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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.

PETITION FOR REHEARING

RECEIVED
SEP 21 2017
SC Court of Appeals

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Pursuant to Rules 221(a) and 240, SCACR, Appellant/Petitioner Damyon M. Cotton files this Petition for Rehearing regarding this Court's decision in *State v. Cotton*, 2017-UP-356 (S.C. Ct. App. filed Sep. 6, 2017). Rehearing is appropriate because this Court failed to properly apply prior appellate court precedent of this state which prohibits the admissibility of propensity evidence.

REHEARING STANDARD

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR, states: "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." In order to prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001).

ARGUMENT

I. THE COURT MISAPPREHENDED OR FAILED TO APPLY PRIOR APPELLATE COURT PRECEDENT IN AFFIRMING THE TRIAL COURT'S ADMISSION OF PRIOR BAD ACT EVIDENCE UNDER THE COMMON SCHEME EXCEPTION TO RULE 404(B), SCRE.

a. In affirming the trial court's admission of the prior bad act evidence, this Court overlooked the fact that a single prior alleged incident cannot establish a common scheme or plan.

In most all sexual crime cases involving prior bad act evidence, the prior acts involve a continuing course of illicit conduct, often with the same or related victims, rather than a single isolated prior act with a different and wholly unrelated alleged victim. *See, e.g.*, *State v. Wallace*, 384 S.C. 428, 431-32, 683 S.E.2d 275, 276-77 (2009) (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). As explained in *State v. Kirton*, the common-scheme or plan exception can be generally applied in cases involving sexual crimes where evidence of acts prior or subsequent to the act charged in the indictment are held admissible as tending to show continued illicit acts between the same parties. *See State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008). In *Kirton*, this Court went through a thorough review of previous cases addressing prior bad act evidence in sexual crime 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.

In this case, the trial court ruled that a single prior alleged incident established a common scheme or plan. This Court overlooked that this ruling was in error because 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. Further, this Court failed to realize that the trial court's admission of a single prior bad act stands in stark contrast to the few cases in which our appellate courts have addressed the issue of whether a single prior act establishes a common scheme. *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).

b. 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.

State v. Tutton provides that in a case where there is no continuous illicit conduct, the trial court's "determination of admissibility of the uncharged act rests solely on whether the requisite degree of similarity between the separate acts is present . . . ." 354 S.C. 319, 324-25, 580 S.E.2d 186, 189 (Ct. App. 2003). The similarity between separate acts under

the common scheme or plan exception regarding prior bad act evidence must not merely be a similarity in the results. *Id.* Rather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are individual manifestations. *Id.*

In this case, the Court overlooked that there were only general similarities between the prior victim and Cusack's testimony, which were insufficient to establish a common scheme or plan. In fact, the 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 the 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. This Court overlooked that these factors are common to several, if not most, sex crimes, and lack any real significance. *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. This Court overlooked the abundant dissimilarities between the prior bad act and this case.

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.

As explained in Cotton's appellate briefs, the 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, this Court overlooked the fact that there is not a clear connection or close degree of similarity between the prior bad act and crime charged and that the trial court's ruling on such was in error. *See State v. Lyle,* 125 S.C. 406, 417, 118 S.E. 803, 807 (1923) (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").

II. The probative value of the prior victim's testimony outweighed its prejudicial effect.

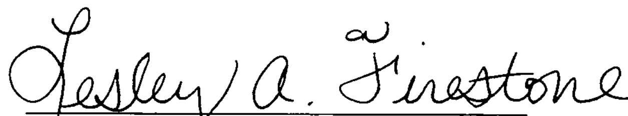
"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Tutton*, 354 S.C. at 325, 580 S.E.2d at 189. The determination of the prejudicial effect of the evidence must be based on the entire record, and the result will generally turn on the facts of each case. *Kirton*, 381 S.C. at 24, 671 S.E.2d at 115.

This Court overlooked the fact that the dissimilarities between the alleged prior act with the prior victim and the current alleged act with Cusack nullified the probative value of the prior bad act evidence. Moreover, this Court failed to consider the extremely prejudicial nature of this evidence, which was testimonial evidence the jury could not have possibly ignored. Accordingly, counsel for Cotton urges this Court to reconsider this decision and find the trial court improperly allowed the 404(b) evidence in this case.

CONCLUSION

For the aforementioned reasons, this Court should grant this petition, withdraw its prior opinion, and issue a new opinion addressing the arguments Petitioner made and reversing the judgment below.

Respectfully submitted,



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September 20, 2017

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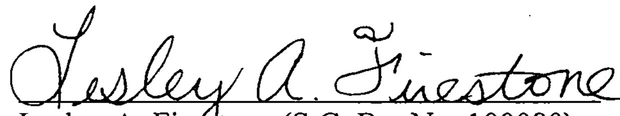
PROOF OF SERVICE

The undersigned hereby certifies that on September 20, 2017, she served counsel for the Respondent with a copy of the *Petition for Rehearing* by mailing a copy of the same by United States Mail to the following address:

Henry Gunter, Esquire
Alan McCrory Wilson, Esquire
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211



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September 20, 2017

VIA FAX TO (803)734-1839 AND
BY OVERNIGHT DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: The State vs. Damyon Cotton
Appellate Case No.: 2014-000395

Dear Ms. Kitchings:

With regard to the above-referenced matter, enclosed for filing please find an original and seven (7) copies of Appellant's Petition For Rehearing, together with the original and one copy of the Proof of Service and our check in the amount of $25.00 for the requisite filing fee.

Please file the original Petition and Proof of Service, and return a date-stamped copy of each to me in the enclosed stamped, self-addressed envelope.

By copy of this letter, I am serving counsel of record with a copy of the same.

Thank you for your assistance in this matter.

Sincerely,

MOORE & VAN ALLEN PLLC

Lesley A. Firestone

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LAF/ws

Enclosures: As Stated

cc (w/enc.): Henry Gunter, Esquire
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire