spoken about the possibility that Appellant might be harmed if sent to prison, Appellant had taken advantage of very vulnerable, young children and had showed them no mercy. She stated that, in terms of lewd acts, this case involved very serious acts – acts that were repetitive and involved a lot more in terms of the ABHAN and indecent liberties. While she expressed her sorrow for Appellant's family, the Assistant Solicitor pointed out that their suffering was the result of Appellant's behavior. (R. p. 552, line 14 – p. 553, line 5.) The Assistant Solicitor ended her argument on sentencing by asking the trial court to impose consecutive sentences to reflect the repetitive and long-term nature of the crimes. (R. p.

552, line 25 – p. 553, line 3.)

After clarifying the maximum sentence on each charge, the Court sentenced Appellant to 15 years on the conviction for lewd act on a minor and a consecutive 10 years on the conviction for assault and battery of a high and aggravated nature. (R. p. 553, line 6 – p. 554, line 5.) The following colloquy then occurred.

[DEFENSE COUNSEL]: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.

THE COURT: I'm sorry, what now?

[DEFENSE COUNSEL]: We object to the sentences being run consecutively as being vindictive and punishing [Appellant] for going to trial. I think there were – and this is where I'm a little reluctant to go into detail but we did have – I think I have to, to preserve [Appellant]'s rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas –

THE COURT: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record.

I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: That's what I told you.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Because if it is it's the last time I will speak with you without a court reporter present.

[DEFENSE COUNSEL]: I apologize. But, yes, sir. I think I have to.

THE COURT: Pardon? It was not an in-camera hearing. I was trying facilitate the disposition of this case.

[DEFENSE COUNSEL]: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.

THE COURT: Pardon?

[DEFENSE COUNSEL]: That's an accurate summary of what was said.

THE COURT: Okay. Now, do you want to make a motion on that, what I put on the record?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: What's your motion?

[DEFENSE COUNSEL]: That running these sentences consecutively is punishing [Appellant] for his right to go to trial.

THE COURT: Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty.

The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: All right. Motion denied....

(R. p. 554, line 7 – p. 556, line 14).

On appeal, Appellant argues that the sentence imposed by the trial court was vindictive, constituted evidence of bias against Appellant, and violated Appellant's due process rights. The State strongly disagrees.

In *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995), this Court held that a trial judge abuses his discretion in sentencing when he considers the fact that the

defendant exercised his right to a jury trial. *See also State v. Follin*, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002). In this case, the record clearly demonstrates that the trial court did not consider the fact that Appellant exercised his right to a jury trial. Instead, the court in sentencing Appellant took into account the evidence that had been introduced throughout the trial – not all of which was available when counsel talked to the parties about a plea involving *only one* charge and a possible sentence on that *one* charge. The fact that the trial court referred to evidence that would have supported a jury verdict on the original indictment for criminal sexual conduct with a minor in the first degree does not change this fact. The Court is allowed, in sentencing a defendant within the proper sentencing range – as Appellant does not dispute it did in this case – is allowed to consider the evidence presented during the course of the trial and the information provided at time of sentencing by the parties.

The record clearly establishes that the sentences were not punishment for Appellant exercising his constitutional right to a jury trial. It establishes that they were not based on any improper considerations. The jury convicted Appellant of engaging in improper conduct with Minor 1 – he took advantage of a position of trust, he took advantage of a young child, and he did not commit the abuse just once, but several times. The sentences are within the appropriate range and fairly based on the evidence presented. There was no error.

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), this Court should affirm the judgment of the circuit court.

Respectfully submitted,

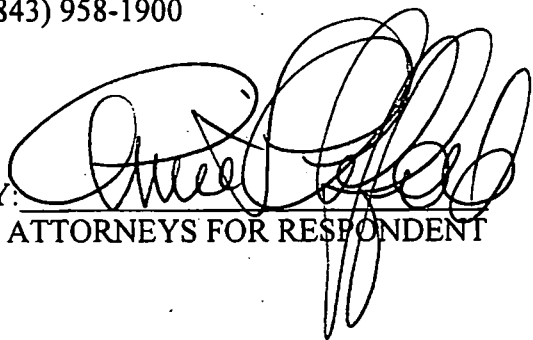
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