STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of General Sessions

The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000395

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DAMYON M. COTTON,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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The trial judge properly admitted the testimony of a prior sexual assault victim under the common scheme or plan exception to Rule 404(b) where Appellant's sexual assault of the prior victim was highly similar to his sexual assault of the current victim and the similarities between the two incidents outweighed any dissimilarities.

STATEMENT OF THE CASE

Appellant was indicted in Darlington County in July of 2013 for criminal sexual conduct in the first degree and kidnapping. On February 24, 2014, Appellant proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Appellant guilty of both offenses, and Judge Baxley sentenced him to fifteen years, concurrent, on each charge. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge properly admitted the testimony of a prior sexual assault victim under the common scheme or plan exception to Rule 404(b) where Appellant's sexual assault of the prior victim was highly similar to his sexual assault of the current victim and the similarities between the two incidents outweighed any dissimilarities.

Background Facts

The victim, age nineteen at the time of trial, testified that she first met Appellant through a "chat line" over the phone.[1] (R. p. 6-7). After exchanging numbers on the chat line, the victim and Appellant talked on the phone and ultimately arranged to go to the movies together on February 1, 2013. (R. p. 7-8). Appellant picked the victim up around 6:30 pm, but when they arrived at the movie theater, Appellant "didn't want to go in" and instead tried to force the victim's head onto his penis. (R. p. 8; p. 162, lines 23-25). After the victim refused to provide oral sex, Appellant then drove the victim to K-Mart to look for Valentine's Day gifts. (R. p. 9). Upon arrival, Appellant decided he did not want to go inside and instead again attempted to make the victim perform oral sex. (R. p. 9). He then tried to give the victim cash to go buy something from the store but the victim threw the money back at Appellant. (R. p. 9). The victim subsequently asked Appellant to take her home. (R. p. 10). Appellant refused and instead took the victim's phone and drove her out to Turnpike Road to a wooded area. (R. p. 10). Appellant told the victim that she had been telling him "a long time" that she was going to "give him some" and "now is the time." (R. p. 10, lines 16-18). He also threatened to "take a gun out" if the victim did not cooperate. (R. p. 16, lines 13-23).

[1] The victim subsequently explained that although she initially met Appellant over the chat line, she saw him in person one time at a friend named Tanzy's house. (R. p. 17-18; p. 128-29).

At that point Appellant leaned over and tried to take off the victim's pants. (R. p. 11-12). When he was unable to do so, he exited the car, went around and opened the passenger side door, and dragged the victim out of the car. (R. p. 12-13). The victim told Appellant she did not want to have sex but Appellant told her she had to do it since it was time. (R. p. 13). In an attempt to dissuade Appellant, the victim told him she was pregnant and that she had herpes. (R. p. 14). Appellant said "we'll fix that," put on a condom, and began having vaginal sex with the victim. (R. p. 14). When Appellant was finished, he threw the condom in the woods and gave the victim back her clothes. (R. p. 14). Appellant and the victim, who was crying, got back in the car and Appellant began apologizing, saying he loved the victim, and asking her not to call the police. (R. p. 14-15). He returned the victim's phone to her when they got on Highway 52. (R. p. 158). Appellant then dropped the victim off at home. (R. p. 15). The victim walked the long way around the car so she could memorize Appellant's license plate number. (R. p. 15). As soon as she walked in the house, she ran to her mother and told her she had been raped. (R. p. 15).

The victim's mother testified she was watching television on the evening in question when the victim, looking disheveled, came in the house and immediately told her she had been raped. (R. p. 190-91). The victim's mother noticed the victim's jeans were not buttoned when she came inside and testified that these jeans had not been broken when the victim left the house. (R. p. 191). The victim's mother took the victim to the hospital immediately, where a nurse performed a rape kit. (R. p. 192). Although the victim had some difficulty communicating due to her being a little slow,[2] the victim

[2] The victim suffered from a "learning disability" and "mental difficulties" which made it more difficult for her to communicate clearly. (R. p. 11, lines 6-8; p. 131, line 23 – p. 132, line 4; p. 190, lines 5-8; p. 238,

told the nurse exactly what happened with a good bit of detail. (R. p. 237-38; p. 241-42). The nurse also collected the victim's clothing, including her jeans, and took swabs from the victim. (R. p. 239).

Police officers from Florence and Darlington counties responded to the hospital and interviewed the victim. (R. p. 193-94). The victim provided a statement to police that was consistent with her trial testimony. (See R. p. 161-64; p. 198-205; p. 209-222; p. 498-99). Using the license plate number the victim provided, police ultimately figured out Appellant's name and created a photo lineup. (R. p. 220-21). The victim picked Appellant out as the man who raped her. (R. p. 221, lines 7-13). The evidence collected from the victim on the night of the rape was later submitted to SLED for analysis and Appellant's DNA was found on the buttonhole of the victim's jeans. (R. p. 245-56; p. 273-75).

The Common Scheme or Plan Witness

Prior to trial, the State sought a ruling on whether or not a prior bad act witness would be allowed to testify to establish Appellant's common scheme or plan.[3] (See R. p. 3-4). After presenting the victim's testimony in the pre-trial hearing, the State presented the testimony of Minor, who was age sixteen at the time of trial. (R. p. 20). Minor testified that she was fifteen in June of 2012, when she met Appellant through social media, specifically Facebook. (R. p. 20-21). Minor stated that she met Appellant after posting a status on Facebook asking if anyone wanted to "chill."[4] (R. p. 21, lines 7-8).

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lines 1-12).

[3] Although the State initially planned to offer two additional Lyle witnesses, these additional witnesses did not respond to their subpoenas and apparently decided they did not want to be involved in the case. (R. p. 4, lines 6-21).

[4] In his Brief, Appellant appears to imply that Minor's use of the word "chill" meant she was looking to have sex. (See Brief of Appellant, p. 5, n.12). Appellant bases this implication on an entry from the "Urban Dictionary" website defining the word in that manner. Significantly, however, as of July 8, 2015,

Appellant responded and the two began sending messages back and forth. (R. p. 21). At some point thereafter, Appellant came and picked the victim up from her friend's house for the purpose of giving her a ride home. (R. p. 21; p. 30, lines 20-25; p. 171, lines 20-21). Appellant's brother was also in the car and Appellant asked if Minor would mind riding with him to drop his brother off in Hartsville. (R. p. 21). During the ride, Appellant began "touching on" the victim. (R. p. 21-22). When Appellant's brother exited the car, the victim noticed that her cell phone was dead and asked Appellant if he had a car charger. (R. p. 22). Appellant said his "homeboy" had one and drove to his house to retrieve it. (R. p. 22). However, when he came back out of his "homeboy's" house, he did not have a phone charger; instead he told Minor that it was down the street. (R. p. 22). He then drove down the street to a trailer with a shed in the back. (R. p. 22). He told Minor that she could go in the shed and charge her phone. (R. p. 22-23). The victim felt like going in the shed to charge her phone was "kind of sketchy" so she declined. (R. p. 23).

At that point, Appellant asked if Minor would "give him some head." (R. p. 22, lines 20-21). Minor said no and reiterated that she told him before that she "didn't want to do nothing like that." (R. p. 23, lines 5-7). Appellant complained that he "drove all

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there were over one hundred entries defining the word "chill" on the Urban Dictionary website, with the overwhelming majority defining the term, at least in this context, to mean to "hang out" or to relax. See *Chill*, Urban Dictionary, http://www.urbandictionary.com/define.php?term=Chill. The top six definitions of "chill" in the Urban Dictionary are as follows: "(1) to calm down; (2) cool, tight, wicked, sick, sweet, nice, etc.; (3) to hang out; (4) to be easy going; (5) a little bit cold; (6) its ok." See id. The entry identified by Appellant appears to be one of a minority of entries defining the word as having a sexual connotation, and pursuant to that entry, "chill" is defined as follows: "A term often used by males to manipulate a female into hanging out with him when his real intention is to have sex with her. Also a code word for sex. Commonly used when a female gives a male her number and when he calls her, asks her to chill with him without knowing much about her yet which shows his true intentions is to really have sex." See *Chill*, Urban Dictionary (July 2, 2006), http://www.urbandictionary.com/define.php?term=Chill. This definition is wholly inapplicable under the facts of this case, and notably, defense counsel below never once suggested that Minor was seeking out sex when she made her Facebook post asking if anyone wanted to "chill."

the way to Florence to pick you up and you're not going to give me no head." (R. p. 23, lines 7-9). Appellant then started trying to push Minor's head down toward his lap and when he "got rougher" Minor started pulling away and screaming. (R. p. 23, lines 10-13). Appellant exited the car and came around to the passenger side and started hitting Minor with his fists. (R. p. 24). Minor was so scared that she agreed to perform oral sex. (R. p. 24, lines 15-16). Appellant got back into the car and Minor provided oral sex. (R. p. 24). Appellant then started driving and Minor thought he was going to take her home; however, instead, Appellant pulled into a partial driveway surrounded by trees and instructed Minor to take off her pants. (R. p. 24). At this point it was around 9:00 pm and it was dark outside, and Minor saw a cornfield on the other side of the road but no homes nearby. (R. p. 25). The victim complied with Appellant's demands and took her pants off and exited the car. (R. p. 24-25). Minor tried to dissuade Appellant by telling him she was on her period, but Appellant "didn't care" and put on a condom. (R. p. 25). Appellant raped Minor vaginally and then anally, then they got back in the car and Appellant started being "nice" to Minor. (R. p. 26). He told Minor he was sorry and that he "didn't mean to." (R. p. 26). He then dropped Minor off on a street near her house and she walked the rest of the way home. (R. p. 26-27). On the way home Minor sent a message to one of her friends describing what had just happened to her, and her friend encouraged her to tell her grandmother. (R. p. 27). Minor did so and her grandmother took her to the hospital. (R. p. 27). Subsequently, the victim picked Appellant out of a photo lineup prepared by police as the man who raped her. (R. p. 28, lines 16-20).

Appellant also testified at the pretrial hearing, denying he ever had sexual relations with either victim and offering a contradictory version of events and an alibi.

(See R. p. 38-60). The trial judge ultimately did not find Appellant's testimony credible for purposes of the pretrial hearing. (See R. p. 87, line 24 – p. 88, line 14).

At the conclusion of the pretrial hearing testimony, the solicitor argued that Minor's testimony was admissible under the common scheme or plan exception to Rule 404(b) because there were similarities in the ages of the victims, the relationships between the victims and Appellant, the locations of the incidents of sexual abuse, the use of coercion and threats, and the manner of occurrence of the incidents of sexual abuse. (R. p. 61-62). Specifically, the solicitor pointed out that both victims were young teenaged girls; that Appellant met each victim through social media and did not previously know the victims; that Appellant picked up each victim at nighttime and drove them to a secluded area to rape them; that Appellant used threats, force, and violence with each victim; and that the manner of occurrence was similar where Appellant first requested oral sex with the victims inside of his car and then forced them to have sexual intercourse outside of the car. (R. p. 62-65). The solicitor also pointed out that in both instances Appellant made sure the victims did not have access to their cell phone, and that Appellant ignored both victims when they claimed to have problems that prevented them from having sex and instead simply put on a condom and continued the assault. (R. p. 63-65).

In response, defense counsel argued that the testimony of Minor was mere propensity evidence and was inadmissible where the evidence to establish the prior sexual assault was not clear and convincing; where Minor's allegations were "vague, entirely too general" and lacking in a close degree of similarity to fit under the common

scheme or plan exception, and where the prejudicial value of Minor's testimony "far outweighs" any probative value it would have in the case. (R. p. 67-79).

After recessing to consider the matter, the trial judge ruled that Minor's testimony was admissible under the common scheme or plan exception. (R. p. 82-88). The judge first determined that the evidence was clearly relevant under Rule 401, SCRE, since it had a tendency to make the occurrence of the underlying charge more or less probable. (R. p. 83-84). The judge then found that the evidence fit under the common scheme or plan exception where (1) the ages of the victims were similar and they were both teenaged girls at the time of the assaults; (2) the victims both met Appellant through social media; (3) the incidents of abuse both occurred in and around Appellant's vehicle and occurred after Appellant took the victims to an unfamiliar, unpopulated area under the pretext of giving them a ride somewhere; (4) there were coercion and threats involved in each incident; and (5) the manner of occurrence was similar where Appellant began by asking for oral sex and then moved on to sexual intercourse. (R. p. 85, line 21 – p. 87, line 15). The judge ruled that while there were "minor dissimilarities" between the two incidents, in the "overall scheme of things" the incidents were "very similar" and were the type of incidents anticipated in the common scheme or plan exception. (R. p. 87, lines 16-21). Finally, the judge weighed the prior bad act evidence under Rule 403, SCRE, and determined that the probative value of the evidence was not substantially outweighed by the danger or unfair prejudice.[5] (R. p. 88-89). Thus, the judge allowed the State to present Minor's testimony before the jury, and Appellant renewed his objection to this testimony at trial. (See R. p. 170).

[5] The trial judge noted that he did find that the prior bad act had been proven by clear and convincing evidence since he found Minor's testimony credible and Appellant's testimony not credibile. (R. p. 87, line 24 – p. 88, line 14).

Applicable Law

Under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). After determining that the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, the South Carolina Supreme Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (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. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in

> weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted).

Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity in those acts, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to establish a material element of the charged offense should not be excluded merely because it "incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

Finally, after determining the prior bad act evidence is relevant and falls within a permissible exception of Rule 404(b), SCRE, the trial judge must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." Wallace, 384 S.C. at 435, 683 S.E.2d at 278. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value

of the evidence so as to outweigh its prejudicial effect, it is admissible." Mathis, 359 S.C. at 463, 597 S.E.2d at 879.

Pertinent Case Law

In State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. This Court found the testimony admissible, noting the following:

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

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

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman's home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman's home. The victim and two other women each testified that the abuse began shortly after they arrived at Hallman's farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman's penis. The events in each case took place in the bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the

farm at four years old and was made to rub his penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

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

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

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

Our Supreme Court in State v. McClellan found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in a prosecution for similar acts against the youngest daughter because the "experiences of each daughter parallel that of her sisters . . ." State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Specifically, the Supreme Court noted: "[T]he initial attack occurred around age twelve; Appellant entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to "Honor thy Father"]." Id.

In State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), the Supreme Court reversed the Court of Appeals' determination that the trial judge had erroneously admitted testimony about Wallace's previous sexual abuse of the victim's sister. The Court found that the trial judge had properly admitted the prior bad act evidence where the similarities between the sister's abuse and the victim's abuse - including "petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment

not to tell because no one would believe it" - outweighed any dissimilarities. Id. at 434, 683 S.E.2d at 278. The Court further concluded that the probative value of the sister's testimony about the prior abuse substantially outweighed the danger of unfair prejudice. Id. at 435, 683 S.E.2d at 279.

In State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose that he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner - over the course of two years - reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim's testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner - over the course of two months - hugged her and fondled her breasts while she was baby-sitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. Id. at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness' testimony

regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan but found any testimony related to the dissimilar acts was inadmissible. Id. at 582, 608 S.E.2d at 467.

After the jury convicted him, Hubner appealed, asserting the prior bad act evidence should not have been admitted. Id. at 575, 608 S.E.2d at 464. The Court of Appeals reversed Hubner's convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. Id. at 585, 608 S.E.2d at 469. However, the Supreme Court subsequently overturned the decision of the Court of Appeals and affirmed Hubner's convictions, citing to Wallace. See State v. Hubner, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

In State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012), *cert. denied* Aug. 21, 2014, a case in which the defendant molested unrelated female employees at his sandwich shop, this Court, in admitting testimony from a prior victim, stated as follows:

> Under the factors delineated in Wallace, we agree with the trial court that Employee 4's testimony was admissible under the common scheme or plan exception. Victim and Employee 4 were both young women, aged 16 and 17 to 18 respectively, when the inappropriate touching occurred. They were both employees of Atieh and the inappropriate touching took place at the restaurant primarily around the sink or cooler. There was no direct coercion or threat in either case, although both Victim and Employee 4 were subordinate employees. The specific instances of touching in both cases included Atieh pressing against Victim and Employee 4, touching their rear ends, putting his hand up or down their shirts, and putting his hand inside the waistband of their pants. The similarities of both women's testimonies far outweigh the differences, increasing the probative value of Employee 4's testimony.

Regarding Rule 403, SCRE, this Court found:

> In ruling on Atieh's objection, the trial court limited Employee 4's testimony to matters that would aid in establishing a common scheme or plan, allowing no speculation on what Atieh's intent might have been in putting his hand in the waistband of her pants. The trial court instructed

> the jury it could not consider evidence of bad acts for any reason other than intent, common scheme or plan, or absence of mistake. It specifically cautioned the jury against considering the testimony as proof of Atieh's guilt. The trial court took all precautions to reduce any prejudice Employee 4's testimony may have created and Atieh has shown no clear evidence Employee 4's testimony improperly influenced the jury's verdict. Therefore, we find the trial court did not abuse its discretion in admitting Employee 4's testimony.

State v. Atieh, 397 S.C. 641, 648-49, 725 S.E.2d 730, 734 (Ct. App. 2012).

Discussion

Appellant contends the trial judge erred in admitting evidence of his prior bad acts under Rule 404(b), SCRE. Appellant maintains the prior bad act evidence was improperly admitted where the case involved a single isolated prior bad act with a different and unrelated victim; where the two incidents of sexual assault were linked only by very general similarities common to most sexual assaults; and where the differences between the two assaults far outweighed the similarities.[6] To the contrary, the trial judge properly admitted the evidence under the common scheme or plan exception where the two incidents of sexual assault were highly similar and the similarities outweighed the dissimiliarities. The prior bad act evidence was offered for the limited purpose of establishing the existence of a common scheme or plan, and the jury was thoroughly

[6] Appellant also asserts, in a footnote, that the trial court erred in admitting Minor's testimony because her testimony was not relevant and was not proven by clear and convincing evidence. (See Brief of Appellant, p. 14, n16). However, Appellant makes no argument explaining why Minor's testimony was not relevant. See, e.g., State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); Mulherin-Howell v. Cobb, 362 S.C. 588, 600-601, 608 S.E.2d 587, 594 (Ct. App. 2005) (where a party fails to cite any supporting authority for its position and all arguments are merely conclusory statements, the issue is deemed abandoned on appeal). Additionally, Appellant's argument that the prior bad act was not established by clear and convincing evidence because the State presented only the testimony of Minor herself is wholly without merit. See State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 829-30 (2001) (a single witness' testimony that she directly witnessed the prior bad act factually supports admission of prior bad act testimony); see also State v. Aiken, 322 S.C. 177, 181, 470 S.E.2d 404, 407 (Ct. App. 1996) ("As for Aiken's contention that the evidence of Aiken's other bad acts was not clear and convincing, Govan testified he had direct knowledge of Aiken's participation because the two of them committed the crimes together. We therefore hold the trial court did not abuse its discretion in allowing the testimony of Aiken's participation in the other robberies.").

instructed to consider the evidence only for this limited purpose. Accordingly, Minor's testimony was admissible under Rule 404(b), SCRE, and the trial judge did not abuse his discretion by admitting this evidence under the common scheme or plan exception. Furthermore, even if the trial judge did err in admitting Minor's testimony, such error was entirely harmless under the circumstances of this case due to the overwhelming evidence of Appellant's guilt.

Common Scheme or Plan Exception

In Appellant's case, the evidence regarding Minor's sexual assault was admissible under the common scheme or plan exception because there was a close degree of similarity between the assault of the victim and that of Minor and the relevant and significant similarities between the incidents outweighed any dissimilarities. See Wallace, 384 S.C. at 433, 683 S.E.2d at 278. First, the victims were both young, teenaged girls at the time of the assaults - the victim was eighteen and Minor was fifteen. Second, both victims met Appellant for the first time through social media and they were not part of his usual social circle. When the victims met with Appellant on the dates of the assaults, it was their first time spending time with Appellant alone. These facts are significant because they allowed Appellant to take advantage of young girls who barely knew him and therefore could not as easily identify him to law enforcement. Third, the sexual assaults both began in Appellant's vehicle, with Appellant seeking out oral sex from the victims, then progressed to forced penetrative sex immediately outside the vehicle in a remote, secluded location where Appellant could have his way with the victims without being easily observed and where the victims would not feel like they could easily escape from Appellant.

Fourth, Appellant used force and physical violence with both victims. With the primary victim, he used force when attempting to compel her to perform oral sex inside the vehicle, used physical violence to drag her out of the vehicle, and used violence during the sexual intercourse. (R. p. 7-15; p. 122-26). With Minor, Appellant similarly used force when attempting to compel oral sex inside the vehicle, and also used physical violence before Minor decided it would be safer to simply submit to Appellant's demands. (R. p. 22-27; p. 173-77). Fifth, the manner of occurrence was highly similar in both instances. Appellant, under the pretense of providing the victims with a ride somewhere in his car, took advantage of the victims while alone with them, first attempting to compel them to perform oral sex on him inside the car, then forcing them to remove articles of clothing and have sexual intercourse with him immediately outside the car in a secluded location. Before beginning the assaults, Appellant ensured both victims did not have access to their cell phones. Appellant also ignored both victims' proffered reasons why they could not have sex and instead put on a condom. Finally, following the sexual assaults, Appellant apologized to both victims, tried to act kind toward them, and attempted to minimize his conduct.

Appellant points out in his Brief that his crimes did not involve young children being abused over a lengthy period of years. (See Brief of Appellant, p. 16-17). However, common scheme or plan evidence is not limited to crimes involving children, nor is it limited to sexual crimes. See, e.g., State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (Ct. App. 1995). Here, Appellant's common scheme or plan did not involve children or repeated abuse over a

period of years; instead, it involved sexually assaulting young teenaged girls - girls who barely knew him - one time under highly similar circumstances, as discussed above.

Appellant also stresses in his Brief that his crimes were not "unique." (See Brief of Appellant, p. 20-21). However, prior bad act evidence admitted under the common scheme or plan exception need not illustrate that the defendant's crime is so unique that it could have only been committed by the same person; instead, it need only demonstrate a close degree of similiarity to the charged offense such that it illustrates a common scheme or plan. Cf. People v. Ewoldt, 7 Cal.4th 380, 403, 867 P.2d 757, 770 (1994) (stating that "[t]o establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual," while noting that with respect to the "identity" exception, "[t]he greatest degree of similarity is required" in that "the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.").

Appellant further argues that the differences between the two incidents far outweigh the similarities. (See Brief of Appellant, p. 21-26). To the contrary, although there are minor dissimiliarities between the sexual assaults of the victim and of Minor, the relevant, significant similarities greatly outweigh any minor, insignificant dissimilarities. See State v. Scott, 405 S.C. 489, 501, 748 S.E.2d 236, 243 (Ct. App. 2013) ("Although we recognize that these points of distinction do exist, we find the trial court did not abuse its discretion in determining these distinctions were insufficient to outweigh the many other similarities."), *cert. dismissed as improvidently granted* July 1,

2015; Wallace, 384 S.C. at 433, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)."). The two sexual assaults bore a high degree of similarity. See Scott, 405 S.C. at 501, 748 S.E.2d at 243 ("Despite Appellant's contention to the contrary, the bad act evidence bore the requisite degree of similarity."). Appellant's actions in committing the two sexual assaults in this case followed a consistent pattern and illustrated his common scheme and plan. Accordingly, evidence of Appellant's sexual assault on Minor was admissible as common scheme or plan evidence under Rule 404(b). See Wallace at 433, 683 S.E.2d at 277; Hubner, at 437, 683 S.E.2d at 280; State v. Beekman, 405 S.C. at 231-33, 746 S.E.2d at 487-88; Atieh at 648-49, 725 S.E.2d at 734.

Rule 403 Analysis

Appellant also contends that, even if Minor's testimony was admissible under the common scheme or plan exception, her testimony was inadmissible because the probative value of her testimony was outweighed by the unfair prejudice. (See Brief of Appellant, p. 27). Under Rule 403, SCRE, evidence that is relevant may still be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means tending to prove or disprove. State v. Gray, 408 S.C. 601, 609-10, 759 S.E.2d 160, 165 (Ct. App. 2014) (citing Black's Law Dictionary 1323 (9th ed. 2009)). "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165.

The probative value of evidence must, of course, be weighed against the danger of unfair prejudice. "[T]he standard is not simply whether the evidence is prejudicial;

rather, the standard under Rule 403, SCRE, is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014) (emphasis in original). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (citation omitted). Indeed, "[a]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." Id. (citation omitted).

"When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citation omitted). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. at 534, 763 S.E.2d at 28 (citation omitted). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." Id. (citation omitted); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Speaking on the probative value of evidence under the common scheme or plan exception, the Court of Appeals in State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), observed as follows:

> Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was

> established. . . . Accordingly, the evidence in such cases speaks to the existence of the defendant's plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred. . . .

Tutton, 354 S.C. at 330-31, 580 S.E.2d at 192-93 (citations omitted).

In Appellant's case, the high degree of similarity between the sexual assault of Minor and the sexual assault of the victim rendered Minor's testimony highly probative in the State's case. This is particularly true where there was no semen found inside the victim since Appellant used a condom. Cf. State v. Clasby, 385 S.C. at 158-59, 682 S.E.2d at 898-99 ("Finally, we hold the probative value of this evidence substantially outweighed the danger of unfair prejudice to Clasby. Given there was *no physical evidence* to corroborate B.C.'s testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was *extremely probative* to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child." (emphasis added)). Further, Appellant testified in his defense and presented alibi witnesses, thereby creating a potential credibility contest between the victim and Appellant's witnesses. Evidence that supported the victim's claims by demonstrating Appellant's common scheme or plan was particularly probative under these circumstances. See State v. Chavis, 412 S.C. 101, 111-12, 771 S.E.2d 336, 341 (2015) ("While [common scheme or plan evidence] did not directly corroborate Victim's testimony, it supported her claims by demonstrating Appellant's common scheme of abusing those close to him.").

As stated in Tutton, the evidence spoke only to Appellant's plan, not his character, so the prior bad acts carried no danger of "unfair" prejudice. Further, any *possibility* of unfair prejudice was minimized by the trial court's thorough limiting instruction, given at the beginning of Minor's testimony, regarding the proper purpose of Lyle evidence:

> Ladies and gentlemen, let me give you a charge, if I may, about this testimony, this evidence. You're hearing evidence that the defendant allegedly committed a previous sexual offense which is not the subject of a conviction other than the one for which he's on trial here today. This testimony if you conclude it is true, may only be considered by you on the question of whether there exists some common scheme or plan with regard to these alleged acts and for no other reason and no other purpose. You may give this evidence the weight and value, if any, that you find it should have on the sole issue of whether there may be some common scheme or plan existing here. You must not consider as evidence of the commission of another alleged sexual offense as proof of the defendant's guilt of the charge that we're trying here today; nor as proof of a trait of his character, nor to actions in conformity with that trait of character. With that understanding, you may proceed.

(R. p. 172, line 13 – p. 173, line 9). The trial judge gave a similar admonishment in the final jury charge. (See R. p. 423, line 19 – p. 424, line 12). Significantly, it is well-established that jurors are *presumed* to follow instructions provided by a trial judge. See e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow the law as instructed to them); see also State v. Trotter, 317 S.C. 411, 414, 453 S.E.2d 905, 907 (Ct. App. 1995) ("The trial judge's limiting instruction regarding the nature of Busterna's testimony assured no prejudice would occur."); Judy v. Judy, 384 S.C. 634, 643-44, 682 S.E.2d 836, 841 (Ct. App. 2009) ("Furthermore, to the extent the admission of the prior judgment may have prejudiced Ronnie, we find any prejudice was alleviated when the trial court gave a limiting instruction to the jury as to the proper purpose for which the evidence of the prior judgment was to be used.").

In sum, the trial judge did not abuse his broad discretion in weighing the probative value of the prior bad act evidence against its potential for undue prejudice. See Wallace, 384 S.C. at 435, 683 S.E.2d at 278-79 (the trial judge properly admitted evidence regarding prior incidents of sexual abuse against the victim's sister where the probative value of this evidence substantially outweighed the danger of unfair prejudice); Beekman, 405 S.C. at 233, 746 S.E.2d at 487 ("We further find no error in the trial court's determination that the probative value of the prior bad act evidence outweighed the danger of unfair prejudice to Beekman under Rule 403, SCRE."); State v. Atieh, 397 S.C. at 649, 725 S.E.2d at 734 ("The trial court instructed the jury it could not consider evidence of bad acts for any reason other than intent, common scheme or plan, or absence of mistake. It specifically cautioned the jury against considering the testimony as proof of Atieh's guilt. The trial court took all precautions to reduce any prejudice Employee 4's testimony may have created and Atieh has shown no clear evidence Employee 4's testimony improperly influenced the jury's verdict. Therefore, we find the trial court did not abuse its discretion in admitting Employee 4's testimony."). The trial judge's Rule 403 determination in this case should not be reversed. See State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citations omitted).

Harmless Error

In any event, even assuming the trial judge erred in admitting the prior bad act testimony, Appellant did not suffer prejudice warranting a new trial. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the

result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011); State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). Appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case. Byers, 392 S.C. at 448, 710 S.E.2d at 60. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.").

In Appellant's case, any error with respect to admission of Minor's prior bad act testimony was harmless beyond a reasonable doubt because there was overwhelming evidence Appellant committed criminal sexual conduct in the first degree with the victim. The victim testified at trial, providing a detailed account of events leading up to the sexual assault, the sexual assault itself, and the events that followed. (See R. p. 119-168). Notably, she reported the rape to her mother immediately, as soon as she arrived home and was outside of the custody and control of Appellant. (R. p. 190-91). The nurse who collected evidence from the victim at the hospital recounted the victim's highly consistent version of events as told to her that night. (See R. p. 241-42). The nurse also testified

about scratch marks she found on the victim's buttock and thigh, which were consistent with the victim's account of sexual assault. (R. p. 242, lines 6-13). The victim also provided a consistent version of events to the responding police officers. (See R. p. 161-64; p. 198-205; p. 209-22; p. 498-99). In addition to providing the police with Appellant's license plate number, the victim also positively identified Appellant as her attacker from a photo lineup. (R. p. 204; p. 219-21). Finally, and perhaps most significantly, Appellant's DNA was found on the buttonhole of the jeans the victim was wearing on the night of the sexual assault. (R. p. 256; p. 273-75). Although Appellant testified at trial and presented an alibi defense, he denied ever having sex with the victim yet provided no plausible explanation regarding why his DNA would be found on the *buttonhole* of the jeans the victim was wearing on the night of the sexual assault.[7] (See R. p. 344-52).

In the State's view, the evidence of Appellant's guilt on the charged offenses was overwhelming. Therefore, any error with respect to admission of the prior bad act evidence was harmless beyond a reasonable doubt. See State v. Parker, 315 S.C. 230, 234-35, 433 S.E.2d 831, 833 (1993) (although it was error to admit evidence of the defendant's prior bad acts under the common scheme or plan exception because the State failed to show more than a general similarity, such error was harmless beyond a reasonable doubt due to the overwhelming evidence of guilt separate and apart from the evidence of the prior bad acts); see also State v. Jenkins, Op. No. 27537 (S.C. Sup. Ct. filed July 1, 2015) (Shearouse Adv. Sh. No. 25 at 9) (finding that any error in admission

[7] Appellant asserted he and the victim "never physically got together" but stated he saw the victim once at her aunt's house in Hartsville. (R. p. 350-51). He further claimed that, while he was seated in his car, he gave the victim a hug and his "finger or hand could have touched" the victim's buttonhole. (R. p. 352, lines 3-5). Appellant admitted that this alleged hug occurred two weeks to a month prior to the date of the charged offense. (R. p. 352, lines 6-17).

of DNA evidence – although the Court agreed such evidence was "compelling" – was harmless beyond a reasonable doubt in light of the other evidence presented, and stating that the presence of the challenged evidence did not "taint the remainder of the evidence in the record," nor did it "overwhelm the jury's ability to make credibility determinations" and decide whether the defendant was guilty). Appellant's convictions should be affirmed.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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October 7, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of General Sessions

The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000395

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DAMYON M. COTTON,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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THE STATE OF SOUTH CAROLINA,

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APPELLANT.

AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Lesley A. Firestone**, Moore & Van Allen, PLLC, 78 Wentworth Street, Charleston, SC 29401, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **7th** day of **October, 2015.**

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