

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

THE STATE,RESPONDENT,

v.

WALLACE STEVE PERRY,APPELLANT.

APPELLATE CASE NO. 2014-002654

RECEIVED

AUG 10 2017

PETITION FOR REHEARING

SC Court of Appeals

Pursuant to Rule 221(a), of the South Carolina Appellate Court Rules, Appellant Wallace Steve Perry respectfully submits this petition for rehearing of this Court's opinion. For reasons set forth below, the opinion misapprehended or overlook significant points of law that require reversal of Appellant's conviction.

LAW/ANALYSIS

- I. Newcomer's Testimony was Inadmissible Evidence of a Common Scheme or Plan. Moreover, Newcomer's Testimony was More Prejudicial than Probative under Rule 403, of the South Carolina Rules of Evidence.**

In State v. Wallace, Court provided a number of factors the trial court should consider when determining whether the bad act and the crime charged had a close degree of similarity, including, (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or

threats; and (5) the manner of occurrence, for example, the type of sexual battery. 384 S.C. 428, 433, 683 S.E.2d 275, 278 (2009). There were a number of differences between Newcomer's allegations and the allegations of Appellant's two daughters. First, the ages of Daughter Two, Daughter Three, and Newcomer varied. There was a large age discrepancy from when Appellant allegedly abused Daughter Two to when he allegedly abused Daughter Three and Newcomer. Daughter Two was a young child while Newcomer and Daughter Three were in their tween years. Second, the abuse occurred in different locations and at different times during the day. See id. Newcomer testified the abuse occurred at night, but Daughter Two and Daughter Three testified the sexual abuse usually occurred during the early morning hours between five to six a.m.

Finally, there was an opportunity for the alleged abuse of Daughter Two and Daughter Three to progress to intercourse like Newcomer. All three women testified the abuse spanned a number of years. However, Perry never had intercourse with Daughter Two or Daughter Three. Thus, the type of sexual battery was dissimilar. Accordingly, the trial court erred in admitting Newcomer's testimony under Rule 404(b).

The trial court further erred in finding the testimony was admissible under Rule 403, SCRE. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). There were clear issues with whether the prior bad act occurred. The State admitted there was no trial because Newcomer was pregnant at the time, she was "sexually promiscuous," and she suffered from mental health issues. The Solicitor's Office did not have any records on the charges related to Newcomer. Further, the temporal remoteness between the two acts also adds to the prejudice. See State v. McCombs, 410 S.C. 90, 101, 762 S.E.2d 744, 750 (Ct. App. 2014) (providing the temporal proximity of the bad act and the charged crime is a factor to

consider). Over eight years separated Newcomer's abuse from when Daughter Two claimed Perry began abusing her. An even more remote period of fifteen years separated Newcomer's abuse from when Daughter Three claimed Perry began abusing her. Finally, Daughter Two and Daughter Three's credibility was at issue in this case, and the admission of Newcomer's testimony only created prejudice by implying that because Newcomer alleged Perry abused her, Perry must have Daughter Two and Daughter Three.

II. Dr. Henderson Improperly Commented on Veracity of Daughter Three's Testimony.

For an expert to comment on the veracity of a child's accusations of sexual abuse is improper. See State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper). Dr. Henderson testified her findings from examining Daughter Three were consistent with Daughter Three having experienced sexual abuse despite the fact that Daughter Three's examination was completely normal. Dr. Henderson further stated that her opinion was based on "what [Daughter Three] has shared with me" regarding the allegations of abuse. It is impossible to know what the jury considered to be the "most likely interpretation" of Dr. Henderson's testimony.

South Carolina case law provides it is improper for an expert to indicate the victim's allegations were genuine or truthful. Id.; State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000). Although the Jennings¹ opinion found the expert witness improperly vouched for the child by stating "[t]here is no other way to interpret the language . . . other to mean the forensic interviewer believed the children were being truthful," the Court does not go so far as to find that vouching for the veracity of a witness is admissible if the jury may find different interpretations of the testimony. In other words, an expert witness either vouches for a witness or

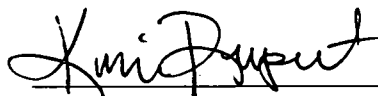
¹ State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011).

does not. Here, Dr. Henderson clearly testified Daughter Three's normal examination was consistent with Daughter Three having experienced sexual abuse. Further, the credibility of Daughter Three was at issue when there was no physical evidence, which makes the possible interpretations of Dr. Henderson's testimony even more harmful. See Jennings, 394 S.C. at 480, 716 S.E.2d at 95 ("Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless."). Thus, the trial court erred when finding Dr. Henderson did not vouch for the veracity of Daughter Three.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests a rehearing of this matter.

Respectfully Submitted,



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CERTIFICATE OF SERVICE


I hereby certify that I served a copy of the Petition for Rehearing upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on August 10, 2017, addressed to the following:

COUNSEL SERVED:

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[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,
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ATTORNEY FOR APPELLANT

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August 10, 2017



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August 10, 2017

VIA HAND DELIVERY

Honorable Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

Re: The State vs. Wallace Steve Perry
Civil Action No.: Appellate Case No. 2014-002654
Our File No.: 1925-0001

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Petition for Rehearing with regard to the above-referenced matter. Please file the original with your office and return a time-stamped copy to me.

If you have any questions or need any further information from me, please do not hesitate to call.

Sincerely yours,

Kerri A. Rupert

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KAR/jrg
Enclosures