

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Edward W. Miller, Circuit Court Judge

THE STATE, .....RESPONDENT,

V.

WALLACE STEVE PERRY, .....APPELLANT.

APPELLATE CASE NO. 2014-002654

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**Table of Contents**

TABLE OF AUTHORITIES ..... 3

ISSUES ON APPEAL ..... 4

STATEMENT OF THE CASE..... 5

STATEMENT OF THE FACTS ..... 6

STANDARD OF REVIEW ..... 13

ARGUMENTS..... 14

    I. The Trial Court Erred in Finding Newcomer’s Testimony Admissible As Evidence Of A  
    Common Scheme or Plan..... 14

        A. The Trial Court Erred in Finding Newcomer’s Testimony Admissible Under Rule  
        404(b), SCRE..... 14

        B. The Trial Court Erred in Finding Newcomer’s Testimony More Probative Than  
        Prejudicial Under Rule 403, SCRE. .... 17

        C. The Admission of Newcomer’s Testimony Was Not Harmless Error. .... 19

    II. The Trial Court Erred In Allowing Dr. Henderson To Improperly Comment On The  
    Veracity Of Daughter Three’s Testimony. .... 20

CONCLUSION..... 21

**Table of Authorities**

Cases

State v. Black,  
400 S.C. 10, 732 S.E.2d 880 (2012) ..... 13

State v. Dawkins,  
297 S.C. 386, 377 S.E.2d 298 (1989) ..... 20,21

State v. Gillian,  
373 S.C. 601, 646 S.E.2d 872 (2007) ..... 17, 18

State v. Jennings,  
394 S.C. 473, 716 S.E.2d 91 (2011) ..... 19, 20, 21

State v. Jenkins,  
412 S.C. 643, 773 S.E.2d 906 (2015) ..... 19

State v. Lyle,  
125 S.C. 406, 118 S.E.2d (1923) ..... 14

State v. McCombs,  
410 S.C. 90, 762 S.E.2d 744 (Ct. App. 2014)..... 18

State v. McDonald,  
343 S.C. 319, 540 S.E.2d 464 (2000) ..... 13

State v. Parker,  
315 S.C. 230, 433 S.E.2d 831 (1993) ..... 14

State v. Saltz,  
346 S.C. 114, 551 S.E.2d 240 (2001) ..... 13

State v. Stokes,  
279 S.C. 191, 304 S.E.2d 814 (1983) ..... 14

State v. Tapp,  
398 S.C. 376, 728 S.E.2d 468 (2012) ..... 19

State v. Timmons,  
327 S.C. 48, 488 S.E.2d 323 (1997) ..... 14

State v. Tuffour,  
364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005)..... 14

State v. Wallace,  
384 S.C. 428, 683 S.E.2d 275 (2009) ..... 7, 14, 15, 16, 17

Rules

Rule 404(b), SCRE ..... 2, 7, 15, 16, 17, 18

Rule 403, SCRE ..... 2, 18, 19

**ISSUES ON APPEAL**

- I. DID THE TRIAL COURT ERR IN FINDING THE STEPDAUGHTER'S TESTIMONY ADMISSIBLE AS EVIDENCE OF A COMMON SCHEME OR PLAN?
  
- II. DID THE TRIAL COURT ERR IN ALLOWING DR. HENDERSON TO IMPROPERLY COMMENT ON THE VERACITY OF DAUGHTER THREE'S TESTIMONY?

## STATEMENT OF THE CASE

Wallace Steve Perry was indicted for two counts of first-degree criminal sexual conduct (CSC) and two counts of second-degree criminal sexual conduct. The case was tried from December 1 to 3, 2014 before a jury. The jury found Mr. Perry guilty of all charges. The trial court sentenced Mr. Perry to concurrent sentences of thirty years' imprisonment for each conviction of first-degree CSC and twenty years' imprisonment for each conviction of second-degree CSC.

This appeal follows.

## STATEMENT OF THE FACTS

Prior to trial, the State proffered the testimony of Brandy Newcomer as a witness under Rule 404(b), South Carolina Rules of Evidence, to testify about the prior bad acts of Perry. (Trial Tr. p. 39, ll. 6-9). Newcomer was Perry's stepdaughter from a prior marriage. (Trial Tr. p. 39, ll. 22-25). The State represented that Perry allegedly digitally penetrated Newcomer, performed oral sex on her, and the two eventually had sex. (Trial Tr. p. 40, ll. 1-6). However, the State offered to limit Newcomer's testimony about having sex with Perry to redact dissimilar particulars of the sexual conduct. (Trial Tr. p. 40, ll. 7-11). During the proffer, Newcomer testified Perry snuck into her room one night, the sexual abuse "progressed," and "the penetration and everything started." (Trial Tr. p. 45, ll. 23-25).

The State argued Newcomer was a proper 404(b) witness for showing a motive, common scheme, or plan because she, Daughter Two, and Daughter Three were "tweens" when the abuse occurred; Perry was the father figure for all three girls; the abuse always occurred in Perry's home; the alleged abuse of the three girls involved digital penetration and occurred during nighttime hours; and Perry threatened the girls would get into trouble if they said anything. (Trial Tr. p. 52, ll. 1-p. 53, ll. 15). Perry objected to Newcomer as a 404(b) witness. (Trial Tr. p. 48, ll. 7-8; p. 55, ll. 10-13). Perry issued a subpoena to the Spartanburg Solicitor's Office regarding the charges against Perry relating to Newcomer. (Trial Tr. p. 56, ll. 10-19). The Solicitor's Office did not have any records on any charges related to Newcomer, except that Perry participated in pre-trial intervention without admitting any guilt. (Trial Tr. p. 56, ll. 13-19). The State admitted there was no trial because Newcomer was pregnant at the time, there were concerns the defense would characterize her as "sexually promiscuous," and she suffered

from serious mental health issues. (Trial Tr. p. 55, ll. 20-p. 56, ll. 5). The trial court reserved ruling on the issue. (Trial Tr. p. 54, ll. 21-24).

During the trial, the trial court indicated it was inclined to allow Newcomer's testimony. (Trial Tr. p. 178, ll. 1-2). Perry again objected to the admission of Newcomer's testimony. (Trial Tr. p. 178, ll. 3-8). Perry argued the admission of Newcomer's testimony would only confuse the jury, divert attention away from the case at hand, and create serious prejudice. (Trial Tr. p. 179, ll. 10-19). Moreover, Perry argued Newcomer's testimony was inadmissible to show a common scheme or plan because the State's attempt to tie Newcomer's testimony to Daughter Two and Daughter Three's testimony was too attenuated. (Trial Tr. p. 180, ll. 14-19). The fact that the alleged abuse occurred in Perry's home or with people he knew did not create a common scheme or plan. (Trial Tr. p. 180, ll. 14-19).

Perry also submitted records from the Solicitor's Office, which showed the records relating to any charges against Perry had been destroyed. (Trial Tr. p. 181, ll. 1-2). Thus, neither the State nor Perry had any way to review prior court records to determine Newcomer's credibility. (Trial Tr. p. 181, ll. 2-8). Finally, Perry argued the decision under State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), was unconstitutional.<sup>1</sup> The trial court found Newcomer's testimony was admissible under the 404(b) exception. (Trial Tr. p. 183, ll. 20-24).

Newcomer testified her mother and Perry married when she was around five years old, and they separated when she was fourteen years old. (Trial Tr. p. 242, ll. 1-3). Newcomer, who was thirty-six years old at the time of Perry's trial, claimed Perry put his hands down her pajamas one night when she was nine years old. (Trial Tr. p. 244, ll. 3-6). She stated this

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<sup>1</sup> In Wallace, the Supreme Court found a defendant's prior bad act of sexually abusing the accuser's sister was admissible.

continued until Perry stopped touching her when she was thirteen years old. (Trial Tr. p. 245, ll. 19-22). Newcomer recalled Perry usually touched her when she was in her bedroom, but sometimes it occurred in the bathroom. (Trial Tr. p. 247, ll. 8-10). She alleged Perry performed oral sex on her once. (Trial Tr. p. 247, ll. 16-18). Newcomer stated Perry threatened her not to tell because no one would believe Newcomer and Newcomer's accusations would hurt the family. (Trial Tr. p. 245, ll. 4-5). She waited to tell her mother about Perry touching her until she was fourteen years old. (Trial Tr. p. 245, ll. 11-12). Newcomer's mother and Perry were still married when Newcomer alleged Perry had inappropriately touched her, but her mother left Perry shortly thereafter due to Newcomer's allegations. (Trial Tr. p. 248, ll. 8-10).

Perry met Laura Jones in their neighborhood in 1993, around the time he separated from Newcomer's mother. (Trial Tr. p. 73, ll.3-8). The pair never married, but they had two set of twins—Daughter One and Daughter Two, and Daughter Three and Son. (Trial Tr. p. 74, ll.1-6). Daughter One and Daughter Two were born in 1994, and Daughter Three and Son were born in 1996. (Trial Tr. p. 91, ll.17-20). Perry and Jones separated in 2000, but they remained close friends after separating. (Trial Tr. 74, ll. 7-8).

Although Perry and Jones did not have a formal custody arrangement, they decided Jones had custody during the week and Perry had custody on the weekends from Friday until Sunday afternoon. (Trial Tr. p. 74, ll. 17-23). Perry also had custody of their children during the holidays. (Trial Tr. p. 74, l. 23). Although there was no formal court order, Perry regularly paid child support. (Trial Tr. p. 74, l. 25). When the pair separated, Daughter One and Daughter Two were five years old and Daughter Three and Son were three years old. (Trial Tr. p. 75, ll. 9-10). Jones described Perry as a "very good father." (Trial Tr. p. 76, ll. 1-2). Jones spoke with Perry

often during the week, especially if one of their children was having issues at school. (Trial Tr. p. 76, ll. 6-9).

In March 2012, Daughter Three told Jones that Perry had sexually abused her during her weekend visitations with him. (Trial Tr. p. 76, ll. 14-22). Shortly thereafter, Daughter Two also claimed Perry sexually abused her. (Trial Tr. p. 78, l. 21). Jones waited over two months before reporting the allegations of sexual abuse, and only after her older children urged her to report the accusations. (Trial Tr. p. 76, ll. 19-25; p. 78, ll:11-13). Jones testified neither Daughter Three nor Daughter Two had ever claimed to have any problems with Perry before. (Trial Tr. p. 83, ll. 9-13).

Daughter Three testified she was approximately three years old when her parents separated. (Trial Tr. p. 93, ll. 5-7). Daughter Three recalled visiting Perry with her siblings every weekend as a child. (Trial Tr. p. 93, l. 22). When the children first began visiting Perry, he was living at the Churchill Apartments, where he worked in maintenance. (Trial Tr. p. 93, ll. 15-16). Perry's apartment at Churchill had three bedrooms. (Trial Tr. p. 94, ll. 10-11). Daughter Three recalled Son and Perry each had their own room, and she slept with her two other sisters on one air mattress in the other bedroom. (Trial Tr. p. 94, ll.13-19). Daughter Three alleged Perry came into their bedroom in the early morning hours and lay on the air mattress with the three girls. (Trial Tr. p. 97, ll. 7-15). Daughter Three claimed she woke up one morning when Perry's finger was in her vagina. (Trial Tr. p. 96, ll. 5-6). She stated Perry began touching her when she was ten years old until she was eleven years old. (Trial Tr. p. 96, ll. 10-14; p. 98, ll. 8-13).

Daughter Three testified Perry never woke up the other two girls when he lay on the air mattress with them. (Trial Tr. p. 97, ll. 16-19). Although Daughter One and Daughter Two never awoke during these alleged visits, Daughter Three claimed she woke up once when Perry began touching Daughter Two because she could feel the air mattress moving around. (Trial Tr. p. 99, ll. 1-3). However, Daughter Three did not tell her mother about Perry allegedly touching her or her sister until she was in high school. (Trial Tr. p. 101, ll. 11-22). Daughter Three claimed Perry threatened her not to tell because she would get in trouble or be taken away from her mother. (Trial Tr. p. 96, ll. 19-23).

Daughter Two testified Perry began touching her when she was five or seven years old during her visits to his apartment on the weekends. (Trial Tr. p. 136, ll. 17-18; p. 148, ll. 1-12). Daughter Two claimed Perry came into the girls' bedroom in the early morning hours. (Trial Tr. p. 136, ll. 22-23). Daughter Two recalled her two sisters slept with her on an air mattress in their bedroom. (Trial Tr. p. 137, ll. 4-9). According to Daughter Two, the air mattress was pushed against the side of one wall in their bedroom. (Trial Tr. p. 145, ll. 11-12). Daughter One slept on the side of the air mattress facing the wall, Daughter Three slept in the middle of her two sisters, and Daughter Two slept on the outside of the air mattress. (Trial Tr. p. 145, ll. 8-10).

Around 2007, Perry moved to the Carlyle Apartments. (Trial Tr. p. 137, ll. 22-23). Daughter Two recalled she and Daughter Three shared a bedroom, Daughter One slept on the couch, and Perry shared a bedroom with Son while Perry lived at the Carlyle apartments. (Trial Tr. p. 138, ll. 1-9). According to Daughter Two, Perry continued visiting her bedroom during the early morning hours. (Trial Tr. p. 138, ll. 12-15). Perry allegedly threatened Daughter Two not to tell anyone or either the children would be taken away from their mother. (Trial Tr. p. 137, ll. 1-3). Daughter Two claimed Perry put his fingers in her vagina, and he performed oral

sex on her two times. (Trial Tr. p. 138, ll. 12-15). She stated Perry stopped touching her when she was around sixteen or seventeen years old. (Trial Tr. p. 141, ll. 12-17). Daughter Two continued visiting Perry every weekend until Daughter Three claimed Perry had abused her. (Trial Tr. p. 141, ll. 10-11).

Daughter One, Daughter Two's twin sister, recalled sleeping on the air mattress at the Churchill Apartments with Daughter Two and Daughter Three. (Trial Tr. p. 214, ll. 13-17). When Perry moved to the Carlyle apartments, Daughter One began sleeping on the couch while Daughter Two and Daughter Three continued to share a room. (Trial Tr. p. 214, ll. 18-23). Daughter One never saw or heard Perry touching her sisters. (Trial Tr. p. 216, ll. 1-7).

Detective Mary Thomas, of the Greenville Police Department, testified there was no physical evidence with this case. (Trial Tr. p. 167, ll. 10-23). Dr. Nancy Henderson, qualified as an expert in child sexual abuse, testified she examined Daughter Two and Daughter Three. (Trial Tr. p. 199, ll. 14-p. 200, ll. 6). Although Daughter Three had a normal examination with no specific findings, Dr. Henderson opined her findings were consistent with Daughter Three having experienced sexual abuse based solely on Daughter Three's allegations. (Trial Tr. p. 206, ll. 16-19). Perry objected, arguing Dr. Henderson was improperly vouching, but the trial court overruled the objection. (Trial Tr. p. 206, ll. 20-25). Similarly, Dr. Henderson testified Daughter Two's normal examination was consistent with Dr. Henderson's opinion that Daughter Two had been sexually abused. (Trial Tr. p. 209, ll. 3-11).

Perry denied touching or performing oral sex on Daughter Two, Daughter Three, or Newcomer. (Trial Tr. p. 304, ll. 20-25; p. 305, ll. 12-25). Perry further denied lying in Daughter Two and Daughter Three's room next to the air mattress in the early morning hours. (Trial Tr. p.

309, ll. 8-14). In fact, Perry was usually not up that early in the morning. (*Id.*). Perry testified that shortly before Daughter Two and Daughter Three made these accusations, his children became very upset when he moved in with his girlfriend, Angela Ramey. (Trial Tr. p. 306, ll. 18-24). Ramey and their friend, Patty Frye, similarly testified Ramey and Perry's relationship with his children became tense when Ramey moved in with Perry. (Trial Tr. p. 277, ll. 8-10; p. 283, ll. 1-4).

The jury found Perry guilty of first-degree CSC and second-degree CSC with Daughter Two. (Trial Tr. p. 372, ll. 14-22). The jury also found Perry guilty of first-degree CSC and second-degree CSC with Daughter Three. (Trial Tr. p. 372, ll. 23-p. 373, ll. 8). The trial court sentenced Perry to concurrent thirty-year sentences for each of the two first-degree CSC convictions and twenty-year sentences for each of the two second-degree CSC convictions. (Trial Tr. p. 382, ll. 9-11).

### **STANDARD OF REVIEW**

“In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court’s factual findings unless the findings are clearly erroneous.” State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court’s ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

## ARGUMENTS

### **I. The Trial Court Erred in Finding Newcomer's Testimony Admissible As Evidence Of A Common Scheme or Plan.**

#### **A. The Trial Court Erred in Finding Newcomer's Testimony Admissible Under Rule 404(b), SCRE.**

"[N]o tenet of evidence law in the context of 'prior bad acts' is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged . . . ." State v. Tuffour, 364 S.C. 497, 502, 613 S.E.2d 814, 817 (Ct. App. 2005), *vacated*, 371 S.C. 511, 641 S.E.2d 24 (2007). Evidence of other bad acts may be admitted only to prove defendant's guilt if that evidence establishes: (1) motive; (2) intent; (3) absence of mistake or accident; (4) identity; or (5) a common scheme or plan involving other crimes so closely related to the one charged that proof of one tends to prove the other. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

With regard to a common scheme or plan exception, the State must prove more than a close degree of similarity between the prior bad acts and the crime charged to satisfy Lyle. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). In other words, the fact that a person commits two similar crimes does not satisfy the "common scheme or plan" exception. State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983). The mere presence or similarity only serves to enhance the potential for prejudice. State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993). Instead, there must be a connection between the other prior bad acts and the crime charged "so that proof of the former tends to prove the latter." Stokes, 279 S.C. at 193, 304 S.E.2d at 815.

In State v. Wallace, the Supreme Court held evidence of other acts of sexual misconduct was admissible in a trial for CSC with a minor as a common scheme or plan under Rule 404(b) if

there was a “close degree of similarity” between the two acts. 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009). The trial court should weigh the similarities with the dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Id. at 433, 683 S.E.2d at 278. If the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Id.

The Wallace Court provided a number of factors the trial court should consider when determining whether the bad act and the crime charged had a close degree of similarity, including, (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 occurrence, for example, the type of sexual battery. Id. Wallace essentially created an exception to Rule 404(b)’s exclusion of propensity evidence. In non-sexual offense cases, the mere presence of similarity only enhances the potential for prejudice; however, in cases where the defendant has been charged with a sexual offense, a close degree of similarity seems to satisfy Lyle.

In Wallace, the defendant was accused of sexually abusing a minor child by touching her breasts and digitally penetrating her. Id. at 431, 683 S.E.2d at 276-77. The defendant began touching the child’s breasts when the child was in seventh grade. Id. at 431, 683 S.E.2d at 276. One night, the defendant pulled the child’s pants off and “pushed his hands up her private parts.” Id. The child disclosed the sexual abuse to her older sister the next day. Id. at 431, 683 S.E.2d at 277. The sister alleged the defendant had also sexually abused her from the time she was in seventh grade until she graduated from high school. Id. at 431, 683 S.E.2d at 277. The sister’s abuse began with touching of the breasts, digital penetration and oral sex, and then progressed to the point of intercourse. Id. at 435, 683 S.E.2d at 278. The Supreme Court found the trial court

had properly redacted the sister's testimony regarding intercourse, which was dissimilar to the child's abuse, to avoid unfair prejudice to the defendant. Id. The Court noted the fact that the child's abuse was interrupted before it could culminate in intercourse did not diminish the similarity between the progression the abuse took in each case. Id.

Here, the trial court erred in finding Newcomer's testimony admissible under Rule 404(b), SCRE. There was not a close degree of similarity between the alleged abuse of Newcomer and Daughter Two and Daughter Three's testimony. First, the ages of Daughter Two, Daughter Three, and Newcomer varied. See id. at 433, 683 S.E.2d at 278 (providing the age of the victims when the abuse occurred is a factor to consider when determining admissibility under Rule 404(b)). Daughter Two testified the abuse began when she was approximately five years old until she was almost seventeen years old, but Daughter Three and Newcomer testified Perry allegedly abused them during their tween years only. (Trial Tr. p. 96, ll. 10-14; p. 98, ll. 8-13; p. 141, ll. 12-17; p. 148, ll. 1-12; p. 244, ll. 3-6; p. 245, ll. 19-22). Daughter Three and Newcomer's ages may have been similar; however, Daughter Two claimed she was sexually abused from when she was a young child until she was almost an adult. Second, the abuse occurred in different locations and at different times during the day. See id. Newcomer testified the abuse occurred at night, but Daughter Two and Daughter Three testified the sexual abuse usually occurred during the early morning hours between five to six a.m. Third, although Perry allegedly threatened Daughter Two, Daughter Three, and Newcomer, the content of the threats was different. See id. Daughter Two and Daughter Three testified Perry threatened they would get into trouble if they told, but Newcomer testified Perry said no one would believe her and the allegations would hurt their family.

Finally, and perhaps most dissimilar, during the proffer of Newcomer's testimony, she and the State indicated the sexual abuse progressed to intercourse. (Trial Tr. p. 40, ll. 7-11). The trial court redacted a portion of Newcomer's testimony about having intercourse with Perry in an effort to make that alleged bad act more similar to the charged crimes. This case is unlike Wallace where the Supreme Court found the trial court did not err in redacting the sister's testimony about having intercourse with the defendant. 384 S.C. at 435, 683 S.E.2d at 278. In Wallace, there was no opportunity for the abuse of the child to progress like the sister's abuse because the child reported the defendant digitally penetrated her the day after it happened. See id. Here, there was an opportunity for the alleged abuse of Daughter Two and Daughter Three to progress to intercourse like Newcomer. All three women testified the abuse spanned a number of years. Specifically, Daughter Two testified the abuse spanned almost a dozen years, much longer than Newcomer testified Perry had sexually abused her. However, Perry never had intercourse with Daughter Two. Thus, the type of sexual battery was dissimilar, and the trial court erred in redacting the dissimilarity of the type of sexual battery. Accordingly, the trial court erred in admitting Newcomer's testimony under Rule 404(b).

**B. The Trial Court Erred in Finding Newcomer's Testimony More Probative Than Prejudicial Under Rule 403, SCRE.**

If the bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. See id. at 435, 683 S.E.2d at 278. Thus, the prior bad act evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v.

Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Although remoteness in time between the prior bad act and the charged crime is not a dispositive factor, it is one that the court must consider when determining whether testimony is admissible. State v. McCombs, 410 S.C. 90, 101, 762 S.E.2d 744, 750 (Ct. App. 2014), *vacated*, 412 S.C. 282, 772 S.E.2d 510 (2015).

As an initial threshold, the trial court erred in failing to consider the fact that Newcomer testified she had intercourse with Perry, which was different from Daughter Two and Daughter Three's testimony about the sexual abuse involving digital penetration and oral sex. The trial court could not simply redact that portion of the testimony to find Newcomer's testimony was more probative than prejudicial. The trial court should have considered all of Newcomer's testimony when it made its determination under Rule 403. See Gillian, 373 S.C. at 609, 646 S.E.2d at 876 (providing the prejudicial effect must be considered in light of the entire record). When considering Newcomer's testimony as a whole, the dissimilarities outweighed the similarities. See McCombs, 410 S.C. at 101, 762 S.E.2d at 750 (providing the weighing of similarities between the bad act and the charged crimes is a factor to consider when analyzing admissibility under Rule 403).

There were also clear issues with whether the prior bad act occurred. The State admitted there was no trial because Newcomer was pregnant at the time, she was "sexually promiscuous," and she suffered from mental health issues. (Trial Tr. p. 55, ll. 20-p. 56, ll. 5). The Solicitor's Office did not have any records on the charges related to Newcomer. (Trial Tr. p. 56, ll. 13-19). Further, the temporal remoteness between the two acts also adds to the prejudice. See id. (providing the temporal proximity of the bad act and the charged crime is a factor to consider). Over eight years separated Newcomer's abuse from when Daughter Two claimed Perry began

abusing her.<sup>2</sup> An even more remote period of fifteen years separated Newcomer's abuse from when Daughter Three claimed Perry began abusing her.<sup>3</sup> Finally, Daughter Two and Daughter Three's credibility was at issue in this case, and the admission of Newcomer's testimony only created prejudice by implying that because Newcomer alleged Perry abused her, Perry must have Daughter Two and Daughter Three.

**C. The Admission of Newcomer's Testimony Was Not Harmless Error.**

Finally, the admission of Newcomer's testimony was not harmless error. "Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules." State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). Instead, appellate courts should determine the materiality and prejudicial character of the error in light of the entire case. Id. at 651, 773 S.E.2d at 910. An error is harmless if it did not reasonably affect the result of the trial. Id. The issue is not whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial court contributed to the guilty verdict. State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

This case boils down to the credibility of the two sisters asserting Perry sexually assaulted them. There was no physical evidence in this case, and there was nothing to investigate because the sisters waited years to accuse Perry. Aside from the sisters' testimony, the only other testimony presented by the State was witnesses who testified about the sisters' out-of-court conversations about the sexual abuse. See e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d

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<sup>2</sup> Newcomer was thirty-six years old at the time of trial, which means she was born in 1978. She testified the abuse began when she was approximately nine years old, or in 1987, and it ended when she was about thirteen years old, which was in 1991. Daughter Two testified the abuse started when she was five years old. Daughter Two was born in 1994, so she would have been five years old in 1999.

<sup>3</sup> Daughter Three testified the abuse began when she was approximately ten years old, which was in 2006.

91, 94-95 (2011) (“We further find the trial court’s admission of the reports did not amount to harmless error. *There was no physical evidence presented in this case. The only evidence presented by the State was the children’s accounts of what occurred and other hearsay evidence of the children’s accounts.* Because the children’s credibility was the most critical determination of the case, we find the admission of the written reports was not harmless.” (emphasis added) (citation omitted)). Accordingly, the admission of Newcomer’s testimony was not a harmless error.

## **II. The Trial Court Erred In Allowing Dr. Henderson To Improperly Comment On The Veracity Of Daughter Three’s Testimony.**

It is improper for an expert to comment on the veracity of a child’s accusations of sexual abuse. See id. at 480, 716 S.E.2d at 94. For example, a therapist cannot indicate he believed a child’s allegations were genuine. State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989). In Jennings, the Supreme Court concluded the trial court had erred in admitting a forensic interviewer’s report that stated each child “provided a compelling disclosure of abuse.” 394 S.C. at 480, 716 S.E.2d at 94. The trial court further erred in allowing the forensic interviewer to conclude each of the children provided details consistent with the background information received from their mother, the police report, and the other children. Id. The forensic interviewer’s report and opinions were erroneously used to prove the children were being truthful. Id.

At trial, Dr. Henderson testified her findings from examining Daughter Three were consistent with Daughter Three having experienced sexual abuse, even though Daughter Three’s examination was completely normal. (Trial Tr. p. 206, ll. 9-19). Dr. Henderson further stated that her opinion was based on “what [Daughter Three] has shared with me” regarding the allegations of abuse. (Trial Tr. p. 206, ll. 9-15). The trial court erred when it overruled Perry’s

objection to Dr. Henderson improperly vouching for Daughter Three. There is no way to interpret Dr. Henderson's testimony other than she believed Daughter Three's allegations were true, despite the fact that Daughter Three had a completely normal examination. Id. ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); see also Dawkins, 297 S.C. at 393-94, 377 S.E.2d at 302. Further, the admission of Dr. Henderson's testimony is not harmless error when there was no physical evidence in this case and the credibility of Daughter Three was at issue. Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95. Accordingly, the trial court erred in allowing Dr. Henderson to testify about the truthfulness of Daughter Three's testimony.

#### CONCLUSION

For the reasons of the foregoing arguments, Appellant's convictions should be reversed and this case should be remanded to the Greenville County Court of General Sessions for a new trial.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,



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