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

INITIAL REPLY BRIEF

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I. Newcomer's Testimony Was Inadmissible as Evidence of a Common Scheme or Plan.

A. The State Failed to Acknowledge the Dissimilarities in Newcomer's Testimony from Daughter Two and Daughter Three's Testimony.

In State v. Wallace, the Supreme Court held evidence of other acts of sexual misconduct was admissible in a trial for criminal sexual conduct with a minor as a common scheme or plan under Rule 404(b), South Carolina Rules of Evidence, 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 the following factors to determine whether the bad act and the crime had a close degree of similarity:

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.

There are at least four factors under Wallace where Newcomer's testimony differed from Daughter Two and Daughter Three's testimony, and thus, the similarities did not outweigh the dissimilarities to make the bad act evidence admissible under Rule 404(b). Perhaps most

dissimilar, the State asserted Perry had sex with Newcomer, but Daughter Two and Daughter Three never testified the abuse progressed to sexual intercourse. When the State admitted the abuse had progressed to sexual intercourse, the trial court erred by failing to take that factor into consideration in its Rule 404(b) analysis.

Further, the trial court erred in allowing the State to redact that portion of Newcomer's testimony to make the acts more similar. The State argues that pursuant to State v. Hubner, 384 S.C. 436, 683 S.E.2d 279 (2009), the trial court did not err in its analysis of the difference in the type of sexual battery and redacting the dissimilar portions of Newcomer's testimony. However, Hubner does not speak to the issue of whether the trial court properly redacted Newcomer's testimony. In Hubner, the Supreme Court only reversed the Court of Appeals in light of Wallace. Although the Hubner opinion did not directly address redacting testimony, Wallace specifically addressed the issue. In Wallace, the Court found the trial court did not err in redacting a portion of the witness's testimony about sexual intercourse because there was never an opportunity for the defendant's sexual abuse of the minor child to progress to the extent as claimed by the witness. This case is factually distinguishable from Wallace because Perry had an even longer period of time with Daughter Two and Daughter Three where the sexual abuse could have progressed into sexual intercourse. Accordingly, the trial court erred in failing to consider the dissimilarities in the type of sexual battery and redacting Newcomer's testimony to make it more similar to Daughter Two and Daughter Three's testimony.

Further, the ages of Newcomer, Daughter Two, and Daughter Three varied. There is a huge difference between Daughter Two stating the abuse began when she was five years old and Newcomer testifying the abuse began in her tween years. The State attributed the difference in ages to a "minor confusion" by Daughter Two, but Daughter Two affirmatively testified at trial

that the abuse began when she was approximately five years old. (Resp. Br. 11; Trial Tr. p. 148). The State also fails to acknowledge the difference in the location and time of day when the abuse occurred by claiming all three alleged the abuse occurred in a home. This is such a bland analogy that any case could be found to be similar under that circumstance. Finally, Newcomer's claim that Perry told her no one would believe the sexual abuse allegations or that the allegations would hurt her family hardly arise to the level of threats made to Daughter Two and Daughter Three. Accordingly, the trial court erred in finding Newcomer's testimony admissible under Rule 404(b).

B. The State Failed to Consider Other Circumstances That Make Newcomer's Testimony More Prejudicial than Probative.

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 Wallace, 384 S.C. 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).

In its Brief, the State only argued Newcomer's evidence was admissible under Rule 403 because the prior bad act was similar to the charged offenses. (Resp. Br. 13-15). As an initial matter, Perry disputes the alleged prior bad act and charged offenses were similar. Moreover, the State failed to address other facts in this case that make Newcomer's testimony more prejudicial than probative. See id. Perry challenged whether the bad act had even occurred by presenting records from the Solicitor's Office showing no evidence of any charges related to Newcomer.

(Trial Tr. p. 181, ll. 1-2). The State also admitted Newcomer did not proceed to trial on her allegations, claiming she 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). Clearly, there were concerns about whether the sexual abuse ever occurred that the trial court failed to address in its Rule 403 analysis. Finally, the trial court should have considered the temporal remoteness of the bad act to the charged offenses. Thus, Respondent's argument that Newcomer's testimony was more probative than prejudicial lacks merit because the trial court failed to consider the unique facts of this case.

II. Dr. Henderson's Testimony Was Used at Trial to Prove Daughter Three Was Truthful, Which Was Not a Harmless Error When Daughter Three's Credibility Was at Issue.

Our law clearly provides an expert cannot comment on the veracity of a child's accusations of sexual abuse. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011). In Jennings, the trial court erred in admitting a forensic interviewer's report that stated each child "provided a compelling disclosure of abuse." Id. at 480, 716 S.E.2d at 94. Here, despite opining Daughter Three had a normal physical examination that would not support any allegations of sexual abuse, Dr. Henderson testified her findings—from the normal physical examination—supported her opinion that Daughter Three experienced sexual abuse. (Trial Tr. 206, ll. 9-19). There was no physical evidence for Dr. Henderson to determine Daughter Three was sexually abused, but Dr. Henderson nevertheless opined that she believed Daughter Three's accusations. (See id.). The State argues the trial court did not err in overruling Perry's objection to Dr. Henderson testimony because the trial court understood what Dr. Henderson "truly meant." (Resp. Br. 18). This argument only shows how confusing Dr. Henderson's testimony may have

been to a jury if those jurors also had to decipher what Dr. Henderson "truly meant." Dr. Henderson's testimony was erroneously used to prove Daughter Three was being truthful.

CONCLUSION

For the reasons stated within the arguments of Appellant's Brief and Reply Brief, Appellant respectfully requests this Court reverse his convictions.

Respectfully Submitted,

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