STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of General Sessions

The Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002340

THE STATE,

Respondent,

v.

AUGUST BYRON KREIS, III,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

205 E. Main Street
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUES ON APPEAL

I.

The trial judge's error in charging the jury pursuant to S.C. Code Ann. § 16-3-657 that the Victim's testimony need not be corroborated was harmless in light of the compelling evidence of guilt presented during Appellant's trial and the corroborated nature of the victims' testimony.

II.

The trial judge properly admitted evidence of Appellant's prior sexual abuse of Victim 3 where the testimony of the witness constituted evidence of a common scheme or plan due to the significant similarity to the testimony of Victim 1 and Victim 2, including the age of the victims when the abuse occurred, the relationship between Appellant and his victims, the location where the abuse occurred, and the manner in which the abuse occurred, and the probative value was not substantially outweighed by the risk of unfair prejudice.

STATEMENT OF THE CASE

Appellant was indicted during the August 2015 term of the Grand Jury for Lexington County for criminal sexual conduct with a minor in the second degree (2015-GS-32-02034), attempting or committing a lewd act upon a child (2015-GS-32-02030), and lewd act upon a child (2015-GS-32-02036). Appellant proceeded to a trial by jury from November 2-5, 2015, in Lexington, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable Doyet A. Early, III, to imprisonment for a term of twenty years for criminal sexual conduct with a minor in the second degree, imprisonment for a term of fifteen years for attempting or committing a lewd act upon a child, and imprisonment for a term of fifteen years for lewd act upon a child, with all sentences running consecutively for an aggregate sentence of fifty years' imprisonment. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant and Mother have seven children together: Victim 1, Victim 2, Son 1, Son 2, Victim 3[1], Son 3, and Son 4. In January of 2014, Victim 1 disclosed to her mother that Appellant sexually abused her in the past. Tr. p. 95. Upon Victim 1's disclosure, Mother asked Victim 2 whether Appellant engaged in any inappropriate behavior with her. Tr. p. 99. Victim 2 ran away to a neighbor's house, then came back and admitted to Mother that something happened to her as well. Tr. pp. 99-100. Mother subsequently asked Victim 3 whether Appellant ever "did stuff" to her and Victim 3 replied in the affirmative. Tr. pp. 208-09.

At the time of trial, Victim 1 was twenty-one years old. Tr. p. 77. Victim 1 testified that during her childhood, her family lived in Pennsylvania, New York, Florida, Tennessee, Kentucky, and South Carolina. Tr. p. 80. The family lived in Lexington from the time Victim 1 was ten years old until she was thirteen years old. Tr. p. 80. Victim 1 testified she and her father had a normal parent child relationship during the day; however, Appellant would "do stuff at night," then the next day would act as if nothing happened. Tr. pp. 83-84. When asked when Appellant abused her, Victim 1 stated:

> There wasn't a lot of opportunity during the daytime. And, you know, at night when everybody is sleeping, he would come in either - - if I was in the bedroom, he would come in and pick me up and take me to the couch while nobody was in the living room, or if I was sleeping on the couch that night, he would just come out of his bedroom and on the couch.

Tr. p. 85. In addition to the living room, Appellant sexually assaulted Victim 1 in the bedroom she shared with her sisters, the master bedroom, and the master bathroom. Tr. 86. Victim 1 testified Appellant would, "put his mouth on my vaginal area," and that particular act occurred every time he abused her. Tr. p. 88. In addition, Victim 1 disclosed Appellant "would try to put

[1] While she is referred to Victim 3 in the Brief of Respondent, Appellant was not indicted for any incidents with respect to Victim 3 in this particular case. At the time of trial, Appellant had pending charges in Richland and Kershaw counties for sexually assaulting Victim 3. Tr. p. 44.

his penis in my mouth." Tr. p. 88. "He would touch me, touch my breasts, touch my vagina." Victim 1 clarified Appellant forced her to perform oral sex on him on multiple occasions. Tr. p. 88. Victim 1 also clarified Appellant digitally penetrated her on multiple occasions. Tr. p. 89. Victim 1 stated Appellant had been sexually abusing her for as long as she could remember. Tr. pp. 124-25. Victim 1 "would always pretend like I was sleeping and just let it happen. Like I said, it was a normal occurrence." Tr. p. 90. The last occasion where Appellant attempted to assault Victim 1 was when she was thirteen years old. Tr. pp. 89-90. On the final occasion, Appellant had a condom with him and attempted to insert his penis into Victim 1's vagina. Tr. pp. 89-90. Victim 1 resisted and struggled until Appellant gave up. Tr. p. 90. Victim 1 described Appellant as an angry, violent man who taught his children, "violence solves everything." Tr. p. 97. Victim 1 was nineteen years old at the time she disclosed Appellant's abuse. Tr. p. 95. She stated she did not disclose the abuse earlier because she did not want a broken family. Tr. p. 137.

Victim 2 was nineteen years old at the time of trial. Tr. p. 141. Victim 2 and her family lived in Lexington County from the time Victim 2 was nine years old until she was eleven years old. Tr. p. 142. Victim 2 described her relationship with Appellant as, "I mean, he's my father. But I never really liked being around him much." Tr. p. 143. Victim 2 also described her father as "violent and mean." Tr. p. 151. Victim recounted an incident where she was asleep on the couch and Appellant came out of his bedroom and pulled her onto the floor. Tr. p. 144. Appellant subsequently tried to put his penis into Victim 2's mouth. Tr. p. 144. Victim 2 noted that she kept her mouth shut but, "could feel it on my lips and teeth." Tr. p. 146. Appellant also digitally penetrated her. Tr. pp. 146-47. The only other incident involving Appellant that Victim 2 recalled was an incident where Appellant tried to pull her onto the bed in the master bedroom when no one else was home. Tr. pp. 147-48. Victim 2 ran away from Appellant because she

"knew what he was trying to do." Tr. p. 148. Victim 2 revealed she did not disclose Appellant's abuse at the time because he was the one who paid the bills and did not know what would happen to the family if he was gone. Tr. p. 149.

Following Victim 2's testimony, the State proffered the testimony of Victim 3. Tr. pp. 161-80. The State's proffer of Victim 3's testimony followed a pre-trial discussion concerning the admission of Victim 3's testimony as Lyle evidence. Tr. pp. 51-56. During the pre-trial, hearing, the trial judge delayed ruling on the issue, instructing the parties, "But when you get to the third daughter outside of Lexington County, we'll do a proffer to see exactly what she's going to say and what we've got already in evidence, and I'll make a ruling on it at that time." Tr. p. 56.

At the time of trial, Victim 3 was fourteen years old. Tr. p. 166. While living at an apartment in Richland County and an apartment in Kershaw County, Victim 3 recalled Appellant doing things that made her uncomfortable. Tr. pp. 165, 198-99. Victim 3 recounted a specific incident where she and Appellant were on the bed together watching The Wizard of Oz and Appellant began touching her. Tr. p. 166. Victim 3 elaborated that Appellant touched her vagina with his hand. Tr. pp. 166-67. While Appellant was touching Victim 3's vagina, Son 3 walked into the room. Tr. p. 170. Victim 3 testified that when Son 3 walked in the room, Appellant stopped touching her. Tr. p. 171. Son 3 corroborated Victim 3's testimony, testifying he walked into Appellant's bedroom and saw Appellant and Victim 3 on the bed. Tr. p. 177. Son 3 stated Appellant and Victim 3 were under a blanket and that he saw "movement." Tr. p. 178. Son 3 immediately walked out of the room because "something was strange," meaning that it was "not right." Tr. pp. 178-79. Victim 3 also recounted an occasion where Appellant attempted to force her to perform oral sex on him. Tr. p. 172. Victim 3 resisted, testifying, "I rolled over. I didn't

open my mouth." Tr. p. 172. Victim 3 also noted Appellant previously took her hand and attempted to make her hand touch his genitals. Tr. p. 173. Victim 3 was eleven or twelve years old at the time of Appellant's abuse. Tr. p. 174.

Following the proffer of Victim 3 and Son 3's testimony, Defense Counsel stated, "Your Honor, prior to starting my argument, I'd like to put it on the record that my client has asked me not to contest the children testifying." Tr. p. 182. Appellant told the Court he had no objection to the Lyle evidence coming in and that he would "rather have it all come out now." Tr. p. 183. Defense Counsel noted he disagreed with Appellant's decision and that he was prepared to argue the issue. Tr. pp. 183-84. Following argument by Defense Counsel and the solicitor, the trial judge ruled:

> So what all I have to look at here is, obviously, the age of the victims. They were all close in age, they were young children at the time it occurred. The relationship is the same, they were all biological, natural children. The alleged perpetrator is their dad. The location is all in the home; different homes, but in the home where the children lived. I don't think there's any evidence of any coercion or threats other than - - no evidence of threats. The manner of occurrence, all are similar in that it was digital penetration, attempted or forced fellatio, oral sex. The children's descriptions where pretty much mirror images of each other. So I find that the similarities outweigh the dissimilarities, and that the bad acts or the testimony of [Victim 3] and [Son 3] should be admitted under a 403 analysis, which is required. . . . And, even though this is not part of my analysis, the defendant is - - has consented to the testimony of [Victim 3] and [Son 3]. He's advised me that he wishes to take the witness stand. He advised me he wishes, you know, the whole story come out and tell his side, and wants any allegations that [Victim 3] or [Son 3] may testify, he consents to their testimony. So I'll allow the testimony with that ruling.

Tr. pp. 193-95. Victim 3 and Son 3's subsequent trial testimony matched their testimony during the proffer. Tr. pp. 197-221.

Following Appellant's arrest, Mother provided Detective Shannon Dykes of the Lexington County Sheriff's Department with a letter written by Appellant that was addressed to Mother. Tr. pp. 251, 258-61. In the letter, Appellant makes a variety of incriminating statements.

Appellant wrote, "I realize you most likely regret even knowing me now." Tr. p. 264. Appellant also wrote, "Just for your knowledge, I'm not asking for bail and have already told the lawyers that they gave me it's not going to trial. I'll stay here until sentenced to prison." Tr. p. 265. Appellant also stated, "Although I'm sure you want nothing to do with me, I'd like to know you got my things from the house. . . . I hate myself more than anyone else could." Tr. pp. 265-66. Further, Appellant admitted, "I deserve whatever happens to me, but I'm so sorry I hurt the only ones I love and love me, you and our children." Tr. p. 267.

After the State rested its case, Appellant chose to testify in his own defense. Tr. pp. 310-50. On direct examination, Appellant noted he was on a domestic terrorism watch list. Tr. p. 329. On cross-examination, the State asked Appellant why he was on a domestic terrorism watch list. Tr. p. 335. Appellant responded that he is a member of a number of organizations the United States government considered to be a threat. These organizations included the Ku Klux Klan, the Christian Sheriff's Posse Comitatus, and the Aryan Nations. Tr. p. 335. In fact, Appellant was the international leader of the Aryan Nations. Tr. p. 337. Appellant described his goal of spreading the word of the Aryan Nation, even going as far as appearing on the Jerry Springer Show. Tr. p. 337. Appellant testified he wrote the incriminating letter to Mother because he "gave up" because the federal government, which he referred to as a "Zionist Occupational Government," was out to get him. Tr. 340-41. When reminded that his children were the ones accusing him of illicit acts and they were not affiliated with the federal government, Appellant responded, "No. But they've been taken through a bunch of psychobabblists, pseudoscientist pieces of shit that don't know anything but to - - couldn't find their - - no. They're being used. They're being used. In my eyes, they're being used, ma'am." Tr. p. 341. Appellant later admitted he was investigated by the Pennsylvania State Police while living in Pennsylvania for sexually

abusing his two daughters from a prior marriage. Tr. p. 347. Appellant had a "protection from abuse" order entered against him in Pennsylvania where he was prohibited from contacting the parent of his two daughters from the prior marriage. Tr. pp. 347-48.

During the charge conference, the trial judge indicated he intended to give the jury a non-corroboration charge. Tr. pp. 354-56. The trial judge subsequently instructed the jury, "I might add there's a statute also that says, enacted by our legislature, that in a prosecution under this particular section, 16-3-655, II and III, that the testimony of the victim need not be corroborated in prosecutions under these code sections." Tr. p. 399.

Following the jury's guilty verdict, Appellant addressed the Court during sentencing. Appellant stated:

> I want to thank Mr. Shealy for his best efforts. And I pretty much knew how it was all going to come out. I had my say. And I - - and even though he doesn't agree, I'm - - they want to put me away for the rest of my life. Even if you gave me 16 or 20 years, it's still going to be the rest of my like (sic). So I'd rather hear you say life than listen to them.[2] You know, to me, they're the enemy, they'll always be the enemy. That's ZOG[3] sitting at that table. I hate the Jew. I'll always hate the Jew until my death, period. This government is run by an evil group of people. And please, vote for Trump.

Tr. pp. 435-36.

[2] Appellant earlier requested the trial judge sentence him to life imprisonment in the event he was found guilty. Tr. p. 48.

[3] Appellant earlier explained to the trial judge that "ZOG" was an abbreviation for "Zionist Occupational Government." Tr. p. 340.

ARGUMENT

I.

The trial judge's error in charging the jury pursuant to S.C. Code Ann. § 16-3-657 that the Victim's testimony need not be corroborated was harmless in light of the compelling evidence of guilt presented during Appellant's trial and the corroborated nature of the victims' testimony.

Appellant contends the trial court committed reversible error by instructing the jury that "the testimony of the victim need not be corroborated." Appellant further avers the error could not be harmless because it was a "he said/she said" case. Appellant's argument that any error could not be harmless is wholly without merit. Any error by the trial judge in giving the non-corroboration charge was harmless in light of the compelling evidence of guilt presented during trial and the corroborated nature of the victims' testimony.

As noted in Respondent's Statement of Facts, the trial court, pursuant to the South Carolina Supreme Court's decision in State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006), instructed the jury that a rape victim's testimony need not be corroborated.[4] This instruction, previously found appropriate and consistent with the legislative's remedial intent, was found confusing and unconstitutional by the South Carolina Supreme Court in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

In Stukes, the trial court instructed the jury on the no-corroboration requirement. While deliberating, the jury sent the trial court a note, asking: "[T]he South Carolina law that the victim's testimony in CSC . . . does not need to be corroborated, . . . does that law imply that the victim's testimony must be accepted as being true?" Rather than respond directly to the jury's question, the trial court recharged the general law on credibility. The jury immediately returned a guilty verdict. Stukes, 416 S.C. at 497. The Supreme Court observed "it is inescapable that

[4] S.C. Code Ann. § 16-3-657 provides: "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658."

this charge confused the jury" as "illustrated by the jury's query as to whether our law implies a victim's testimony must be accepted as being true." Id. at 499-500. Turning to the trial court's reaction to the jury note, the Supreme Court lamented, "In our view the trial court's decision to merely recharge credibility, as opposed to answer the question in the negative, did nothing to inform the jury on this issue." Id at 500. Reviewing for harmless error, the Supreme Court found the instruction was prejudicial because the case hinged on credibility: the victim claimed to be raped, and the defendant claimed it was consensual. Id.

Notwithstanding the trial judge's error in giving the no-corroboration charge, said error is harmless in Appellant's case. As a general rule, the appellate court will decline to set aside a conviction due to insubstantial errors not affecting the result. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). Determining whether an error is harmless depends on the circumstances of the particular case and no set rule governs this finding. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Instead, the materiality and any prejudicial character of the alleged error must be determined from its relationship to the entire case. Id. An error is harmless when it could not reasonably have affected the result of the trial. Id.; see also State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Abundant evidence supports that the assaults on Victim 1, Victim 2, and Victim 3 were part and parcel of Appellant's common scheme or plan of sexually assaulting every single one of his daughters. Appellant's sexual abuse of Victim 1 and Victim 2 was corroborated by the properly admitted Lyle testimony of Victim 3 and Son 3. Victim 3 detailed instances of abuse nearly identical to that of Victim 1 and Victim 2, and Son 3 walked in during one of the specific instances of abuse

described by Victim 3 at trial and corroborated that he walked into Appellant's bedroom and saw Appellant and Victim 3 under a blanket where "something strange" was going on that made him leave the room immediately. Appellant also made a series of statements in a letter to Mother that were quasi-confessional. Appellant's statements such as, "I deserve whatever happens to me, but I'm so sorry I hurt the only ones I love and love me, you and our children" and "I hate myself more than anyone else could" are demonstrative of Appellant's knowledge of his own guilt. Appellant also made statements in the letter resigning himself to a life in prison. Aside from the evidence and testimony presented by the State at trial, Appellant's primary defense offered at trial was that a "Zionist Occupational Government" somehow coerced his daughters into fabricating sexual abuse allegations in order to ensure he went to prison.

All the above leads to the natural conclusion that the trial judge's error in giving the no-corroboration charge was an insubstantial error not affecting the result of trial. First, the no-corroboration charge was harmless because the victims' allegations were corroborated. Second, the non-corroboration language was not prejudicial to Appellant because it could not have had any impact on the verdict in light of the evidence of Appellant's guilt presented during trial. The State presented compelling evidence of Appellant's guilt while Appellant only offered an anti-Semitic conspiracy theory that his daughters were somehow puppets of an entity he referred to as the "Zionist Occupational Government." Furthermore, Appellant's case is distinguishable from Stukes, as the prejudice in Stukes was the jury appeared to misunderstand the instruction based on its note to the trial court. In the instant case, there is no evidence the jury misunderstood the trial court's correct statement of law. Therefore, there is no showing of prejudice. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly admitted evidence of Appellant's prior sexual abuse of Victim 3 where the testimony of the witness constituted evidence of a common scheme or plan due to the significant similarity to the testimony of Victim 1 and Victim 2, including the age of the victims when the abuse occurred, the relationship between Appellant and his victims, the location where the abuse occurred, and the manner in which the abuse occurred, and the probative value was not substantially outweighed by the risk of unfair prejudice.

Appellant asserts the trial judge erred in finding Victim 3's testimony admissible as evidence of a common scheme or plan. Specifically, Appellant contends the abuse of Victim 3 was not sufficiently similar to the indicted charges with respect to Victim 1 and Victim 2. Appellant also contends the trial court erred in finding Victim 3's testimony more probative than prejudicial under Rule 403, SCRE. These arguments lack merit, as there was an exceptionally close degree of similarity between Appellant's prior sexual abuse of Victim 3 and his sexual abuse of Victim 1 and Victim 2. Furthermore, the evidence of the prior bad act had significant probative value that was not substantially outweighed by the risk of unfair prejudice.

Evidence of Appellant's Prior Sexual Abuse of Victim 3 was Admissible to Show a Common Scheme or Plan

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). An abuse of discretion occurs when the trial judge's conclusions either lack

evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008).

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, this Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).
>
> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278.

In the current case, all five factors enumerated in Wallace weigh in favor of admitting the evidence due to the substantial degree of similarity between Appellant's abuse of Victim 1 and Victim 2 and Appellant's abuse of Victim 3. As to the first factor, the age of the victims when

the abuse occurred, the abuse began when the Victims were at a pre-teen age. In her direct testimony, Victim 1 testified the abuse had been occurring as long as she could remember; however the instances of abuse in Lexington County occurred from the age of ten until she was around thirteen. Victim 2 testified she was between the ages of nine and eleven when the family lived in Lexington and Appellant sexually abused her. While Victim 2 did not testify to her specific age when the incidents occurred, she did testify that it was in "the middle" of when the family lived in Lexington County. Tr. pp. 148-49. During her proffer, Victim 3 testified she was eleven or twelve years old at the time of the abuse. Tr. p. 174. Victim 3 later testified during cross-examination that she was twelve years old at the time of the abuse. Tr. pp. 211-12. All three victims were pre-teens and aged within a few years of each other at the time of Appellant's abuse. While it is unclear when Appellant's abuse of Victim 1 began, the instances of abuse Victim 1 recounted at trial all occurred when she was between the ages of ten and thirteen. Identically, Victim 2 was around ten years old at the time of the instances of abuse she testified to at trial. Similarly, Victim 3 was eleven or twelve years old at the time of the instances of abuse she testified to at trial. The ages of Appellant's victims at the time of the abuse, thus, are strikingly similar.

As to the second factor, the relationship between the victims and the perpetrator, the relationship between Appellant, the relationship between Appellant and each victim is strikingly similar. Appellant was the biological father of Victim 1, Victim 2, and Victim 3. Appellant's victims all shared the unfortunate circumstance of being in a familial relationship with him.

As to the third factor, the location where the abuse occurred, all of the sexual abuse occurred within the home. Victim 1 testified Appellant sexually abused her on the couch in the living room, in the bedroom she shared with her sisters, the home's master bedroom, and the

master bathroom. Victim 2 testified she was sexually abused on the couch and recounted an occasion where Appellant attempted to sexually assault her in the master bedroom. Victim 3 was sexually abused by Appellant in the master bedroom. Not only did all the abuse occur within the home for all three victims, Appellant either assaulted or attempted to assault all three Victims in the master bedroom. The location where the abuse occurred is therefore extremely similar for all three victims.

As to the fourth factor, the use of coercion or threats, there is a high degree of similarity between the crimes charged and the prior bad act where Appellant did not expressly threaten Victim 1, Victim 2, or Victim 3. The absence of coercion or threats is therefore identical for each victim. Interestingly, all three victims reported a fear of reporting the abuse because Appellant was the financial provider for the family. See Tr. pp. 91, 141, 212. The victims' reluctance to report Appellant's abuse was therefore not rooted in express threats by Appellant, but an implicit threat to the family's financial well-being.

As to the fifth factor, the manner of the occurrence, the type of sexual battery was similar for Victim 1, Victim 2, and Victim 3. Appellant used the exact same manner of abuse for Victim 2 and Victim 3, as both victims were subjected to digital penetration and Appellant attempted to force them to perform oral sex on him. Victim 1 was also subjected to digital penetration and forced to perform oral sex on Appellant; however, Appellant also performed oral sex on Victim 1 and attempted penile penetration of her vagina on one occasion.

All five of the aforementioned factors demonstrate the significant degree of similarity between Appellant's prior abuse of Victim 3 and Appellant's abuse of Victim 1 and Victim 2. The victims were of similar ages at the time of the abuse, all three victims were in a biological familial relationship with Appellant, the abuse all occurred within the home and usually occurred

in the bedroom or in the living room, all three victims were not expressly threatened by Appellant but noted a reluctance to disclose because of Appellant's status as the family's financial provider, and all three victims were digitally penetrated by Appellant and Appellant either performed or attempted to perform oral sex on them. The trial judge properly admitted the prior bad act evidence due to the significant similarities outweighing the minimal dissimilarities.

The Probative Value of the Prior Instances of Sexual Abuse by Appellant Was Not Substantially Outweighed by the Threat of Unfair Prejudice

Evidence of prior bad acts must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999). Prejudicial evidence is still proper unless it amounts to undue or unfair prejudice. See State v. Beck, 342 S.C. 129, 136-37, 536 S.E.2d 679, 683 (2000) ("We find that evidence of the [prior bad act], although certainly prejudicial to Appellant, is not unduly so under our previous decisions."). "'Unfair prejudice' within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible." State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (2004). "Stated differently, evidence which is 'logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally

reveals the accused's guilt of another crime.'" State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

Due to the extensive similarities between the prior bad acts and the charged offenses, the evidence had significant probative value. The evidence of prior instances of Appellant's sexual misconduct where Appellant previously performed the same sexual acts with another biological child enhances the probative value of the evidence as to outweigh its prejudicial effect. There were striking similarities in regards to the age of the victims when the abuse occurred, the manner in which the abuse occurred, the nature of the abuse, the timing of the abuse, the location of the abuse, and other important factors. Cf. Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("Here, the similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity."). Any potential prejudicial effect of the evidence comes from the evidence's legitimate probative value, and that prejudicial effect does not substantially outweigh the evidence's probative value. The trial judge, thus, properly declined to exclude the evidence under Rule 403, SCRE.

Even if the trial judge erred in admitting Victim 3's testimony, Appellant suffered no prejudice because he expressly stated he wanted the Lyle evidence admitted at trial. Appellant asked Defense Counsel to not contest Victim 3 testifying and later told the Court he had no objection to the Lyle evidence coming in because he would "rather have it all come out now." Tr. p. 183. The trial judge's ruling, therefore, gave Appellant the exact result he desired. Appellant's convictions and sentences should be affirmed.

CONCLUSION

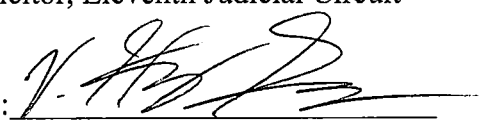
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: 

V. Henry Gunter, Jr.
Bar # 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 27, 2017