STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WALTER SCOTT GARRETT,

APPELLANT

APPELLATE CASE NO. 2015-001526

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting dated other bad sex acts evidence from the time the alleged victim was a small child in another state since this evidence was not admissible under Lyle, appellant had inadequate notice of the specific nature of these explosively prejudicial allegations, and the trial court failed to conduct the prejudice analysis required by Rule 403, SCRE?

2.

Whether the court abused its discretion in refusing to dismiss this case based on the twenty-four year pre-indictment delay since the delay was very prejudicial to appellant including the fact that a witness died in the intervening time who would have testified that the alleged victim told her that she only accused appellant of the sexual abuse to get even with him for "taking her mother away" from her, and appellant could not prepare a defense, and get a fair trial given the unreasonable pre-indictment delay?

## STATEMENT OF THE CASE

Appellant Walter Scott Garrett was indicted at the July 7, 2014 term of the Charleston County Grand Jury for two counts of criminal sexual conduct with a minor in the first degree. The indictment alleged that appellant had oral sex and sexual intercourse with the alleged victim in Charleston County "between October 1989 and January 1990." R. *. Appellant's case was called to trial on July 6, 2015 before the Honorable Deadra Jefferson. John Kozelski, III and Laurie Proctor represented appellant. Deborah Herring-Lash and Nina Savas were the assistant solicitors. Tr. 1-2.

On July 8, 2015, the jury found appellant guilty of criminal sexual conduct with a minor in the first degree. Tr. 228, ll. 1-6. Judge Jefferson sentenced appellant to fifteen years imprisonment. Tr. 244, ll. 13-21.

This appeal follows.

## ARGUMENT

1.

The court erred by admitting dated other bad sex acts evidence from the time the alleged victim was a small child in another state since this evidence was not admissible under Lyle, appellant had inadequate notice of the specific nature of these explosively prejudicial allegations to defend against them, and the trial court failed to conduct the prejudice analysis required by Rule 403, SCRE.

**Relevant facts**

This is a sad case as defense counsel Kozelski explained in his opening statement:

> *Over 30 years ago* [the alleged victim] was a little girl . . . And as a small child *it was just her and her mother, Cathy Garrett, on the road.* And when I say on the road, I mean literally on the road. **They would hitchhike from state to state escaping whatever it was that Cathy Garrett was running from at the time. And many times it was fueled by drugs and alcohol. That was until she met my client, Walter Scott Garrett, as they passed through Clayton County, Georgia in 1983.**
>
> **Now, Cathy Garrett loved Walter Garrett, she married Walter Garrett, but he was also a person that stood in between the mother of a child who desperately craved her mother's attention. Now, Walter took the two into his home and raised [the alleged victim] as his own.**

July 6, 2015 Tr. 112, l. 18 – 113, 10. (emphasis added).

Appellant moved Cathy Garrett and the alleged victim to Charleston in 1989 after Hugo apparently looking for clean-up or construction work in its aftermath. July 6, 2015 Tr. 120, ll. 17-20. However, it was not until 2014 when appellant was indicted on two counts of Criminal Sexual Conduct with a Minor, First Degree for actions allegedly occurring in Charleston County between October 1989 and January 1990. R. * (Indictments).

Appellant was located in Georgia in December 2013, twenty-three years after the last alleged act of malfeasance. July 6, 2015 Tr. 49, ll. 11-16. He was served with his arrest warrant on January 3, 2014, twenty-four years after the actions described in the indictment allegedly took place. July 7, 2015 Tr. 60.[1]

The 24-year delay between the alleged misconduct and indictment was due in part to the fact that the Sheriff's Department did not enter the warrant into NCIC (National Crime Information Center). July 6, 2015 Tr. 49, l. 10. It was not until the Sheriff's Department conducted an internal audit in 2013 when it was realized that numerous warrants had not been entered. Id. at ll. 11-13.

During this delay, an incredibly important witness, appellant's mother died. Defense counsel told the judge that appellant was present when the alleged victim told his mother that "she was accusing him because he took her mother away." The judge quickly interjected that the defense could then call appellant's mother as a witness. However, Defense counsel told the judge that appellant's mother died in 1999. The judge then reasoned that appellant, while not having to testify, could solve the problem by testifying that the alleged victim made this admission to his mother. Defense counsel noted that while the judge said she did not mean to shift the burden of proof that she actually was doing so. Tr. 66, l. 12 – 67, l. 20.

In addition, counsel noted that DSS documents were destroyed in accordance with their document retention policy. July 6, 2015 Tr. 56, ll. 1-16. Medical records, including those related to twenty-one sessions that the alleged victim (hereinafter "JSP") attended at the Crime

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[1] Two different court reporters were used for this three day trial. Thus, the different transcript numbers.

Victim's Research and Treatment Center which detailed the alleged victim's auditory and visual hallucinations, were also destroyed. July 6, 2015 Tr. 65, ll. 1-5.

One of JSP's supervising doctors, Dr. Julie Kaposki, was not called to testify. She did not remember anything about the case at this late date. Id. at ll. 6-11. Another witness, appellant's mother, had died during the intervening two decades, in 1999. July 6, 2015 Tr. 67, ll. 2-3.

As stated, JSP moved to Charleston County with her mother and appellant in 1989 when she was 10 years old. July 6, 2015 Tr. 118, July 7, 2015 Tr. 29. Before living in South Carolina, she previously lived in Florida and Georgia. July 6, 2015 Tr. 121. Although the indictments dealt only with alleged misconduct in Charleston County for a period of four months JSP testified regarding misconduct which allegedly occurred in Georgia, beginning with what she allegedly remember from the age of three. July 6, 2015 Tr. 130 – 136, 140, July 7, 2015 Tr. 6 – 13. Starting at the same age, JSP was in and out of foster care. July 6, 2015 Tr. 118, ll. 24-25.

The state filed a pre-motion to include testimony of prior bad acts allegedly committed by appellant. July 6, 2015 Tr. 9, ll. 24-25. The proposed testimony encompassed a time span beginning in 1983 until appellant, JSP, and Cathy Garrett moved to Charleston County in the end of 1989. July 6, 2015 Tr. 10, ll. 12 - 16. It was the solicitor's plan to let JSP testify about these prior bad acts *in camera*, and then argue for their admissibility. ("I'll go through the Charleston County allegations and then I'll break and she can talk about Georgia in camera.). July 6, 2015 Tr. 11, ll. 18-23, Tr. 95, 2-9

Following JSP's *in camera* testimony, defense counsel moved to first have the testimony excluded under Rule 5. July 6, 2015 Tr. 143, ll.8-14. Records produced in discovery did not contain any reference to additional allegations. July 6, 2015 Tr. 158, ll. 21-25. Following a

discussion of other discovery and documents produced, the trial court concluded that the evidence was admissible. July 6, 2015 Tr. 152, ll. 8-9.

In denying defense counsel's motion to exclude testimony, the judge referred to appellant's actions as a continuing course of conduct, thereby invoking the exception described in State v. Lyle.[2] The judge did not weigh the unduly prejudicial effect of these other bad acts against their probative value despite defense counsel's presentation that it would be explosively prejudicial for the state to admit evidence alleging appellant molested JSP from the time she was three years old despite the limited time frame in the indictment. Defense counsel repeatedly protested that there was no way they could defend against such a broad dated attack at this late date. July 6, 2015 Tr. 152-154.

The judge maintained that audio tapes that were provided by the solicitor refuted defense counsel's argument of inadequate notice to prepare any attempt to refute these allegations, and this "trial by ambush." The judge insisted "trial by ambush" was seemingly just part of the system. "You know, South Carolina, trials, criminal cases, are to a large extent about ambush, unfortunately or fortunately. I'm used to it. I've been doing this so long I don't know that there is any appreciable difference." July 6, 2015 Tr. 142, l. 7-15; Tr 154, ll. 21-25.

However, and despite the judge's claims of the normalcy of "trial by ambush" those audio tapes contained JSP's statement regarding conduct that occurred *in Charleston, not Georgia.* July 6, 2015 Tr. 150, ll. 2-17. The judge then noted, as if it dispatched with all of appellant's arguments, that a limiting limiting instruction on the other bad acts would be given. July 6, 2015 Tr. 158, ll. 5-11.

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[2] 125 S.C. 406, 118 S.E. 803 (1923).

**Discussion**

The trial judge erred by admitting testimony from the alleged victim regarding her recollections from age three until the beginning of the indictment timeframe. Her testimony of alleged prior bad acts should have been excluded under Rule 403, SCRE and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009).

During the majority of the time period listed in the indictments, October 1989 through January 1990, appellant and the alleged victim lived in South Carolina. July 7, 2015 Tr. 78, ll. 20-21. The alleged victim was born on May 25, 1979; she was 10 years old during the indictment timespan. July 6, 2015 Tr. 117, l. 8. Although both indictments contained a limited temporal description, the trial court allowed the alleged victim to testify regarding acts which she claimed to have taken place 1) in Georgia and 2) outside of the narrow time span. Appellant contended at trial that this evidence should not have been admitted.

> "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence. It compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it.

State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923).

Evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged is excluded under South Carolina law except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999); State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923). "Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the

other crimes. The trial judge must clearly perceive the connection between the other crimes and the crimes charged." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (citing State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)). Evidence of a prior bad act is not admissible if the State fails to adduce any proof that a defendant was responsible for the act. State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997).

**Rule 403**

Further, even if evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; Fletcher, 379 S.C. at 23, 664 S.E.2d at 483; King, 334 S.C. at 512, 514 S.E.2d at 582. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998).

JSP was allowed to testify about prior bad acts under the "common scheme or plan" exception. July 6, 2015 Tr. 157, ll. 22 – 23. **However, the trial court never conducted the balancing test required by State v. Wallace:**

> **Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE.** 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.

384 S.C. 428, 435, 683 S.E.2d 275, 278-79 (2009), see also State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007). (Emphasis added).

This Court in State v. King, 416 S.C. 92, 784 S.E.2d 252 (Ct. App. 2016), (May 2, 2016) discussed many of these same issues. Because the trial court in that matter failed to

conduct an analysis in accordance with the South Carolina Rules of Evidence, this Court remanded that matter back to the Circuit Court. As noted in King, State v. Spears analyzed the same issue and came to the same conclusion. See State v. Spears, 403 S.C. 247, 254, 742 S.E.2d 878, 881 (Ct.App.2013) ("find[ing] the [circuit] court erred by failing to conduct an on-the-record Rule 403 balancing test."), *cert. denied* (Sept. 11, 2014). Id. at 110, 784 S.E.2d at 262.

The trial judge discussed admissibility, but she never analyzed prejudice. July 6, 2015 Tr. 152-156. The probative value of prior bad acts was substantially outweighed by the prejudice of allowing JSP to discuss incidents which allegedly took place beginning on her third birthday. This is the same witness who, over the course of a few minutes' worth of cross-examination, replied at least ten times with some variation of "I do not remember." July 7, 2015 Tr. 22, l. 20 – 27, l. 6.

Other than JSP, *no witnesses* with anything approaching personal knowledge of the prior bad acts were called to testify at trial. As defense counsel correctly argued, appellant's mother could have testified about impeaching statements made by JSP, but she passed away before appellant was indicted. As a result, a single witness, JSP, offered evidence of prior bad acts which allegedly occurred thirty-two years prior to trial. JSP's recollections began at age three, a time when most memories are hazy, at best. The probative value of her testimony was outweighed significantly by the prejudice faced by appellant at this late date.

Appellant was also prejudiced by the admission of JSP's testimony in that he was unable to put together an alibi on such short notice. Defense counsel filed a Brady[3] motion on June 29, 2015, wherein he requested evidence of other crimes or other acts that the State may use in an

[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

attempt to show motive, identity, and the existence of a common scheme or plan. R. p. *. July 6, 2015 Tr. 147, l. 22 – 148, l. 2.

In determining that the state did not have to give notice of every specific prior bad act, the judge also reasoned that defense counsel could have discussed these prior occurrences with appellant in order to find out specific incidents. July 6, 2015 Tr. 159, ll. 5 - 8. This remark indicated the judge's burden shifting and conflicting belief that appellant could refute these allegations if he was not guilty of them, and at the same time appellant likely could not establish an alibi to such dated out-of-state allegations at this late date anyway. July 6, 2015 Tr. 148, ll. 24 – 25, 149, ll. 2 – 4, 155, ll. 17 - 18. Regardless, appellant had no notice of specific allegations prior to JSP's *in camera* testimony at trial, and he was therefore utterly without a prayer of refuting the allegation. July 6, 2015 Tr. 148, ll. 16 – 20.

Taken as a whole, JSP's testimony regarding alleged misconduct outside of the realm of the indictment substantially prejudiced appellant. The probative value of the evidence pales in comparison to the perception and resulting prejudice. Her testimony should have been excluded. Assuming, *arguendo*, that the evidence was admissible, the trial court failed to perform the necessary prejudice analysis which the Supreme Court in Wallace unequivocally held *must* be performed. As a result, appellant requests that this case be remanded to Charleston County for a new trial. In the alternative, this case should be remanded for a prejudice versus probative value analysis as mandated by the applicable case law.

2.

The court abused its discretion in refusing to dismiss this case based on the twenty-four year pre-indictment delay since the delay was very prejudicial to appellant including the fact that a witness died in the intervening time who would have testified that the alleged victim told her that she only accused appellant of the sexual abuse to get even with him for "taking her mother away" from her, and appellant could not prepare a defense, and get a fair trial given the unreasonable pre-indictment delay.

Appellant was severely prejudiced by the pre-indictment delay. JSP's testimony includes alleged misconduct from 1983 until early 1990. Appellant was not indicted until 2014. R. *. As a result, documents were destroyed, witnesses moved and passed away, and the initial arrest warrants were not placed into a national database.

South Carolina has adopted a two-prong inquiry when pre-indictment delay is alleged to have violated a defendant's due process rights. State v. Brazell, 325 S.C. 65, 72-73, 480 S.E.2d 64, 68-69 (1997) (citing U.S. v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). First, the defendant must prove that the delay caused substantial actual prejudice to his right to a fair trial. Id. The second prong requires the court to consider the reason for the state's delay and to balance the justification for the delay against the prejudice to the defendant. Id.

To meet his burden of showing substantial prejudice, the defendant must identify the evidence and expected content of the evidence with specificity, as well as show that he made serious efforts to obtain the evidence and that it was not available from other source. Brazell, supra. The second part of the due process inquiry requires the court to consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant. Brazell, supra. When balancing the prejudice and the justification, the basic inquiry then

becomes whether the government's action in prosecuting after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." State v. Lee, 375 S.C. 394, 400, 653 S.E.2d 259, 262 (2007).

Appellant's mother passed away in 1999, ten years after the alleged misconduct concluded **and fifteen years prior to the indictments.** As a result, appellant was prejudiced by his inability to call her as an impeachment witness to reveal JSP's admission that she made these allegations out of anger at appellant "because he took her mother away." July 6, 2015 Tr. 66, ll. 20 – 23.

Due to the pre-indictment delay, however, appellant's mother was no longer alive to testify. That witnesses will die if there is a substantial delay between allegations, and indictment and trial is as literally predictable as death and taxes. Her testimony, discussed with specificity, was now unobtainable due to her death. Although appellant may have overheard the conversation, it was burden shifting, and unreasonable to expect him to expose himself to an experienced prosecutor by taking the state to refute allegations he could not effective refute with only **his words.** Juries are not inclined to accept the simple word of a criminal defendant. Everything a defendant testifies to is likely viewed as self-serving not only by the solicitor but, as stated, very often by the jury also.

In addition to the unavailable witness, appellant was prejudiced by the fact that potentially exculpatory records no longer existed. July 6, 2015 Tr. 68, ll. 14 – 17. DSS records and caseworker notes were destroyed. July 6, 2015 Tr. 56, ll. 1 – 16, 73, ll. 11 – 17. These records were not obtainable from other sources. Similarly, documents related to JSP's twenty-one therapy sessions which documented her auditory and visual hallucinations were no longer available. July 6, 2015 Tr. 65, ll. 4 – 5.

JSP's mother was available to testify at trial, but her credibility was questioned by the solicitor. July 6, 2015 Tr. 79, ll. 16-19. The solicitor maintained: "She can't remember very much." The solicitor asserted that years of drugs and alcohol had taken their toll. Id. Had this trial occurred soon after the last alleged act of malfeance, yet another witness may have been available to testify competently.

Due to no fault of his own, appellant was prejudiced. The state sought to introduce evidence of flight, but following an *in camera* review of a Charleston County Detective's testimony, **that line of questioning was withdrawn**:

> Q: Was it imperative to your investigation to determine where her parents were at that time?
>
> A: In the, in - - so it's - - well, really, no, at that particular time because we had already taken her into protective custody.
>
> Q: During your interview of the victim did you, did you - -
>
> Ms. Savas: Your Honor - -
>
> The Court: Uh-huh.
>
> Ms. Savas: **- - based on Detective Reed's answer to that question, I don't believe that we could pursue that line of questioning under your - -**
>
> **The Court: Are you withdrawing your line of questioning?**
>
> **Ms. Savas: Yes, Your Honor.**

July 7, 2015, Tr. 73, ll. 9 – 21. (emphasis added).

The state had to abandon its claim that it could not locate appellant because he fled. The state tried to poison the judge's thinking about this unreasonable pre-indictment delay throughout by claiming appellant fled. It finally had to fold its hand on flight -- on appellant allegedly being the author of his own dilemma -- when it could not prove its bare assertions with admissible

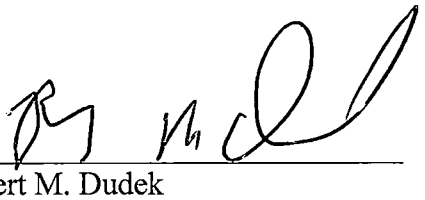
evidence. In fact, *a fair reading of this record* shows the local police essentially did nothing but drop by appellant's house on one occasion, and then threw the warrant into the desk drawer where such non-priority warrants were kept.

Appellant was greatly by this pre-indictment delay. Important witnesses had either died, become incapacitated with the passage of time, simply could not remember dated events or could not be located.. In addition, potentially exculpatory documents were no longer ascertainable. The essential demands of fairness were violated in this case by the almost a quarter of a century passage of time between the last alleged acts of malfeance and appellant's trial. As defense counsel stated, indictments were delayed for 24 years with no real justifiable reason. July 6, 2015 Tr. 71, ll. 10-18. Due to this fundamentally unfair delay, there is now only one possible remedy, the dismissal of these charges and appellant's release from prison prior to his death.

## CONCLUSION

By reason of the foregoing arguments, the charges against appellant should be dismissed. In the alternative, appellant's conviction should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial. In the second alternative, this case should be remanded to the Charleston Court of General Sessions for a prejudice versus probative value analysis as mandated by the case law.

Respectfully submitted,



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This 8th day of July, 2016.