STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001526

THE STATE, ...RESPONDENT,

v.

WALTER SCOTT GARRETT,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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II. The trial judge properly denied Appellant's motion to dismiss this case based on the twenty-four year pre-indictment delay because Appellant failed to demonstrate he was substantially prejudiced by the length of the delay and the delay was caused, in part, because Appellant absconded from the state when he discovered Victim reported her assaults to police.

STATEMENT OF THE CASE

On July 7, 2014, Appellant was indicted for two counts of criminal sexual conduct (CSC) with a minor in the first degree. On July 6-8, 2015, Appellant proceeded to a jury trial before the Honorable Deadra L. Jefferson. John J. Kozelski, III, Esquire (Counsel) represented Appellant; Assistant Solicitors Debbie Herring-Lash, Esquire and Nina Savas, Esquire represented the State. The jury found Appellant guilty as indicted. The trial judge sentenced him to concurrent terms of fifteen years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On January 15, 1990, Victim reported to her school guidance counselor that Appellant, her stepfather, had sexually assaulted her on numerous occasions. The school contacted the police, and kept Victim at the school until police and representatives of the Charleston County office of the South Carolina Department of Social Services (SCDSS) arrived. Before officers arrived, Appellant and Victim's mother (Mother) attempted to pick Victim up from school, but left after school authorities turned them away and informed them police were en route. (R. p.64, line 6–p.65, line 16; R. p.133, line 19–p.135, line 1).

Victim was taken into protective custody and interviewed by Detective William Reed. Detective Reed ascertained that Victim was ten years' old at that time. She informed him that she had been sexually abused by Appellant for years and the abuse while the family resided in Georgia. Subsequently, other officers went to Victim's home, searching for Appellant, but were unable to locate him. (R. p.170, lines 1–7; R. p.179, line 19–p.180, line 20; R. p.181, lines 12–20).

On January 16, Detective Reed obtained warrants for Appellant. He attempted to serve them on January 29 by visiting Victim's home, but Appellant was not there. On January 30, Detective Reed contacted the Clayton County, Georgia Department of Social Services (GDSS), who had removed Victim from Appellant's home on multiple prior occasions for previous sexual assaults against Victim. He obtained the entire GDSS files on Appellant and Victim, and continued his investigation. On April 5, he obtained an inspection warrant for Victim's home, and again attempted to serve Appellant. Neither Appellant nor Mother were at the home, so he placed the case on inactive status and put the warrants in the Charleston County Sheriff's Office Warrants Division's file. (R. p.182, line 3–p.184, line 6; R. p.196, lines 21–23).

Around December 2013, Officer Sheri Church found the warrants, and noticed they had not been placed in National Crime Information Center (NCIC) database. Appellant was located in Clayton County, Georgia and served his warrants on January 3, 2014. (R. p.160, line 17–p.162, line 3; R. p.164, lines 11–25).

Prior to trial, the State provided Appellant with the entirety of the GDSS records on Appellant and Victim, all of which were preserved in the Charleston County Sheriff's Office casefile. Moreover, the State provided Appellant with the SCDSS records which were preserved in the casefile; while not all of the documents pertaining to Victim's SCDSS case were preserved, many of them, including: (1) Victim's January 16, 1990 medical exam; (2) the incident report; (3) the taped audio statement given by the Victim on January 15, 1990; (4) the Guardian Ad Litem report; (5) treatment plans; and (6) court orders were preserved and provided in discovery. (R. p.27, line 2–p.29, line 14). However, some of the SCDSS records, including caseworkers' notes, were destroyed in accordance with its document retention policy. (R. p.10, line 24–p.11, line 13; R .p.28, line 5–p.29, line 14).

Motion to Dismiss for Delay

During the pretrial hearing, Counsel moved to dismiss the instant case, based upon the almost twenty-four year pre-indictment delay between law enforcement obtaining the warrants and serving them on Appellant. Comparing the instant case to State v. Lee, 375 S.C. 394, 653 S.E.2d 259 (2007), in which the South Carolina Supreme Court found a defendant was substantially prejudiced by a twelve-year pre-indictment delay, Counsel argued the twenty-four year delay caused substantial prejudice to Appellant's ability to defend himself because: (1) Appellant's mother, who was close with Victim and allegedly had a conversation with her in which Victim claimed she fabricated the charges because Appellant "took her mother away,"

died in 1999; (2) he was unable to locate Appellant's family court attorney from 1987, who represented Appellant in the GDSS case and could testify as to why GDSS put Victim back in Appellant's home; (3) Appellant's medical records and SCDSS files from after her January 15, 1990 report were destroyed, so he was unable to review those items for potentially exculpatory evidence; and (4) Appellant's final treatment summary of her twenty-one session treatment at the Crime Victim's Research and Treatment Center stated Appellant as unaware of the emotion of others and the impact of her behaviors on other individuals and noted she appeared to have "auditory and visual hallucinations," but the records describing those issues in detail were all destroyed and the witnesses who could discuss those sessions either could not be located or had no recollection. (R. p.5, line 17–p.26, line 21).

In response, the State argued the instant case was distinguishable from that of Lee in that Appellant actually received a substantial portion of the relevant records in this case. The State explained that the entirety of the GDSS file was preserved in the Charleston County Sheriff's Office file, including the handwritten caseworker notes, and that such documents were provided to Appellant during discovery. The State also noted Appellant was given: (1) a large portion of the SCDSS file was preserved in that same case file, including treatment plans and case summaries covering the period between 1990 and 1994; (2) the records of the medical exam performed on the Victim on January 16, 1990; (3) the incident report; (4) a taped audio statement given by Victim on January 15, 1990; (5) an affidavit from a SCDSS worker which was filed with copies of all of Victim's treatment plans and a guardian ad litem report, all of which reference her statements to police and SCDSS. Moreover, the State noted the conversation in which Victim allegedly recanted was also witnessed by Victim's foster mother and William Cramer, both of whom were witnesses testifying for the State. (R. p.27, line 2–p.30, line 11).

The State also noted: (1) Victim's parents left the school on January 15, 1990 because they were informed law enforcement was en route, and that Appellant's decision to leave the state following this incident was one of the factors leading to the delay in service of the warrants; and (2) Mother was available to testify at trial, but that it would not call her because it felt her testimony was not credible. (R. p.30, line 19–p.31, line 24; R. p.34, line 1–p.35, line 2).

The trial judge denied the motion to dismiss, stating Appellant failed to establish he was substantially prejudiced by the delay, and stated she would flesh out the justification for her ruling later during the trial. (R. p.50, lines 10–25).

On the third day of trial, prior to closing arguments, the trial judge made a full statement regarding the grounds justifying her decision to deny Appellant's motion. She noted the State did obtain a warrant for Appellant's arrest fairly quickly after Victim's report to police, but that officers were unable to locate Appellant due to him leaving the state. She also found: (1) she could not discern "any appreciable difference" between how the case would have been tried in 1990 versus 2015; (2) the delay benefitted Appellant in some regards since the initial responding officer and the school guidance counselor who first met with Victim on January 15, 1990 were both unavailable at trial;[1] and (3) the State provided Appellant with a substantial amount of GDSS and SCDSS records and caseworkers assigned to Victim were under an affirmative obligation to put any significant information in the file, including any recants from Victim, and any information missing from the records would likely have only bolstered the State's case; the information presented to the trial judge showed Appellant had made "some effort" to avoid police following January 15, 1990; and (5) Counsel was able to cross-examine Victim using the discovery, allowing him to challenge Victim's credibility by pointing out out the fluctuations

[1] The record indicates the officer experienced a stroke at some point in the intervening years and was living in an assisted care facility; the guidance counselor was killed in a car accident. (R .p.172, line 15–p.174, line 2).

between her testimony and the versions of events she told authorities in 1990. (R. p.223, line 22–p.234, line 9; R. p.235 line 12–p.238, line 1).

Ultimately, the trial judge found that while Counsel made several general allegations of prejudice, he failed to allege specific missing evidence which, due to its absence, amounted to a depravation of Appellant's constitutional rights. Further, Counsel failed to question Victim's foster mother and Cramer about the conversation in which Victim purportedly recanted, which may have yielded the same information to which Counsel alleged Appellant's mother would have testified. Accordingly, the trial judge denied Appellant's motion to dismiss. (R. p.234, lines 10–20; R. p.238, line 2–p.239, line 18).

Motion to Exclude Prior Bad Acts

Prior to the start of trial, the State also filed a motion in support of admitting evidence of Appellant's prior bad acts, encompassing the sexual assaults Appellant perpetrated against Victim in Georgia. The State argued that those assaults, which Victim claims happened regularly whenever she lived with Appellant between 1983 and 1990, were part of a continuous course of conduct. The Court determined it would decide the matter in camera during Victim's testimony. (Supp. R.p.1, line 24–p.3, line 23; R. p.50, lines 2–9).

Victim began her testimony by discussing the events of January 15, 1990 and outlining the various sexual assaults which occurred during the several month period Appellant, Mother, and Victim lived in South Carolina, which included events in which Appellant: (1) forced Victim to perform oral sex on him; (2) forced Victim to watch Mother perform oral sex on him; (3) placed his penis in her vagina; (4) bathed her and then rubbed her vagina with a towel; and (5) performed over-the-clothes touching of her vagina. (R. p.84, line 6–p.73, line 24).

During an in camera review of the prior bad act evidence, Victim testified to assaults which occurred in Georgia. She testified the abuse began on her third birthday, and that various types of sexual assaults occurred. Specifically, Victim testified Appellant: (1) forced her to perform oral sex on him; (2) placed his penis in her "privates"; and (3) touched Victim's vagina while he bathed her, and would force her to perform oral sex on him after the bath was complete. Victim stated that she was removed from Appellant and Mother's home primarily for physical abuse, but that she informed GDSS of the sexual abuse both times she was placed in long-term foster care, but that GDSS put her back in the home both times because it claimed her parents were "doing better." Victim confirmed that the sexual assaults did not occur during the periods she lived in foster homes, but that the assaults would resume upon her return. (R. p.74, line 13–p.81, line 23).

On cross-examination, Victim claimed that she stopped reporting the sexual abuse to GDSS because "no one was listening to [her]." She could not recall the name of the case worker to whom she told about the assaults. She also thought she may have told her foster mother about the assaults when she was approximately six years old. However, she could not recall how she described the sexual assaults to GDSS and foster mother. She also informed her mother about the assaults when she was ten years' old, but her mother "chose to ignore" the information. (R. p.82, line 4–p.85, line 9).

Counsel objected to the admission of the prior bad act evidence noting that "the only exception" he took to the evidence was that it was the first time he had heard about the specific acts testified to by Victim. He claimed the only discovery he received regarding the prior bad acts were the GDSS records, which only mentioned allegations of fondling and digital penetration. Counsel argued that the State should have provided him with notice that it planned

to discuss the oral and penile intercourse; the State's failure to do so violated Rule 5, SCRCrimP; and that he did not have an opportunity to ask his client whether there was some alibi, explanation, or other defense against these additional allegations. (R. p.86, line 12–p.88, line 14; R. p.92, line 21–p.93, line 20).

The State disagreed, arguing: (1) the motion it filed regarding admission of the prior bad act evidence made it clear that it sought to introduce evidence "of the same nature and the same manner as the assaults that were alleged to have happened – in Charleston"; and (2) the audio recording of Victim's January 15, 1990 interview with police, which was provided to Appellant in discovery, discussed penile penetration and oral sex; (3) the medial report from January 16, 1990 states Victim described oral intercourse and both digital and penile penetration; and (4) the GDSS documents discuss Victim having rectal bleeding and pain in her vaginal area. The State also argued the prior bad act evidence was very relevant to the instant case, noting they were part of a continuous course of conduct from Appellant which only temporarily abated during the periods Victim was in foster care. (R. p.88, line 15–p.92, line 15; R. p.94, line 16–p.97, line 4).

The trial judge found the prior bad act evidence was "clearly admissible' pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), as it was clear and convincing evidence of a common scheme or plan and absence of mistake. She also noted Appellant's assaults against Victim between 1983 and 1990 constituted a continuous course of conduct which provide the jury with the "complete context of the crime," and that the assaults in Georgia and South Carolina were similar in nature, as they all ended "either by play resulting in fellatio or . . . some form of penetration, whether it be digital, oral, or penile." (R. p.97, line 8–p.99, line 12).

The trial judge then performed a prejudice analysis, noting: (1) the wording of the State's motion to admit the prior bad act evidence, combined with the other materials provided in

discovery including the audio recording of Victim's interview with police, doctor's notes, and SCDSS reports, made it "very clear" she sought to admit evidence of oral and vaginal intercourse; (2) the State made all disclosures required under the rules of evidence; (3) some degree of surprise to the parties is inherent in every criminal case, and the State was not required to give Appellant every specific detail about what it planned to present at trial; (4) Counsel's argument about being unable to provide an alibi was "tenuous at best," as the age of Victim and continuous cohabitation with Appellant made it extremely unlikely that any such alibi existed; (5) the State agreed to omit any reference to the physical abuse Victim suffered in Georgia; (6) she would instruct the jury that the prior bad act evidence was not the subject of a conviction, not evidence of guilt for his current charges, and could only be considered for the limited purpose of determining a common scheme or plan or absence of mistake. (R. p.99, line 13–p.101, line 5; R. p.103, lines 5–11; R. p.104, lines 11–17).

After the trial judge's ruling, both parties and the judge agreed the best course of action was to break for the day and resume the examination of Victim the following day. The following morning, Victim resumed her testimony. Counsel failed to object to Victim's testimony about Appellant's prior bad acts. (R. p.106, line 7–p.107, line 7; R .p.109, line 3–p.119, line 17).

On cross-examination, Counsel peppered Victim with questions regarding her memories of events going back as far as 1982.[2] Counsel asked Victim questions regarding: (1) her attempts to locate Mother in 1990, during which she spoke with Appellant's mother whom did not believe her accusations of abuse; (2) her memories of the GDSS caseworkers who handled her removals from the home; (3) her efforts to report the abuse to GDSS and other adults; (4) her visits with Appellant and Mother while she was in GDSS custody; (5) her February 1989 comments to

[2] It appears that in August of 1982, Victim was removed from Mother's custody by GDSS when the latter was arrested for public drunkenness. The removal only lasted a few days, and Victim did not recall this event. (R. p.123, line 24–p.124, line 15).

GDSS caseworker Cindy Wheeler that everything was fine in the home and she was happy to be with her family; (6) other reports to caseworkers that in which she claimed her home life was good; (7) the fact she never reported the accusations of forced oral intercourse to GDSS; (8) Mother cheating on Appellant with a man she met hitchhiking; (9) her comments to Cramer that Appellant had not penetrated her vagina with his penis; and (10) her auditory and visual hallucinations in which she imagined red and blue people spoke to her. (R .p.124, line 3–p.138, line 18).

Counsel cross-examined Cramer regarding his reports on his interviews with Victim, pointing out that in his report, Cramer stated Victim demonstrated "masturbation with objects," and had him testify, by refreshing his memory with a copy of his treatment plan provided in discovery, that Victim denied full penetration of Appellant's penis in her vagina. (R. p.155, line 13–p.156, line 25).

During his cross-examination of Detective Reed, Counsel questioned him regarding his interviews with Victim and his attempts to locate Appellant and Mother in January through April, 1990. Notably, he asked Detective Reed about his failures to: (1) obtain an inspection warrant until April 5, 1990; (2) conduct a search for evidence in Appellant and Victim's home during his January 29, 1990 and April 5, 1990 visits and attempts to locate Appellant; (3) contact other law enforcement agencies, including the Clayton County Sheriff's Office, to try and locate Appellant after he left the State. (R. p.189, line 1–p.200, line 7).

Counsel also cross-examined Dr. Sara Schuh about her January 16, 1990 medical examination of Victim. He questioned her about specific findings listed in her written report,

noting Dr. Schuh found no physical evidence of any sexual abuse.[3] (R. p.217, line 7–p.218, line 16).

[3] In her written report, Dr. Schuh noted: (1) Victim's labia minor was normal; (2) Victim's vulva was clean and atraumatic; (3) Victim's hymen was intact; (4) she did not find any discharge in Victim's vagina; (5) she could not see Victim's cervix; and (6) her rectum was atraumatic and did not have discoloration. According to Dr. Schuh, these were all normal findings for an examination on a girl of Victim's age. (R. p.217, line 7–p.218, line 16).

ARGUMENT

I.

The trial judge properly admitted evidence of Appellant's prior bad acts against victim where Appellant failed to timely object to the admission of the evidence at trial, records of the bad acts were provided to him over a year prior to trial, and the trial judge reviewed the evidence and determined it was admissible under Rule 403, SCRE.

Appellant argues the trial judge erred in admitting the evidence of Appellant's prior bad acts against victim because the judge failed to conduct a Rule 403, SCRE balancing test to determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to him.

The State disagrees with Appellant's allegations of error. Initially, the State notes Appellant failed to timely object to Victim's testimony regarding Appellant's prior bad acts or to the alleged failure of the trial judge to perform a Rule 403 balancing test. Accordingly, this issue is not preserved for appellate review. Additionally, Appellant's argument is meritless for several reasons: (1) the trial judge did, in fact, perform a Rule 403 balancing test on the record; (2) Appellant was on constructive notice of the types of bad acts the State sought to admit at trial; (3) even if Appellant was without notice of the types of prior bad act evidence the State sought to admit, said error was harmless as it would have had no impact on his ability to provide alibi evidence.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of

discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). However, prior bad acts may be admissible when they establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 32–33, 446 S.E.2d 438, 439 (Ct. App. 1994).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Further, even though the evidence . . . falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE).

"Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional

circumstances." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." Id. (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). "[If] an on-the-record Rule 403 analysis is required, this Court will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." State v. King, 349 S.C.142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002).

Preservation

The State notes Appellant failed to timely object to Victim's testimony about the prior bad acts. Admittedly, lengthy in camera discussion about admission of the prior bad acts took place on the first day of trial. The trial judge deemed the prior bad acts were admissible, and then adjourned court for the day. When Victim resumed her testimony the following morning, Counsel failed to make any objection to her prior bad act testimony. Accordingly, any issues regarding that testimony are not preserved for review. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (stating an objection made in limine is not a final ruling on the admissibility of evidence, and an objection to the admission of evidence must be made at the time the evidence is offered and a final ruling is made, otherwise the issue is not preserved for review). Additionally, when the judge made her in camera ruling regarding the admissibility of the prior bad acts, Counsel failed to make any objection or other comment about the perceived absence of a Rule 403 balancing test. Thus, any argument regarding the 403 balancing test is also unpreserved on that ground. See State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (stating a party may not argue one ground at trial and an alternate ground on appeal);

State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (stating a party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground).

Rule 403, SCRE Balancing Test

Appellant is incorrect in his assertion that the trial judge failed to perform a Rule 403 balancing test. While the trial judge did not did not directly state on the record "I am performing a Rule 403 balancing test," the trial judge performed such an analysis before making a ruling on the admissibility of the prior bad act evidence.

In State v. Brayboy, 401 S.C. 207, 736 S.E.2d 679 (2012) this Court found a trial judge who did not specifically state on the record that he was performing a Rule 403 balancing test did, in fact perform such an analysis through various comments made at trial. The Court took notice of three specific statements by the judge in which he stated: (1) he wanted the jurors to base their decision "solely on the facts presented during the course of [the] trial . . . and not on some issue that occurred in previous conviction"; (2) the use of the convictions during impeachment should have "nothing to do" with showing the jury that "[a defendant] did it once, they must [have] done it again"; and (3) the questioning a witness regarding his prior conviction for possession of a sawed-off shotgun, which was "a direct issue involved in the case," was "highly prejudicial to a jury in determining . . . someone's credibility."

Here, in ruling on the admissibility of the evidence, the trial judge first found the evidence admissible as a Lyle exception. After stating the various factors considered under Wallace, the trial judge directly addressed Counsel's argument that the defense was "surprised" by the type of prior bad acts presented by the State. She noted the State's motion, considered in tandem with the discovery provided to Appellant, very specifically pointed to the types of prior

bad act evidence the State sought to introduce at trial. Thus, she found there was not "any merit" to Counsel's argument. She also noted that some degree of surprise is inevitable in a trial, but the State disclosed all required evidence. She further noted the argument that Appellant could have provided an alibi with proper notice of alleged prior bad acts was "tenuous at best," based on the constant cohabitation of Appellant and Victim and the continuous commission of the assaults over that nearly seven-year period. Moreover, the trial judge determined a limiting instruction was appropriate in order to minimize any unfair prejudice which could arise from presentation of the prior bad acts.

The trial judge's statements prove she performed a Rule 403 balancing test. She determined the defense had adequate notice of the types of prior bad acts the State sought to introduce, and that admission of those acts did not impact Appellant's ability to provide an alibi or explanation for those acts. Furthermore, the trial judge gave a limiting instruction to the jury, which further demonstrated her consideration of the potential prejudice of the prior bad act evidence. Accordingly, the record proves the trial judge performed a Rule 403 balancing test. See Brayboy, 401 S.C. at 213–14, 736 S.E.2d at 682–683; King, 349 S.C. at 155–57, 561 S.E.2d at 647.

Moreover, Appellant failed to provide any evidence that he was prejudiced by the admission of the prior bad acts. At trial, Counsel's only objection to the admission of the prior bad act evidence was that he was unaware of the character of prior bad act evidence the State sought to introduce at trial. He failed to provide any examples of potential alibis or other defense evidence which could have been discovered but for the alleged failure of the State to inform him about the types of prior bad act evidence it sought to introduce. Counsel also failed to refute that certain items provided in discovery, including the audio recording of Victim's January 15, 1990

interview with police and the January 16, 1990 medical report indicated Victim claimed a history of oral and penile intercourse with Appellant. Accordingly, Appellant failed to provide any evidence he was prejudiced by the trial judge's alleged deficiency and this Court should not grant Appellant's requested relief. See Collins, 409 S.C. at 534, 763 S.E.2d at 28 (stating a trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances); Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 (stating unfair evidence is only that which tends to suggest a decision on an improper basis).

II.

The trial judge properly denied Appellant's motion to dismiss this case based on the twenty-four year pre-indictment delay because Appellant failed to demonstrate he was substantially prejudiced by the length of the delay and the delay was caused, in part, because Appellant absconded from the state when he discovered Victim reported her assaults to police.

Appellant argues he was severely prejudiced by the nearly twenty-four year pre-indictment delay, as he lost access to a witness, his mother who died in 1999, and various documents which were destroyed in the intervening years, including: (1) DSS records; (2) caseworker notes; and (3) written records regarding Victim's twenty-one therapy sessions. Appellant further argues that the blame for the delay falls squarely on the State, as it was not permitted to introduce evidence of Appellant's flight at trial.

The State disagrees with Appellant's allegations of error. Appellant was not prejudiced by the delay because: (1) the testimony Appellant wished to elicit from his mother was to an event also witnessed by two other witnesses present at trial, Cramer and Victim's foster mother, and Counsel did not dispute their ability to testify to those events and made no attempt to elicit that information from them on cross-examination; (2) while some records pertaining to Appellant's case were destroyed, hundreds of pages of pertinent records were preserved, including the entirety of the GDSS file, the medical evaluation of Victim performed January 15, 1990, 133 pages of SCDSS records composed of case summaries, court documents, the written summary of Victim's twenty-one counseling sessions, and pictures and written explanations prepared by Victim; (3) Counsel used the discovery to mount an effective trial defense;

(4) Appellant, in part, contributed to the pre-indictment delay when he fled the State after finding out the police began investigating his sexual assaults of Victim

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S. 479, 485 (1984). The fundamental fairness standard requires criminal defendants to be given a meaningful opportunity to present a complete defense. Id.; see State v. Harris, 311 S.C. 162, 167, 427 S.E.2d 909, 912 (Ct. App. 1993) ("Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense."). However, a defendant is not entitled to a "perfect" investigation or trial; only fair ones. See State v. Greene, 255 S.C. 548, 558, 180 S.E.2d 178, 184 (1971) ("[The appellant] was not entitled to a perfect trial, only a fair one."); see also Patterson v. New York, 432 U.S. 197, 208 (1977) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."); see generally Baker v. McCollan, 443 U.S. 137, 146 (1979) (instructing law enforcement officers are not required to perform entirely error-free investigations).

The Supreme Court of South Carolina has adopted a two-prong inquiry to determine whether a pre-indictment delay has violated a defendant's due process rights. State v. Brazell, 325 SC. 65, 72–73, 480 S.E.2d 64, 68–69 (1999). First, a defendant must prove that the delay caused substantial actual prejudice to his right to a fair trial. Id. To prove substantial actual prejudice, a defendant must demonstrate he was "meaningfully impaired in his ability to defendant against the [S]tate's charges" to such a degree that the delay likely impacted the ultimate disposition of the criminal proceeding. Id. at 73, 480 S.E.2d at 69. When the claimed prejudice is the unavailability of a witness or other evidence, "a defendant must identify the evidence and expected content of the evidence with specificity, as well as show that he made

serious efforts to obtain the evidence and that it was not available from another source." State v. Lee, 375 S.C. 394, 398, 653 S.E.2d 259, 261 (2007).

If a court finds that the delay caused such prejudice, the court must then consider the reason for the State's delay and balance the justification for the delay against said prejudice. Id. "When balancing the prejudice and the justification, '[t]he basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" Brazell, 325 S.C. at 73, 480 S.E.2d at 69 (quoting U.S. v. Automated Med. Labs., Inc., 770 F.2d 399, 404 (4th Cir. 1985)).

Prejudice

In Lee, the defendant was charged and convicted of four counts of first degree criminal sexual conduct with a minor and one count of lewd act on a minor. The Supreme Court of South Carolina found Lee was prejudiced by a twelve-year pre-indictment delay because all records pertaining to: (1) the previous 1988 DSS investigation into the abuse survived the twelve-year delay; (2) the Department of Juvenile Justice's investigation; and (3) family court proceedings were destroyed during the twelve-year delay. The court noted the complete lack of records eliminated Lee's ability to cross-examine the State's witnesses and look into potential exculpatory evidence, ultimately prejudicing him. The court made specific reference to the fact that DSS had removed Victims from Lee's home due to allegations of sexual abuse and later returned them, but records explaining why the agency returned the children to the home or decided not to prosecute him at that time were unavailable, and thus the missing evidence, "on balance would have likely benefitted Lee . . . ." Id. at 399, 653 S.E.2d at 261.

Here, Appellant had access to a significant amount of discovery prior to trial. The State provided Appellant with 571 pages of discovery, including the entirety of the GDSS file and 133

pages of SCDSS's records into the event. Notably, the GDSS records contains documents describing Appellant and Mother's behavior after Victim was removed from their home, and how their purported improved behavior was the agency's justification for placing Victim back in their custody. Additionally, the discovery allowed Counsel to cross-examine Victim and other witnesses about: (1) discrepancies among Victim's trial testimony and the statements she made to the various agencies over the years; (2) the lack of physical evidence of sexual assault; (3) victim's auditory and visual hallucinations; and (4) the time of officers' attempts to locate Appellant in the weeks and months following January 15, 1990. Thus, Appellant received substantial evidence to dispute the State's allegations.

Appellant's claims regarding the unavailability of Appellant's mother are also meritless. Counsel claimed Appellant's mother witnessed Victim recanting her story, but failed to challenge the State's assertion that two other trial witnesses also witnessed the alleged conversation, and did not attempt to cross-examine them on that subject during trial. Accordingly, Appellant failed to demonstrate that Appellant's mother was the sole source of that information or that he was prejudiced by her unavailability.

Justification for Delay

Even if this Court finds Appellant was prejudiced by the pretrial delay, such prejudice was caused, in part, by Appellant himself.

In Lee, the South Carolina Supreme Court found, balancing the justification for the delay against the prejudice to Lee, that the State offered no valid explanation for the delay in indicting the defendant, and the only explanation for the delay, that it pursued charges because other alleged victims surfaced, did not justify the State's failure to prosecute Lee for his original crimes.

The instant differs in several regards from Lee. The record shows the State did attempt to arrest and prosecute Appellant. However, officers were unable to locate Appellant because he fled the State. When Appellant and Mother attempted to pick Victim up from school on January 15, 1990, the school informed them police were coming to the school to investigate allegations of sexual abuse. They left and did not attempt to contact Victim in the subsequent months and years. Within weeks, Appellant fled[4] the State. The record shows Appellant intentionally avoided Victim and police after the assault, and is partially to blame for the prosecution delay. Appellant's decision to abscond from justice is a significant factor in law enforcement's inability to prosecute him, and therefore this Court should not allow him to profit from this behavior by overturning his conviction.

[4] In his brief, Appellant argues the State was forced to "abandon" its claim that it could not locate Appellant before he fled simply because it was not allowed to present evidence of the flight to the jury. The trial judge ruled the evidence was not admissible because the officer who possessed direct knowledge of Appellant and Mother fleeing the school was unable to testify at trial, due to a stroke he suffered years before. However, the trial admissibility of the flight evidence is a completely separate issue from the factual questions of what caused the delay in prosecuting Appellant. Moreover, Victim's testimony corroborated these events, as she testified Appellant and Mother went to pick her up from school that day, school official refused to let her go home with them, they left the school, and Appellant and Mother did not contact Victim after that incident. (Br. of Appellant pp.15–16).

CONCLUSION

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

Respectfully submitted,

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November 8th, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001526

THE STATE, ...RESPONDENT,

v.

WALTER SCOTT GARRETT,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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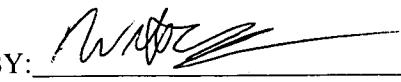
BY: 

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