ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of General Sessions

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000395

The State, ...Respondent,

v.

Damyon M. Cotton, ...Appellant,

APPELLANT'S AMENDED FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in admitting evidence of a prior alleged bad act involving a single, isolated incident with a female that was wholly unrelated to and not the subject of the charged offense?

STATEMENT OF THE CASE

Damyon M. Cotton was arrested on February 13, 2013, in connection with the sexual assault of Yasmin Cusack. (R. pp. 455-58). The Darlington County grand jury indicted Cotton for criminal sexual conduct in the first degree and kidnapping on July 18, 2013. (R. pp. 455-58). The case proceeded to trial before a jury in the Darlington County court of general sessions on February 24, 2014. (R. p. 1). The Honorable J. Michael Baxley presided as the trial judge. (R. pp. 459-60). The jury convicted Cotton as charged, and the trial court sentenced him to fifteen years on each charge, to run concurrently. (R. pp. 435, l. 18-p. 436, l. 13; 459-60). This appeal follows.

STATEMENT OF FACTS

I. *Lyle* Hearing

Prior to trial, the State moved to admit evidence of a prior bad act. (R. p. 3, ll. 4-5). The trial court held a hearing pursuant to *State v. Lyle*.[1] (R. pp. 3-89). In its memorandum in support of this motion, the State originally indicated that it planned to introduce evidence of three prior bad acts; however, it ultimately only presented one. (R. p. 4, ll. 12-14). During the *Lyle* hearing, the State presented testimony from the following witnesses: An alleged prior bad act witness; Yasmin Cusack, the witness whom Cotton was on trial for allegedly assaulting; and Cotton. (R. pp. 3-60).

A. Cusack: The Alleged Victim

Cusack testified first. (R. p. 5). She testified that she met Cotton through a friend and explained that their first communication was on the telephone through a chat line

[1] *State v. Lyle*, 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923).

service.[2] (R. p. 6, ll. 16-p. 7, l. 4). In explaining how the chat line worked, Cusack stated that the chat line would prompt a user to select whether they wanted to "talk to the fellas or ladies" and then it would prompt a user to leave a greeting describing oneself. (R. p. 7, l. 5-11, p. 17, ll. 14-21, p. 164, ll. 13-19). According to Cusack, when a user found someone they were interested in, they would exchange numbers with that person. (R. p. 7, ll. 7-11). Cusack exchanged numbers with Cotton, and they began calling each other after that.[3] (R. p. 7, ll. 7-15, p. 41, ll. 8-12). Cusack was 18 at the time. (R. p. 16, ll. 10-12).

Initially, Cusack testified that she and Cotton only met in person on one occasion.[4] (R. p. 13, ll. 19-21, p. 18, ll. 23-25). According to Cusack, she and Cotton made plans to go see a movie on the night of February 1, 2013. (R. p. 7, ll. 17-20, p. 8, ll. 1-11). Prior to the movie outing, Cusack testified that she had called Cotton to ask him what he wanted for Valentine's Day. (R. p. 7, ll. 10-14). Cusack stated that Cotton picked her up from her house around 6:40 p.m. that night to go to the movies. (R. p. 8, ll.

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[2] During the pre-trial hearing on cross-examination, Cusack testified that she first met Cotton through a chat line and then ended up meeting him through a friend of hers named Tanzy. (R. p. 17, ll. 24-25). At trial, Cusack testified that she knew Cotton "[b]asically like through a friend." (R. p. 132, ll. 8-9).

[3] Cusack told Investigators Scott Gauger and Brandon Peavy that she met Cotton through a friend. (R. p. 204, ll. 15-19, p. 209, ll. 22-25). She never mentioned anything to Investigators Gauger or Peavy about meeting Cotton through a chat line. (R. p. 204, ll. 20-23, p. 227, ll. 10-12). Additionally, this was the first time that defense counsel heard the theory that Cusack and Cotton met on a chat line. (R. p. 77, l. 25-p. 78, l. 8). The discovery materials indicated that Cusack and Cotton met through Cusack's friend named Tanzy. (R. p. 78, ll. 2-4).

[4] During trial, Cusack testified that she had seen Cotton on two different occasions. (R. p. 128, l. 25-p. 129, l. 6). She stated that she saw him at her friend Tanzy's house, approximately two weeks before February 1, 2013, which was the date on which she claimed to have a second in-person meeting with Cotton. (R. p. 90, l. 25-p. 91, l. 6, p. 92, ll. 5-8).

9-14, 24-p. 9, l. 1, p. 18, ll. 3-7, p. 147, ll. 10-14). Cusack alleged that when they arrived at the movie theater Cotton forced her to perform oral sex.[5] (R. p. 9, ll. 2-8).

After leaving the movie theater, Cusack testified that they went to K-Mart to go Valentine's Day shopping.[6] (R. p. 9, ll. 9-14, p. 122, ll. 13-15). While in the K-mart parking lot, Cusack testified that Cotton gave her fifteen dollars and asked her to perform oral sex, to which she told him no.[7] (R. p. 9, ll. 15-20). Cusack then asked Cotton whether he was going to accompany her inside K-mart. (R. p. 9, ll. 15-22, p. 122, l. 22-p. 123, l. 9). He told her no, at which point she threw the money back at him and told him to take her home.[8] (R. p. 9, ll. 15-22, p. 122, l. 22-p. 123, l. 9).

Cusack claimed that after leaving K-mart, she and Cotton drove to Turnpike Road. (R. p. 9, l. 25-p. 10, l. 3). When they arrived at a wooded area on Turnpike Road, Cusack stated that Cotton took her phone and told her "[you] been telling [me] a long

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[5] At trial Cusack testified that she did not perform oral sex while in the movie theater parking lot. (R. p. 121, l. 24-p. 122, l. 8). In her written statement that she gave to law enforcement on the night of the incident, Cusack also did not report that oral sex occurred at this location; however, she claimed that Cotton "forced [her] to have sex with him in the [movie theater] parking lot." (R. p. 498).

[6] Cusack testified she believed Cotton was going to give her a Valentine's Day gift and that she planned to give him one as well. (R. p. 9, ll. 11-15, p. 122, ll. 14-21, p. 150, l. 20-p. 151, l. 3).

[7] On cross-examination prior to trial, Cusack claimed that Cotton forced her to perform oral sex in the K-mart parking lot. (R. p. 18, ll. 11-14). At trial, Cusack testified she did not perform oral sex at this location. (R. p. 122, l. 24-p. 123, l. 3). In the statement that she gave law enforcement that night, Cusack did not report that oral sex occurred in the K-mart parking lot. (R. p. 498).

[8] In her written statement, Cusack stated that Cotton told her "if [she] suck his dick he'll take me Valentine shopping. Then we went to K-mart and he hand me $ 15 dollars. I ask him was he going in the store with me[;] he said no[,] he don't feel like it." (R. pp. 160-163; 498).

time that [you] was gonna give [me] some and so now is the time." (R. p. 10, ll. 16-21). Cusack stated Cotton then forced her to perform oral sex.[9] (R. pp. 11, ll. 9-11; 23-24).

Cusack explained that Cotton then began to try to take her pants off while he was in the car, but unable to, he got out of the car and went around to the passenger side door and removed her from the car. (R. p. 11, l. 24-p. 12, ll. 1, 22-p. 13, l. 8). Cusack claimed that Cotton then began undressing her outside of the car and told her "it was the time . . . to . . . give him some 'cause like we were talking on the phone about it." (R. p. 13, l. 7-18). Cusack stated that she told Cotton she was pregnant and that she had herpes to try to get him to stop. (R. p. 13, l. 24-p. 14, l. 4). According to Cusack, Cotton then put on condom and they had vaginal intercourse.[10] (R. p. 14, ll. 6-7). Afterwards, Cusack testified that Cotton threw the condom in the woods, handed her clothes to her, and then took her home. (R. p. 14, l. 16-p. 15, l. 5). Cusack stated on the way home, Cotton apologized, told her that he loved her, and to call him when she got inside her house. (R. p. 14, ll. 21-25).

Prior to the alleged sexual assault, Cusack claimed that Cotton threatened her with a gun.[11] (R. p. 16, ll. 13-16). Although Cusack claimed that Cotton threatened her with a gun, she stated that she never saw Cotton with a gun nor did he ever present one to her.

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[9] Prior to trial, Cusack testified that only vaginal sex occurred on Turnpike Road. (R. p. 15, l. 19-p. 16, l. 1).

[10] At trial, Cusack's testimony conflicted yet again. There, she testified that Cotton dragged her out of the car and attempted to get her to perform oral sex; however, she refused. (R. p. 12, ll. 5-6). She stated he then restrained her and they engaged in vaginal intercourse. (R. p. 12, ll. 5-18).

[11] At trial, Investigator Gauger testified that Cusack never reported that Cotton threatened her with a gun. (R. p. 203, ll. 7-18).

(R. p. 16, ll. 20-21). Cusack stated that Cotton dropped her off at her house around 8:00 p.m. (R. p. 158, ll. 24-25).

After Cusack got home, she and her mother went to McLeod hospital. (R. p. 127, ll. 10-17). Here, a sexual assault kit was performed. (R. pp. 235, ll. 14-16; 463-69). During the examination, Cusack reported to the ER nurse that she had genital herpes. (R. pp. 237, ll. 14-17; 463-69).

B. The Alleged Prior Victim

The alleged prior victim (the "Prior Victim") testified next. (R. p. 20). Prior Victim explained that she met Cotton through Facebook. (R. p. 20, l. 24-p. 21, l. 1). According to Prior Victim, she posted a status update on Facebook asking anyone if they wanted to "chill."[12] (R. p. 21, ll. 7-8). Cotton liked this status update, and they began messaging. (R. p. 21, ll. 7-9, p. 30, ll. 19-20). Subsequently, Cotton picked Prior Victim up from her friend's house.[13] (R. p. 21, ll. 14-15). Cotton's brother was sitting in the front passenger seat of Cotton's car, so Prior Victim got into the back seat behind Cotton's brother. (R. p. 21, ll. 21-23). Prior Victim agreed to ride with Cotton to Hartsville to take his brother home. (R. p. 21, ll. 14-21). After Cotton dropped his

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[12] "Chill" is defined in the Urban Dictionary as "a code word for sex." *See Chill*, Urban Dictionary (July 2, 2006), http://www.urbandictionary.com/define.php?term=Chill. Time Magazine rated Urban Dictionary as one of its "50 Best Websites" in 2008, and described it as follows: "To stay hip, visit Urban Dictionary, which has millions of user-submitted words and definitions. Visitors can vote on the best entries . . . ." Anita Hamilton, Urban Dictionary - 50 Best Websites 2008, Time (Jun. 17, 2008), http://www.time.com/time/specials/2007/article/0,28804,1809858_1809955_1811527,00.html. As of March 23, 2015, the cited definition had 165 "up" votes and 92 "down" votes.

[13] This occurred in June 2012. (R. p. 21, ll. 2-7). The Prior Victim was 15 at the time. (R. p. 20, ll. 22-23).

brother off in Hartsville, Prior Victim stated that Cotton began touching her. (R. p. 21, ll. 21-24). At that time, he was in the driver seat, and she was still located in the backseat behind the front passenger side of the car. (R. p. 21, l. 21-p. 22, l. 4).

Prior Victim asked Cotton whether he had a phone charger because her phone was dead. (R. p. 22, ll. 6-7). According to Prior Victim, he then drove to one of his friend's house where he told her she could obtain a phone charger. (R. p. 22, ll. 6-9). Prior Victim stated Cotton went into the house; however, when he came out, he did not have a phone charger. (R. p. 22, ll. 6-10).

After leaving his friend's house, Prior Victim stated that they drove to and pulled into a driveway with a trailer and a shed in the back. (R. p. 22, ll. 15-18). Here, Prior Victim testified that she got out of the back seat and moved to the front passenger seat. (R. p. 23, ll. 22-23). According to Prior Victim, Cotton told her that she could charge her phone in the shed, but she declined the offer. (R. p. 22, ll. 17-20).

Prior Victim testified that Cotton then asked her to perform oral sex. (R. p. 22, ll. 20-21). Prior Victim responded, "no, like I told you before, I didn't want to do nothing like that." (R. p. 23, ll. 5-7). Prior Victim testified that prior to their meeting, she messaged Cotton on Facebook and told him she "didn't want to do nothing like that 'cause, I mean, I just wanted to go ahead and make that clear." (R. p. 30, ll. 21-23). Prior Victim stated that Cotton then got of the car and came around to the passenger side door and began hitting her, at which time she told Cotton that she would perform oral

sex. (R. p. 24, ll. 8-17). Cotton got back into the car, and Prior Victim performed oral sex.[14] (R. p. 24, ll. 16-17).

Afterwards, Cotton drove to a different driveway surrounded by trees. (R. p. 24, ll. 17-20). Here, Cotton allegedly told Prior Victim to remove her pants and get out of the car. (R. p. 24, l. 20-21, p. 26, ll. 3-4). Prior Victim took off her pants and got out of the car. (R. p. 25, ll. 1-2). Prior Victim testified that Cotton picked her up and put her on the hood of the car. (R. p. 26, ll. 9-12). They then had vaginal and anal sexual intercourse with a condom. (R. p. 25, ll. 2-3, 19). Prior Victim testified during intercourse Cotton asked her if she thought it was rape; if she wanted to have his kids; and for her to call him names such as "daddy." (R. pp. 26, ll. 14-16; 176). According to Prior Victim, she told Cotton that she was on her period in an attempt to get him to stop. (R. p. 25, ll. 21-23). This occurred around 9:00 p.m. (R. p. 25, l. 5).

Prior Victim stated that she went to McLeod hospital after she got home. (R. p. 27, l. 6-9). The hospital performed a sexual assault kit, which included testing for sexually transmitted diseases. (R. p. 31, ll. 19-23). Prior Victim testified that the STD test indicated that she had Chlamydia. (R. p. 32, ll. 10-12). Prior Victim also testified that she gave a statement to law enforcement regarding the incident and that they took photographs of her immediately after the incident. (R. p. 32, ll. 13-14; p. 180, ll. 10-13).

C. Cotton: The Appellant

Cotton testified after Prior Victim. (R. p. 40). Cotton was twenty-one years old at the time of trial. (R. p. 40, ll. 16-17). Cotton testified that he met Cusack through one

[14] Prior Victim's testimony at trial suggests that she performed oral sex while Cotton was driving. (R. p. 175, ll. 2-4).

of his male friends around October 2012. (R. p. 41, ll. 9-12). He explained that they first began communicating over the phone. (R. p. 41, ll. 10-12). He and Cusack had a romantic relationship that lasted for approximately three to four months. (R. p. 41, ll. 14-15, p. 54, ll. 10-13, p. 55, ll. 4-5, p. 349, ll. 22-25).

When Cotton first spoke to Cusack, she lied to him and gave him a false name. (R. p. 42, ll. 1-5). According to Cusack, her name was Crystal Johnson. (R. p. 42, ll. 4-5). He did not learn of her true identity until he was served with a warrant for the present charges. (R. p. 45, l. 22-p. 46, l. 2, p. 347, ll. 2-6).

i. Backpages.com Testimony

Cotton and Cusack (aka Crystal Johnson) continued to see each other, and at one point during their relationship, Cotton's cousin showed Cotton a website called Backpages.com.[15] (R. p. 42, ll. 11-14). Cotton thought that Backpages was a social media site similar to Facebook. (R. p. 42, ll. 12-18). However, after a closer review, Cotton realized that Backpages was essentially an escort service. (R. p. 42, ll. 17-20). While looking on the website, Cotton saw a profile with a profile picture of a female who looked very similar to who he believed at the time was "Crystal Johnson." (R. p. 42, ll. 12-14, 22-24). Cotton enlarged the profile picture and determined that it was indeed "Crystal Johnson," who he later determined was Cusack. (R. p. 42, l. 22-p. 43, l. 2). Cotton stated that Cusack's profile name on Backpages was "Crystal Lollipop." (R. p.

[15]"Backpage.com" is a website that contains a section for listing "adult entertainment" services. Although the website officially prohibits illegal services including prostitution, it contains dozens of listings explicitly for sex. Feyerick, Deborah; Sheila Steffe (11 May 2011). "A lurid journey through Backpage.com". CNN. The CNN Freedom Project (blog).

45, ll. 9-15). Cotton later confronted Cusack over the phone about having a profile on Backpages.com. (R. p. 42, l. 11-p. 43, l. 7).

ii. The Breakdown of Cotton and Cusack's Relationship

Throughout their relationship, Cotton was suspicious that Cusack was being unfaithful to him. (R. p. 346-347). On one occasion, Cotton called Cusack and heard noises in the background indicating that Cusack and another male were having sexual relations. (R. p. 43, l. 22-p. 44, l. 3). Cotton hung up the phone believing he had dialed the wrong number. (R. p. 44, ll. 3-7). Soon after, Cusack called him back. (R. p. 44, ll. 6-7). While speaking with Cusack, Cotton heard a male in the background saying, "how you gonna be on the phone with somebody else and I'm paying for my time." (R. p. 44, ll. 10-11). Cotton immediately ended his relationship with Cusack over the phone. (R. p. 44, ll. 11-14).

Cotton proceeded to receive texts from the other male instructing Cotton to not "be calling my girl when she with me. If you're gonna try to get your time, pay for your time like I pay for mine." (R. p. 44, ll. 17-20). The last communication Cotton had with Cusack occurred on the night of February 1, 2013. (R. p. 44, l. 22-p. 45, l. 5). He received a text from her stating, ***"if you want to play games I can play games just as well."*** (R. p. 44, l. 25-p. 45, l. 2).

iii. Cotton's Testimony Regarding the Alleged Prior Victim

In regard to the alleged Prior Victim, Cotton testified that he first began communicating with her ***after she messaged him*** on Facebook asking for help. (R. p. 47, ll. 19-21). Cotton told her he could. (R. p. 47, ll. 22-24). Subsequently, he met her at a Sav-way store. (R. p. 48, ll. 13-14). Cotton's brother was in the car when he met Prior

Victim. (R. p. 48, ll. 3-14). Prior Victim asked Cotton whether he would give her a ride somewhere, and Cotton told her that he did not mind. (R. p. 48, ll. 15-16). Cotton drove her to a house where she picked up a large bag of clothes. (R. p. 48, ll. 17-20). As Prior Victim opened the door of the car while also holding the large bag of clothes, she accidentally hit her eye on the corner of the door. (R. p. 48, ll. 20-22). After they dropped off Cotton's brother, Prior Victim asked Cotton whether he would take her to a friend's house because she was having trouble at home. (R. p. 49, ll. 5-12). Cotton then dropped Prior Victim off at her friend's house. (R. p. 49, l. 17-p. 50, l. 2).

D. The Trial Court's Initial Ruling

After hearing the State and Cotton's arguments regarding the prior bad act evidence, the trial court found that the prior bad act was relevant, was established by clear and convincing evidence, and fell within the common scheme exception to Rule 404(b), SCRE. (R. p. 82, l. 14-p. 88, l. 14). The trial court also found that the probative value of the prior bad act outweighed its prejudicial nature under Rule 403, SCRE. (R. p. 88, l.15-p. 89, l. 17).

II. The Trial

During trial, the State presented the testimony of Prior Victim. (R. p. 170, l. 24-p. 171, l. 2). Defense counsel renewed her objection to Prior Victim testifying. (R. p. 170, ll. 16-17). The trial court overruled the objection as it previously decided. (R. p. 170, ll. 18-19).

The defense established an alibi defense at trial. (R. pp. 301-367). Particularly, the defense established that Cotton's car was inoperable on February 1, 2013, and that he was with his friend Calvin on the night of February 1, 2013. (R. pp. 301-367).

Cotton was found guilty of criminal sexual conduct in the first degree and kidnapping. (R. p. 435, l. 18-p. 436, l. 13). The trial court sentenced him to fifteen years. (R. p. 452, ll. 22-25). This appeal now follows.

ARGUMENT

The trial court erred in admitting prior bad act evidence when: the prior bad act was not proven by clear and convincing evidence; the prior bad act and the crime charged were not similar; rather, they were only linked by general similarities; and the probative value of the prior bad act was outweighed by its prejudicial effect.

I. Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Atieh*, 397 S.C. 641, 647, 725 S.E.2d 730, 733 (Ct. App. 2012) (internal quotation marks and citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

II. Applicable Law

A. General Admissibility

In order for the prior bad act evidence to be admissible, the trial court must first determine whether the prior bad act evidence is relevant. *State v. Wallace*, 384 S.C. 428, 433, 638 S.E.2d 275, 277 (2009). If the trial court finds that the prior bad act evidence is relevant, it must then determine whether the prior bad act evidence fits within a ***narrow exception*** of Rule 404(b), SCRE. *State v. Tutton*, 354 S.C. 319, 324-25, 580 S.E.2d 186, 189 (Ct. App. 2003).

B. Clear and Convincing

Where, as here, the defendant has not been convicted of the prior bad act, evidence of the prior bad act must be clear and convincing. *Tutton*, 354 S.C. at 325, 580 S.E.2d at 189. If the trial court finds that there is clear and convincing evidence that the defendant committed the uncharged acts, it must then determine whether that act falls within an exception under *Lyle*. *Id.*

C. Common Scheme or Plan Exception to Rule 404(b), SCRE

Generally, evidence of prior bad acts is not admissible to prove the defendant's guilt. *State v. Lyle*, 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923) (holding evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith). Rule 404(b), SCRE, however, carves out various narrow exceptions where these acts are admissible. The only exception at issue in this case is whether Prior Victim's testimony was sufficiently similar to Cusack's such that Prior Victim's testimony established a "common scheme or plan." It was not.

Evidence of a prior bad act is not admissible to show a common scheme or plan unless there is a close degree of similarity or connection between the crime charged and the prior bad act. *Tutton*, 354 S.C. at 325, 580 S.E.2d at 189; *State v. McCombs*, 410 S.C. 90, 98, 762 S.E.2d 744, 748 (Ct. App. 2014). "The connection must be more than just a general similarity." *Tutton*, 354 S.C. at 325, 580 S.E.2d at 189. "A common scheme or plan involves more than the commission of two similar crimes; some connection between the two is necessary." *Id.* A close degree of similarity or connection exists when the similarities outweigh the dissimilarities. *State v. Wallace*, 384 S.C. 428, 433-34, 683 S.E.2d 275, 278 (2009).

As will be explained in more detail below, this exception is rarely used to admit prior bad act evidence where, as here, the alleged victim is an adult. As with nearly all cases applying this exception, *Wallace* involved the sexual abuse of children. In *Wallace*, our supreme court set forth various factors for the trial court to consider when determining whether there is a close degree of similarity or connection between the prior bad act and the charged crime:

> (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.

Id. The *Wallace* court emphasized that "these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and dissimilarities between the crime charged and the bad act evidence." *Id* at 434, 683 S.E.2d at 278. "When determining whether a close degree of similarity exists, the [trial] court 'should consider all relevant factors.'" *McCombs*, 410 S.C. at 98, 762 S.E.2d at 749 (quoting *State v. Taylor*, 399 S.C. 51, 59, 731 S.E.2d 596, 601 (Ct. App. 2012)).

D. Probative Value vs. Prejudicial Effect

"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Tutton*, 354 S.C. at 325, 580 S.E.2d at 189. 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. Kirton*, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008).

III. The trial court erred in admitting the prior bad act evidence under the common scheme exception to Rule 404(b), SCRE.[16]

The trial court erred in permitting Prior Victim to testify regarding the alleged prior bad act for at least three separate and independent reasons—any one of which is sufficient to reverse. ***First***, in nearly all sexual crime cases where prior bad acts were admitted, the prior bad acts demonstrated continuous illicit conduct with the same victim or related victims. No continued illicit conduct was present here. Instead, this case involved a single isolated prior bad act with a different and unrelated victim. ***Second***, Prior Victim and Cusack's testimony are linked only by very general similarities common to most—if not all—sexual assaults. Finally, and perhaps most importantly, the differences between Prior Victim and Cusack's testimony far outweigh their similarities.

A. Nearly all sex crime cases where prior bad acts have been admitted involve continuous illicit conduct with the same victim or related victims.

During the pre-trial hearing, the State relied on several cases which have applied the common scheme or plan exception in sexual crime cases. (R. pp. 61-64; 71-76). *See*

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[16] Cotton does not concede and expressly asserts that the trial court also erred in finding Prior Victim's testimony was relevant and that the prior bad act was established by clear and convincing evidence. Regarding the clear and convincing standard, the trial court relied solely on the testimony from the alleged Prior Victim. This was in error. The State presented no physical evidence of the sexual act even though a sexual assault kit had been performed. (R. p. 31). The State also did not call anyone from law enforcement to testify about the prior incident even though law enforcement interviewed and took pictures of Prior Victim on the night of the incident. *See McCombs*, 410 S.C. at 95, 762 S.E.2d at 747 (presenting the testimony of the detective who investigated the prior bad act in order to support the admissibility of the prior bad act evidence in a case where there was an isolated prior incident and charged crime with two different and unrelated victims). In light of Prior Victim having a juvenile record and the information introduced from Prior Victim's Facebook profile, evidence other than Prior Victim's testimony should have been introduced to establish the prior bad act by clear and convincing evidence. (R. pp. 479-84).

State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); *State v. Wallace*, 384 S.C. 428, 433-34, 683 S.E.2d 275, 278 (2009); *State v.* Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009); *State v. Kirton*, 381 S.C. at 28, 671 S.E.2d at 117; *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); *State v.* Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994); *State v. Wingo*, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991); *State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009); *State v. Adams,* 332 S.C. 139, 504 S.E.2d 124 (Ct. App. 1998). For several reasons, all of these cases are inapposite to—and do not support admission of—Prior Victim's testimony.

As an initial matter, all of the cases relied on by the State and the trial court involved admission of prior bad act evidence in cases where sexual crimes were committed against children. Here, Cusack was an adult who could and did speak for herself, thus, lessening the need for prior bad act testimony. Prior bad act testimony is needed in child sexual abuse cases because children often have difficulties in communicating such information. This fact is also significant because most of these cases involve child molesters whose behavior is often repetitive and thus lends itself to easily establishing a pattern.

i. Continuous Illicit Conduct

In nearly all sex crime cases involving prior bad act evidence, the prior acts involve a ***continuing course*** of illicit conduct, often with the same or related victims, such as daughters or stepdaughters, rather than a ***single isolated prior*** act with a different and wholly unrelated alleged victim. *See e.g.*, *Wallace*, 384 S.C. at 431-32, 683 S.E.2d at 276-77 (involving the sexual abuse of victim's sister, who the defendant sexually abused

from the time she was in seventh grade until she moved out of defendant's residence after graduating high school); *Clasby*, 385 S.C. 148, 682 S.E.2d 892 (involving four incidents of prior uncharged sexual misconduct committed by defendant on the victim); *Kirton*, 381 S.C. at 28, 671 S.E.2d at 117 (involving prior sexual acts that happened several times a month for six to seven years on the same victim); *McClellan*, 283 S.C. 389, 323 S.E.2d 772 (involving the repeated sexual abuse of defendant's three daughters); *Hallman*, 298 S.C. 172, 379 S.E.2d 115 (involving the habitual and continuous abuse of defendant's three former foster daughters in his criminal sexual conduct trial for abuse of a fourth foster daughter); *Henry*, 313 S.C. 106, 432 S.E.2d 489 (involving the prior sexual abuse of two of defendant's step-daughters which continued over a period of years in his trial for abuse of a third step-daughter); *Blanton*, 316 S.C. 31, 446 S.E.2d 438 (admitting testimony of two females in defendant's trial for criminal sexual conduct against his granddaughter where the females had been sexually molested by the defendant at approximately the same age and in the same manner as defendant's granddaughter); *Wingo*, 304 S.C. 173, 403 S.E.2d 322 (involving prior bad acts of sexual abuse on victim's sister and victim's cousin); *Hubner*, 384 S.C. 436, 683 S.E.2d 279 (involving two unrelated victims where abuse of each female continued over several years).

a. *State v. Kirton*

In *Kirton*, this Court explained that the common-scheme or plan exception is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment are held admissible as tending to show ***continued illicit acts*** between the same parties. *Kirton*, 381 S.C. at 28, 671 S.E.2d at 117. The *Kirton* court then went through a thorough review of previous cases addressing

prior bad act evidence in child sexual abuse cases, most of which involved continuous illicit acts, as opposed to distinct, isolated acts. *Id.* at 28-39, 671 S.E.2d at 117-21.

Kirton also stressed that the case law analyzing such evidence in sexual abuse cases and those permitting the admission of such evidence "do not lower the bar for admissibility under *Lyle* simply because sexual crimes are involved." *Id.* at 30, 671 S.E.2d at 119.

> Regardless of the nature of the charges facing the defendant, there must be evidence that the defendant employed a common scheme or plan in the commission of the crimes. Where there is a ***pattern*** of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the ***continuous nature*** of the assaults will generally suffice to prove the existence of the common scheme or plan as well. In *Weaverling* and *McClellan*, the sheer volume of repeated occurrences, together with the close similarities in the assaults, evidenced a pattern of continuous illicit conduct. Accordingly, these cases fall squarely within the plain meaning of common scheme or plan evidence. *McClellan*, 283 S.C. at 392, 323 S.E.2d at 774 (stating it would be difficult to conceive of evidence more within the common scheme or plan exception); *Weaverling*, 337 S.C. at 469, 523 S.E.2d at 791 (stating the pattern of sexual abuse represented "quintessential common scheme or plan evidence").

Id. at 31-32, 671 S.E.2d at 119 (quoting *Tutton*, 354 S.C. at 328-29, 580 S.E.2d at 191) (emphasis added).

In this case, the trial court improperly ruled that a single prior alleged incident established a common scheme or plan. There was no continuous illicit conduct present in this case like the conduct in nearly all cases where prior bad act evidence has been allowed. *See Kirton*, 381 S.C. at 28-39, 671 S.E.2d at 117-21 (reviewing the history of South Carolina jurisprudence addressing prior bad act evidence in sexual crime cases, most of which involved continuous illicit acts, as opposed to distinct, isolated acts).

Likely recognizing that one prior incident does not establish a common scheme, the State originally claimed that it intended to introduce ***three*** prior bad act witnesses. However, during the *Lyle* hearing and at trial, it presented only ***one***. The trial court's admission of this single prior bad act stands in stark contrast to the few cases in which our courts have addressed the issue of whether a single prior act establishes a common scheme.

ii. Single Incident Cases

Two South Carolina cases are especially relevant here. These two cases analyze the common scheme exception in the context of a single prior bad act. *See State v. Davenport*, 321 S.C. 134, 467 S.E.2d 258 (Ct. App. 1996); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (Ct. App. 1998). *See also State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979) (holding defendant's previous sexual misconduct with his wife, a person other than the victim of the charged crime, was inadmissible because of the dissimilarities between the charged offense and the prior act).[17]

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[17] This case is not analogous to *State v. McCombs*, 410 S.C. 90, 762 S.E.2d 744 (Ct. App. 2014). There were so many more similarities between the prior incident and crime in *McCombs* which are not present in this case. For example, the abuse occurred in the pool at the same residence. *Id.* at 99, 762 S.E.2d at 749. Here, the location of the assaults occurred at completely different geographical locations. In *McCombs*, this Court found that the victims were of a similar class in that they were both neighborhood children. *Id.* The females in this case were totally unrelated and not from a similar particular class. The manner of occurrence was extremely similar in *McCombs*, which is not true in this case. *Id.* Also, this Court found that the circumstances in *McCombs* were similar based on the fact that defendant talked to the victims while the abuse occurred. *Id.* In the present case, while Cotton spoke to Prior Victim during intercourse, he did not speak to Cusack during intercourse. Further, this Court recognized that threats were not used in either the prior or current incident. *Id.* Here, although threats were used during both alleged assaults, the type of threat was extremely different. Moreover, the precedential value of *McCombs* is yet to be determined. Currently, McCombs has a motion to abate the case and withdraw this Court's opinion in *McCombs* pending in our supreme court.
(continued on next page)

In *Davenport*, the court held that similar threats and weapons, as well as the tangential relationships between the alleged victims and the defendant, were insufficient to establish a common scheme or plan. 321 S.C. at 138-39, 467 S.E.2d at 261. In this case, like *Davenport*, there was no similarity in the class of the victims; there was no significant similarity between the females' relationships with the defendant; the location of the assaults occurred in two different geographical areas—in *Davenport*, one assault occurred in Orangeburg while the other occurred in Newberry; and the manner or occurrence of the acts were not similar.

In *Berry*, the incidents occurred fifteen months apart, under different circumstances, at different times, and in different ways. 332 S.C. 214, 219, 503 S.E.2d 770, 773. This Court explained that merely because the two alleged victims both wore glasses and claimed that the defendant grabbed their throats did not make the assaults sufficiently similar such that they were a common scheme or plan.

Similarly here, the alleged incidents occurred: eight months apart; under different circumstances; in different places—in the present case one alleged assault occurred in Darlington County while the other alleged assault occurred in Hartsville or Florence County; with two different and unrelated victims; and in different ways.

B. Alleged Prior Victim and Cusack's testimony are linked only by very general similarities common to most if not all sexual assaults.

Because there is no pattern of continuous illicit conduct present in this case, the common scheme or plan evidence cannot be admitted on just a generalized basis. *Tutton*,

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McComb's counsel contends withdrawal of the opinion in this matter is mandated because McCombs died prior to the disposition of his appeal.

354 S.C. at 328, 580 S.E.2d at 191. Rather, to be admissible as a common scheme or plan, there must be a close degree of similarity or connection between the prior bad act and crime. *Kirton*, 381 S.C. at 27, 671 S.E.2d at 117. Here, there were only general similarities between Prior Victim and Cusack's testimony. These similarities were insufficient to establish a common scheme or plan.

As an initial matter, Prior Victim and Cusack's testimony are linked only by superficial similarities, which are common to most sexual assaults in general. *See Tutton*, 354 S.C. at 328, 580 S.E.2d at 191 (providing in sexual crime cases general similarities are not sufficient to support the finding of a common scheme or plan unless a pattern of continuous illicit conduct is established). In support of admitting Prior Victim's testimony, the State relied on facts common to most sexual assaults: both victims were young females; both females were acquaintances of Cotton; both were allegedly alone with Cotton at the time of the alleged incidents; both incidents allegedly occurred at night and in a private place; and both incidents allegedly involved implicit or explicit forms of violence. These factors are common to several, if not most, sex crimes, and lack any real significance.

Furthermore, Cotton is a young male and thus associates with other young individuals.[18] In most cases of sexual assault, the victim knows the perpetrator.[19] Additionally, it is common sense that sexual assaults rarely, if ever, occur in public and

[18] A U.S. Department of Justice study found that in eighty percent of sexual assault cases, the victims were under the age of thirty. An Analysis of Data and Rape and Sexual Assault, U.S. Department of Justice, Bureau of Justice Statistics, 1997, p. 11.

[19] According to another U.S. Department of Justice study, ninety percent of sexual assault victims knew their perpetrator. The Victimization of College Women, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Research Report, 2000, p. 17.

predominately take place at night.[20] Moreover, the very nature of sexual assaults involves the explicit or implicit use of force and violence. *See State v. Rogers*, 992 P.2d 229 (Mont. 1999) (holding the trial court erred in admitting prior sexual assaults based upon similarities common to sexual assaults, specifically voluntary entry into defendant's vehicle, driving to remote areas, advances, resistance, and forcible intercourse). There is nothing about the prior incident and the charged crime which make them unique. *See State v. Timmons*, 327 S.C. 48, 53, 488 S.E.2d 323, 326 (1997) (holding the trial court erred in admitting prior robberies based upon similarities common to all robberies).

C. The differences between Alleged Prior Victim and Cusack's testimony far outweigh their similarities.

Further, the trial court failed to take into account the abundant dissimilarities between the prior bad act and this case. Here, Prior Victim and Cusack's testimony described two distinct, isolated acts against two different and unrelated individuals, at different times, at different places, and under different circumstances.

i. Significant Differences Between the Alleged Incidents

Significant differences existed between the alleged assaults of these two females. These significant differences include but are not limited to:

> **(1)** Cusack being an adult and Prior Victim being a minor;
> **(2)** Cusack and Cotton having an established relationship opposed to Prior Victim and Cotton being mere acquaintances;
> **(3)** Cusack and Cotton met on two different occasions, while Prior Victim and Cotton only met on one occasion;
> **(4)** Cusack and Cotton met for a purpose of a date, while Prior Victim met Cotton in order to get a ride;
> **(5)** No other people were present other than Cusack and Cotton for their date, while Cotton's brother was present for a portion of the car ride with Prior Victim;

[20] The same study found that 88.3% of sexual assaults occurred between 6 p.m. and 6 a.m. *Ibid*, p. 18.

(6) Cotton made stops at public places with Cusack prior to the incident, while Cotton and Prior Victim made no stops at public places;
(7) Cotton took Cusack's phone but did not take Prior Victim's phone during the alleged abuse;
(8) Cotton was under the influence of marijuana[21] during the alleged assault of Cusack while there was no evidence that Cotton was under the influence of drugs during the alleged assault of Prior Victim;
(9) According to the females, Cotton threatened Cusack with a gun while he threatened Prior Victim with the use of physical violence;
(10) Cotton allegedly removed Cusack from the car and took off her clothes, while Prior Victim took off her clothes and got out of the car on her own volition;
(11) Cusack's assault only involved either vaginal intercourse or oral and vaginal intercourse[22] as opposed to Prior Victim's assault, which involved oral, vaginal, and anal intercourse;
(12) Cotton allegedly asked Prior Victim specific demeaning questions during intercourse, while there was no evidence that Cotton said anything to Cusack during intercourse; and
(13) The location of the alleged assaults differed—one allegedly occurred in Darlington County, while the other occurred in Hartsville or Florence County.

ii. The relationships between Cotton/Alleged Prior Victim vs. Cotton/Cusack

The trial court failed to acknowledge the significant differences between Prior Victim and Cusack's relationships with Cotton. The trial court erred in finding that the females' relationships with Cotton were similar on the basis of the allegations that he met both females on social media. First, the record does not establish that Cusack and Cotton in fact met through social media. Rather, the record is full of evidence which supports the fact that Cotton and Cusack met through a friend and then started a relationship by communicating over the phone.

Even if Cusack and Cotton met on a chat line rather than through a friend, the communication and relationship that developed between them was of a romantic and

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[21] The sexual assault examination protocol indicated that Cotton used marijuana on the night of the incident. (R. p. 466).

[22] Her testimony at trial indicates that only vaginal intercourse occurred.

more personal nature than the relationship that existed between Cotton and Prior Victim, which was based on a couple of impersonal messages sent over Facebook. The record indicates that Cotton and Cusack communicated continuously over the phone for a certain period of time. While Cusack did not testify how long this period was, Cotton testified that their relationship lasted approximately two to four months. Further, while Cusack denied that their relationship was of a romantic nature, facts in the record suggest otherwise – Cusack and Cotton made plans to go on a date; prior to their date they discussed getting each other Valentine's Day gifts; they actually went to K-mart for the purpose of Valentine's Day shopping; and after the alleged intercourse, Cotton told Cusack he loved her.

The State suggested there was a similarity in the parties' relationships based on the fact that both females were acquaintances of Cotton. As explained above, this is a general similarity which is common to nearly all sexual assaults, and even if this were considered to be a similarity, the relationship between Cusack and Cotton was more than mere acquaintances. Moreover, South Carolina case law indicates that a similarity in the parties' relationship based on the fact that the victims were both acquaintances of the defendant is insufficient to establish a connection between the prior bad act and the crime charged. *See State v. Davenport*, 321 S.C. 134, 138, 467 S.E.2d 258, 261 (Ct. App. 1996) (holding that knives were used in both instances and that the relationships of the parties, that defendant only tangentially knew both of the victims before the assaults, were not sufficient criteria to establish a connection between the acts). Therefore, the trial court ultimately erred in treating the relationship between the females and Cotton as a similarity in supporting its decision to allow admission of the prior bad act evidence.

iii. The Location of the Alleged Assaults

A majority of the South Carolina case law provides that in order for there to be a similarity between the prior act and the crime charged based on location, the physical locations where the abuse occurred need to be the same. *See Timmons*, 327 S.C. 48, 53, 488 S.E.2d 323, 326 (1997) (providing that the prior incident and the charged incident that both took place in the Cayce/West Columbia area was too general of a location to warrant the finding of a similarity); *Tutton*, 354 S.C. 319, 580 S.E.2d 186 (providing that the location was similar when all of the alleged abuse occurred at defendant's residence in Laurens County); *Kirton*, 381 S.C. 7, 671 S.E.2d 107 (admitting prior bad act evidence when the prior and charged abuse occurred in the defendant's trailer located in Georgetown County); *Wallace*, 384 S.C. 428, 683 S.E.2d 275 (admitting prior bad evidence when all abuse occurred in the family's residence located in Greenville County). Indeed, the State acknowledged that the prior act and current act did not happen in a singular location like most of the cases in which prior bad act evidence has been admitted. (R. p. 64).

In the face of overwhelming precedent, and the State's acknowledgment of the same, the trial court here found that because both alleged acts occurred in a car and an unpopulated area, the locations were sufficiently similar. This ruling was incorrect for several reasons. First, as explained above, most assaults do not occur in public places. It is common sense that sexual assaults will usually always take place where there are not a lot of people present. Second, while both acts allegedly occurred in unpopulated areas, the trial court completely disregarded the fact that these areas were in two completely different geographic locations. The alleged act with Cusack occurred somewhere in

Darlington County off of Turnpike Road, while the alleged act with Prior Victim occurred off of an unknown road likely somewhere in Florence or Hartsville County.[23]

Further, in regard to the acts that occurred in the car, the alleged touching of both females began at different locations inside the car. With Cusack it allegedly began when they were both located in the front seat; with Prior Victim it began when she was sitting in the back seat of the car. As to the oral sex that occurred immediately prior to intercourse, Cusack testified it occurred inside the car prior to trial, and, at trial, that it was attempted outside of the car. Prior Victim testified that the oral sex occurred inside the car. As to the alleged sexual intercourse that occurred – Cusack testified that it occurred immediately outside of the front passenger door, while Prior Victim testified that it occurred on the hood of the car. *See Atieh*, 397 S.C. at 648, 725 S.E.2d at 734 (admitting prior bad act evidence when the inappropriate touching occurred at defendant's restaurant in specific areas around the sink or cooler). Furthermore, as stated above, the alleged sexual intercourse with these two females happened at completely different geographical locations.

iv. The Manner of The Occurrence Between The Two Acts

The trial court improperly found that the manner of occurrence between the two acts was similar because they both began with oral sex and then proceeded to vaginal and other sex. (R. pp. 86-87). There were major differences in regard to the type of sexual battery that occurred. While Prior Victim's testimony established that she was forced to perform oral sex prior to her sexual assault, Cusack's testimony did not establish that her

[23] Prior Victim testified that Cotton began inappropriately touching her soon after they dropped his brother at his house on Whitehall Lane, which is located in Hartsville. (R. p. 21, ll. 21-24, p. 171, l. 25-p. 1720, l. 8).

alleged assault on Turnpike Road began with or included oral sex. Prior to trial, she testified she performed oral sex at the Turnpike Road location. At trial she stated she did not perform oral sex at that location. Further, the trial court failed to address another major distinction in regard to the type of sexual battery that occurred. Cusack testified that only vaginal intercourse occurred as opposed to Prior Victim who testified that both vaginal and anal intercourse occurred.

The trial court also found that the abuse began in the same way—with Cotton coming around the car and taking the females out of the car. However, the manner in which intercourse was initiated was actually different. Cusack testified when Cotton could not get her pants off in the car, he got out of the car and went to the passenger side door and removed her from the car. She testified he then began undressing her. In contrast, Prior Victim testified that prior to sexual intercourse, she removed her pants and got out of the car on her own volition.

v. Summary

As noted, *Wallace* instructs the trial court to look at the following factors: (1) the age of the victims; (2) the relationship between the victims and the defendant; (3) the location where the acts occurred; (4) the use of threats; and (5) the manner of the occurrence, for example the type of sexual battery. As explained above, Prior Victim and Cusack were three years apart in age; had vastly different relationships with Cotton; described two very different types of assaults at two completely different geographical locations; and explained that the alleged assaults were carried out by different types of threats. Thus, there is not a clear connection or close degree of similarity between the prior bad act and crime charged. Consequently, the trial court erred in admitting Prior

Victim's testimony about the uncharged alleged assault. *See Lyle,* 125 S.C. at 417, 118 S.E. at 807 (holding "if the [trial] court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected").

IV. The admission of Alleged Prior Victim's testimony was extremely prejudicial and far outweighed its probative value.

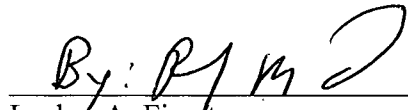
Even assuming the prior bad act evidence would be admissible under the narrow common scheme exception, its probative value was outweighed by its unfair prejudice and thus should have been excluded under Rule 403's balancing test.

Here, the dissimilarities between the alleged prior act with Prior Victim and the current alleged act with Cusack nullified the probative value of the prior bad act evidence. Further, it is patently obvious that this evidence was extremely prejudicial. The jury could not have possibly ignored this testimony. Accordingly, the trial court's decision should be reversed because the probative value of this evidence did not outweigh its prejudicial effect. *See Davenport*, 321 S.C. at 138-39, 467 S.E.2d at 261 (holding defendant must be granted a new trial because the appellate court was unable to perceive a connection or close degree of similarity between the acts and the prejudice of the testimony was manifest).

CONCLUSION

For all of the reasons set forth above, Cotton respectfully requests that this Court reverse the trial court's decision regarding the admissibility of the prior bad act and remand this case for a new trial.

Respectfully submitted,

By: 

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November 18, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of General Sessions

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000395

The State, ...Respondent,

v.

Damyon M. Cotton, ...Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that Appellant's Amended Final Brief comply with the provisions of Rule 211(b), SCACR.

By: RMD

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PROOF OF SERVICE

The undersigned hereby certifies he served counsel for the Respondent; Henry Gunter, Esquire and Christina Catoe Bigelow, Esquire, with a copy of the *Appellant's Amended Final Brief* at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of November 2015.

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SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.