

RECEIVED
OCT 16 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 5503 (S.C. Ct. App. filed July 26, 2017)

THE STATE, ...RESPONDENT,

V.

WALLACE STEVE PERRY, ...PETITIONER.

APPELLATE CASE NO. 2014-002654

APPENDIX VOLUME II

Kerri A. Rupert
Murphy & Grantland, P.A.
krupert@murphygrantland.com
Post Office Box 6648
Columbia, South Carolina 292260
(803) 454-1253

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343
Attorneys for Petitioner

INDEX

Appendix Volume I

Record on Appeal	1
------------------------	---

Appendix Volume II

Appellant Final Brief	301
Respondent Final Brief	327
Appellant Final Reply Brief.....	354
Published Opinion No. 5503, filed July 26, 2017.....	366
Petition for Rehearing	383
Order Denying Rehearing, filed August 24, 2017	389

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

RECEIVED

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

AUG 03 2016

SC Court of Appeals

THE STATE, ...RESPONDENT,

V.

WALLACE STEVE PERRY, ...APPELLANT.

APPELLATE CASE NO. 2014-002654

FINAL BRIEF OF APPELLANT

KERRI A. RUPERT
Collins & Lacy, P.C.
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

Table of Contents

TABLE OF AUTHORITIES	3
ISSUES ON APPEAL	4
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS	6
STANDARD OF REVIEW	13
ARGUMENTS.....	14
I. The Trial Court Erred in Finding Newcomer's Testimony Admissible As Evidence Of A Common Scheme or Plan.....	14
A. The Trial Court Erred in Finding Newcomer's Testimony Admissible Under Rule 404(b), SCRE.....	14
B. The Trial Court Erred in Finding Newcomer's Testimony More Probative Than Prejudicial Under Rule 403, SCRE.....	17
C. The Admission of Newcomer's Testimony Was Not Harmless Error.	19
II. The Trial Court Erred In Allowing Dr. Henderson To Improperly Comment On The Veracity Of Daughter Three's Testimony.	20
CONCLUSION.....	21

Table of Authorities

Cases

<u>State v. Black,</u> 400 S.C. 10, 732 S.E.2d 880 (2012)	13
<u>State v. Dawkins,</u> 297 S.C. 386, 377 S.E.2d 298 (1989)	20,21
<u>State v. Gillian,</u> 373 S.C. 601, 646 S.E.2d 872 (2007)	17, 18
<u>State v. Jennings,</u> 394 S.C. 473, 716 S.E.2d 91 (2011)	19, 20, 21
<u>State v. Jenkins,</u> 412 S.C. 643, 773 S.E.2d 906 (2015)	19
<u>State v. Lyle,</u> 125 S.C. 406, 118 S.E.2d (1923)	14
<u>State v. McCombs,</u> 410 S.C. 90, 762 S.E.2d 744 (Ct. App. 2014)	18
<u>State v. McDonald,</u> 343 S.C. 319, 540 S.E.2d 464 (2000)	13
<u>State v. Parker,</u> 315 S.C. 230, 433 S.E.2d 831 (1993)	14
<u>State v. Saltz,</u> 346 S.C. 114, 551 S.E.2d 240 (2001)	13
<u>State v. Stokes,</u> 279 S.C. 191, 304 S.E.2d 814 (1983)	14
<u>State v. Tapp,</u> 398 S.C. 376, 728 S.E.2d 468 (2012)	19
<u>State v. Timmons,</u> 327 S.C. 48, 488 S.E.2d 323 (1997)	14
<u>State v. Tuffour,</u> 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005)	14
<u>State v. Wallace,</u> 384 S.C. 428, 683 S.E.2d 275 (2009)	7, 14, 15, 16, 17

Rules

Rule 404(b), SCORE	2, 7, 15, 16, 17, 18
Rule 403, SCORE	2, 18, 19

ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THE STEPDAUGHTER'S TESTIMONY ADMISSIBLE AS EVIDENCE OF A COMMON SCHEME OR PLAN?
- II. DID THE TRIAL COURT ERR IN ALLOWING DR. HENDERSON TO IMPROPERLY COMMENT ON THE VERACITY OF DAUGHTER THREE'S TESTIMONY?

STATEMENT OF THE CASE

Wallace Steve Perry was indicted for two counts of first-degree criminal sexual conduct (CSC) and two counts of second-degree criminal sexual conduct. The case was tried from December 1 to 3, 2014 before a jury. The jury found Mr. Perry guilty of all charges. The trial court sentenced Mr. Perry to concurrent sentences of thirty years' imprisonment for each conviction of first-degree CSC and twenty years' imprisonment for each conviction of second-degree CSC.

This appeal follows.

STATEMENT OF THE FACTS

Prior to trial, the State proffered the testimony of Brandy Newcomer as a witness under Rule 404(b), South Carolina Rules of Evidence, to testify about the prior bad acts of Perry. (R. p. 22, ll. 6-9). Newcomer was Perry's stepdaughter from a prior marriage. (R. p. 22, ll. 22-25). The State represented that Perry allegedly digitally penetrated Newcomer, performed oral sex on her, and the two eventually had sex. (R. p. 23, ll. 1-6). However, the State offered to limit Newcomer's testimony about having sex with Perry to redact dissimilar particulars of the sexual conduct. (R. p. 23, ll. 7-11). During the proffer, Newcomer testified Perry snuck into her room one night, the sexual abuse "progressed," and "the penetration and everything started." (R. p. 28, ll. 23-25).

The State argued Newcomer was a proper 404(b) witness for showing a motive, common scheme, or plan because (1) she, Daughter Two, and Daughter Three were "tweens" when the abuse occurred; (2) Perry was the father figure for all three girls; (3) the abuse always occurred in Perry's home; (4) the alleged abuse of the three girls involved digital penetration and occurred during nighttime hours; and (5) Perry threatened the girls would get into trouble if they said anything. (R. p. 35, ll. 1-R. p. 36, ll. 15). Perry objected to Newcomer as a 404(b) witness. (R. p. 31, ll. 7-8; R. p. 38, ll. 10-13). Perry issued a subpoena to the Spartanburg Solicitor's Office regarding the charges against Perry relating to Newcomer. (R. p. 39, ll. 10-19). The Solicitor's Office did not have any records on any charges related to Newcomer, except that Perry participated in pre-trial intervention without admitting any guilt. (R. p. 39, ll. 13-19). The State admitted there was no trial because Newcomer was pregnant at the time, there were concerns the defense would characterize her as "sexually promiscuous," and she suffered from serious mental

health issues. (R. p. 38, ll. 20-R. p. 39, ll. 5). The trial court reserved ruling on the issue. (R. p. 37, ll. 21-24).

During the trial, the trial court indicated it was inclined to allow Newcomer's testimony. (R. p. 157, ll. 1-2). Perry again objected to the admission of Newcomer's testimony. (R. p. 157, ll. 3-8). Perry argued the admission of Newcomer's testimony would only confuse the jury, divert attention away from the case at hand, and create serious prejudice. (R. p. 158, ll. 10-19). Moreover, Perry argued Newcomer's testimony was inadmissible to show a common scheme or plan because the State's attempt to tie Newcomer's testimony to Daughter Two and Daughter Three's testimony was too attenuated. (R. p. 159, ll. 14-19). The fact that the alleged abuse occurred in Perry's home or with people he knew did not create a common scheme or plan. (R. p. 159, ll. 14-19).

Perry also submitted records from the Solicitor's Office, which showed the records relating to any charges against Perry had been destroyed. (R. p. 160, ll. 1-2; R. p. 296-97). Thus, neither the State nor Perry had any way to review prior court records to determine Newcomer's credibility. (R. p. 160, ll. 2-8). Finally, Perry argued the decision under State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), was unconstitutional.¹ The trial court found Newcomer's testimony was admissible under the 404(b) exception. (R. p. 162, ll. 20-24).

Newcomer testified her mother and Perry married when she was around five years old, and they separated when she was fourteen years old. (R. p. 221, ll. 1-3). Newcomer, who was thirty-six years old at the time of Perry's trial, claimed Perry put his hands down her pajamas one night when she was nine years old. (R. p. 223, ll. 3-6). She stated this continued until Perry

¹ In Wallace, the Supreme Court found a defendant's prior bad act of sexually abusing the accuser's sister was admissible.

stopped touching her when she was thirteen years old. (R. p. 224, ll. 19-22). Newcomer recalled Perry usually touched her when she was in her bedroom, but sometimes it occurred in the bathroom. (R. p. 226, ll. 8-10). She alleged Perry performed oral sex on her once. (R. p. 226, ll. 16-18). Newcomer stated Perry threatened her not to tell because no one would believe Newcomer and Newcomer's accusations would hurt the family. (R. p. 224, ll. 4-5). She waited to tell her mother about Perry touching her until she was fourteen years old. (R. p. 224, ll. 11-12). Newcomer's mother and Perry were still married when Newcomer alleged Perry had inappropriately touched her, but her mother left Perry shortly thereafter due to Newcomer's allegations. (R. p. 227, ll. 8-10).

Perry met Laura Jones in their neighborhood in 1993, around the time he separated from Newcomer's mother. (R. p. 52, ll. 3-8). The pair never married, but they had two set of twins—Daughter One and Daughter Two, and Daughter Three and Son. (R. p. 53, ll. 1-6). Daughter One and Daughter Two were born in 1994, and Daughter Three and Son were born in 1996. (R. p. 70, ll. 17-20). Perry and Jones separated in 2000, but they remained close friends after separating. (R. p. 53, ll. 7-8).

Although Perry and Jones did not have a formal custody arrangement, they decided Jones had custody during the week and Perry had custody on the weekends from Friday until Sunday afternoon. (R. p. 53, ll. 17-23). Perry also had custody of their children during the holidays. (R. p. 53, l. 23). Although there was no formal court order, Perry regularly paid child support. (R. p. 53, l. 25). When the pair separated, Daughter One and Daughter Two were five years old and Daughter Three and Son were three years old. (R. p. 54, ll. 9-10). Jones described Perry as a "very good father." (R. p. 55, ll. 1-2). Jones spoke with Perry often during the week, especially if one of their children was having issues at school. (R. p. 55, ll. 6-9).

In March 2012, Daughter Three told Jones that Perry had sexually abused her during her weekend visitations with him. (R. p. 55, ll. 14-22). Shortly thereafter, Daughter Two also claimed Perry sexually abused her. (R. p. 57, l. 21). Jones waited over two months before reporting the allegations of sexual abuse, and only after her older children urged her to report the accusations. (R. p. 55, ll. 19-25; R. p. 57, ll. 11-13). Jones testified neither Daughter Three nor Daughter Two had ever claimed to have any problems with Perry before. (R. p. 62, ll. 9-13).

Daughter Three testified she was approximately three years old when her parents separated. (R. p. 72, ll. 5-7). Daughter Three recalled visiting Perry with her siblings every weekend as a child. (R. p. 72, l. 22). When the children first began visiting Perry, he was living at the Churchill Apartments where he worked in maintenance. (R. p. 72, ll. 15-16). Perry's apartment at Churchill had three bedrooms. (R. p. 72, ll. 10-11). Daughter Three recalled Son and Perry each had their own room, and she slept with her two other sisters on one air mattress in the other bedroom. (R. p. 73, ll. 13-19). Daughter Three alleged Perry came into their bedroom in the early morning hours and lay on the air mattress with the three girls. (R. p. 76, ll. 7-15). Daughter Three claimed she woke up one morning when Perry's finger was in her vagina. (R. p. 75, ll. 5-6). She stated Perry began touching her when she was ten years old until she was eleven years old. (R. p. 75, ll. 10-14; R. p. 98, ll. 8-13).

Daughter Three testified Perry never woke up the other two girls when he lay on the air mattress with them. (R. p. 76, ll. 16-19). Although Daughter One and Daughter Two never awoke during these alleged visits, Daughter Three claimed she woke up once when Perry began touching Daughter Two because she could feel the air mattress moving around. (R. p. 78, ll. 1-3). However, Daughter Three did not tell her mother about Perry allegedly touching her or her sister until she was in high school. (R. p. 80, ll. 11-22). Daughter Three claimed Perry

threatened her not to tell because she would get in trouble or be taken away from her mother. (R. p. 75, ll. 19-23).

Daughter Two testified Perry began touching her when she was five or seven years old during her visits to his apartment on the weekends. (R. p. 115, ll. 17-18; R. p. 127, ll. 1-12). Daughter Two claimed Perry came into the girls' bedroom in the early morning hours. (R. p. 115, ll. 22-23). Daughter Two recalled her two sisters slept with her on an air mattress in their bedroom. (R. p. 116, ll. 4-9). According to Daughter Two, the air mattress was pushed against the side of one wall in their bedroom. (R. p. 124, ll. 11-12). Daughter One slept on the side of the air mattress facing the wall, Daughter Three slept in the middle of her two sisters, and Daughter Two slept on the outside of the air mattress. (R. p. 124, ll. 8-10).

Around 2007, Perry moved to the Carlyle Apartments. (R. p. 116, ll. 22-23). Daughter Two recalled she and Daughter Three shared a bedroom, Daughter One slept on the couch, and Perry shared a bedroom with Son while Perry lived at the Carlyle apartments. (R. p. 117, ll. 1-9). According to Daughter Two, Perry continued visiting her bedroom during the early morning hours. (R. p. 117, ll. 12-15). Perry allegedly threatened Daughter Two not to tell anyone or either the children would be taken away from their mother. (R. p. 116, ll. 1-3). Daughter Two claimed Perry put his fingers in her vagina, and he performed oral sex on her two times. (R. p. 117, ll. 12-15). She stated Perry stopped touching her when she was around sixteen or seventeen years old. (R. p. 120, ll. 12-17). Daughter Two continued visiting Perry every weekend until Daughter Three claimed Perry had abused her. (R. p. 120, ll. 10-11).

Daughter One—Daughter Two's twin sister—recalled sleeping on the air mattress at the Churchill Apartments with Daughter Two and Daughter Three. (R. p. 193, ll. 13-17). When

Perry moved to the Carlyle apartments, Daughter One began sleeping on the couch while Daughter Two and Daughter Three continued to share a room. (R. p. 193, ll. 18-23). Daughter One never saw or heard Perry touching her sisters. (R. p. 195, ll. 1-7).

Detective Mary Thomas, of the Greenville Police Department, testified there was no physical evidence with this case. (R. p. 146, ll. 10-23). Dr. Nancy Henderson, qualified as an expert in child sexual abuse, testified she examined Daughter Two and Daughter Three. (R. pp. 178-79, ll. 14-ll. 6). Although Daughter Three had a normal examination with no specific findings, Dr. Henderson opined her findings were consistent with Daughter Three having experienced sexual abuse based solely on Daughter Three's allegations. (R. p. 185, ll. 16-19). Perry objected, arguing Dr. Henderson was improperly vouching, but the trial court overruled the objection. (R. p. 185, ll. 20-25). Similarly, Dr. Henderson testified Daughter Two's normal examination was consistent with Dr. Henderson's opinion that Daughter Two had been sexually abused. (R. p. 188, ll. 3-11).

Perry denied touching or performing oral sex on Daughter Two, Daughter Three, or Newcomer. (R. p. 239, ll. 20-25; R. p. 240, ll. 12-25). Perry further denied lying in Daughter Two and Daughter Three's room next to the air mattress in the early morning hours. (R. p. 242, ll. 8-14). In fact, Perry was usually not up that early in the morning. (*Id.*). Perry testified that shortly before Daughter Two and Daughter Three made these accusations, his children became very upset when he moved in with his girlfriend, Angela Ramey. (R. p. 241, ll. 18-24). Ramey and their friend, Patty Frye, similarly testified Ramey and Perry's relationship with his children became tense when Ramey moved in with Perry. (R. p. 237, ll. 8-10; R. p. 238, ll. 1-4).

The jury found Perry guilty of first-degree CSC and second-degree CSC with Daughter Two. (R. p. 283, ll. 14-22). The jury also found Perry guilty of first-degree CSC and second-degree CSC with Daughter Three. (R. p. 283, ll. 23-R. p. 284, ll. 8). The trial court sentenced Perry to concurrent thirty-year sentences for each of the two first-degree CSC convictions and twenty-year sentences for each of the two second-degree CSC convictions. (R. p. 293, ll. 9-11).

STANDARD OF REVIEW

“In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court’s factual findings unless the findings are clearly erroneous.” State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court’s ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

ARGUMENTS

I. The Trial Court Erred in Finding Newcomer's Testimony Admissible As Evidence Of A Common Scheme or Plan.

A. The Trial Court Erred in Finding Newcomer's Testimony Admissible Under Rule 404(b), SCRE.

"[N]o tenet of evidence law in the context of 'prior bad acts' is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged" State v. Tuffour, 364 S.C. 497, 502, 613 S.E.2d 814, 817 (Ct. App. 2005), *vacated*, 371 S.C. 511, 641 S.E.2d 24 (2007). Evidence of other bad acts may be admitted only to prove defendant's guilt if that evidence establishes: (1) motive; (2) intent; (3) absence of mistake or accident; (4) identity; or (5) a common scheme or plan involving other crimes so closely related to the one charged that proof of one tends to prove the other. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

With regard to a common scheme or plan exception, the State must prove more than a close degree of similarity between the prior bad acts and the crime charged to satisfy Lyle. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). In other words, the fact that a person commits two similar crimes does not satisfy the "common scheme or plan" exception. State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983). The mere presence or similarity only serves to enhance the potential for prejudice. State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993). Instead, there must be a connection between the other prior bad acts and the crime charged "so that proof of the former tends to prove the latter." Stokes, 279 S.C. at 193, 304 S.E.2d at 815.

In State v. Wallace, the Supreme Court held evidence of other acts of sexual misconduct was admissible in a trial for CSC with a minor as a common scheme or plan under Rule 404(b) if

there was a “close degree of similarity” between the two acts. 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009). The trial court should weigh the similarities with the dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Id. at 433, 683 S.E.2d at 278. If the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Id.

The 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. Id. Wallace essentially created an exception to Rule 404(b)’s exclusion of propensity evidence. In non-sexual offense cases, the mere presence of similarity only enhances the potential for prejudice; however, in cases where the defendant has been charged with a sexual offense, a close degree of similarity seems to satisfy Lyle.

In Wallace, the defendant was accused of sexually abusing a minor child by touching her breasts and digitally penetrating her. Id. at 431, 683 S.E.2d at 276-77. The defendant began touching the child’s breasts when the child was in seventh grade. Id. at 431, 683 S.E.2d at 276. One night, the defendant pulled the child’s pants off and “pushed his hands up her private parts.” Id. The child disclosed the sexual abuse to her older sister the next day. Id. at 431, 683 S.E.2d at 277. The sister alleged the defendant had also sexually abused her from the time she was in seventh grade until she graduated from high school. Id. at 431, 683 S.E.2d at 277. The sister’s abuse began with touching of the breasts, digital penetration and oral sex, and then progressed to the point of intercourse. Id. at 435, 683 S.E.2d at 278. The Supreme Court found the trial court

had properly redacted the sister's testimony regarding intercourse, which was dissimilar to the child's abuse, to avoid unfair prejudice to the defendant. Id. The Court noted the fact that the child's abuse was interrupted before it could culminate in intercourse did not diminish the similarity between the progression the abuse took in each case. Id.

Here, the trial court erred in finding Newcomer's testimony admissible under Rule 404(b), SCRE. There was not a close degree of similarity between the alleged abuse of Newcomer and Daughter Two and Daughter Three's testimony. First, the ages of Daughter Two, Daughter Three, and Newcomer varied. See id. at 433, 683 S.E.2d at 278 (providing the age of the victims when the abuse occurred is a factor to consider when determining admissibility under Rule 404(b)). Daughter Two testified the abuse began when she was approximately five years old until she was almost seventeen years old, but Daughter Three and Newcomer testified Perry allegedly abused them during their tween years only. (R. p. 75, ll. 10-14; R. p. 77, ll. 8-13; R. p. 120, ll. 12-17; R. p. 127, ll. 1-12; R. p. 223, ll. 3-6; R. p. 224, ll. 19-22). Daughter Three and Newcomer's ages may have been similar; however, Daughter Two claimed she was sexually abused from when she was a young child until she was almost an adult. 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. Third, although Perry allegedly threatened Daughter Two, Daughter Three, and Newcomer, the content of the threats was different. See id. Daughter Two and Daughter Three testified Perry threatened they would get into trouble if they told, but Newcomer testified Perry said no one would believe her and the allegations would hurt their family.

Finally, and perhaps most dissimilar, during the proffer of Newcomer's testimony, she and the State indicated the sexual abuse progressed to intercourse. (R. p. 23, ll. 7-11). The trial court redacted a portion of Newcomer's testimony about having intercourse with Perry in an effort to make that alleged bad act more similar to the charged crimes. This case is unlike Wallace where the Supreme Court found the trial court did not err in redacting the sister's testimony about having intercourse with the defendant. 384 S.C. at 435, 683 S.E.2d at 278. In Wallace, there was no opportunity for the abuse of the child to progress like the sister's abuse because the child reported the defendant digitally penetrated her the day after it happened. See id. Here, 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. Specifically, Daughter Two testified the abuse spanned almost a dozen years, much longer than Newcomer testified Perry had sexually abused her. However, Perry never had intercourse with Daughter Two. Thus, the type of sexual battery was dissimilar, and the trial court erred in redacting the dissimilarity of the type of sexual battery. Accordingly, the trial court erred in admitting Newcomer's testimony under Rule 404(b).

B. The Trial Court Erred in Finding Newcomer's Testimony More Probative Than Prejudicial Under Rule 403, SCRE.

If the bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. See id. at 435, 683 S.E.2d at 278. Thus, the prior bad act evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 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). Although remoteness in time between the prior bad act and the charged crime is not a dispositive factor, it is one that the court must consider when determining whether testimony is admissible. State v. McCombs, 410 S.C. 90, 101, 762 S.E.2d 744, 750 (Ct. App. 2014), *vacated*, 412 S.C. 282, 772 S.E.2d 510 (2015).

As an initial threshold, the trial court erred in failing to consider the fact that Newcomer testified she had intercourse with Perry, which was different from Daughter Two and Daughter Three's testimony about the sexual abuse involving digital penetration and oral sex. The trial court could not simply redact that portion of the testimony to find Newcomer's testimony was more probative than prejudicial. The trial court should have considered all of Newcomer's testimony when it made its determination under Rule 403. See Gillian, 373 S.C. at 609, 646 S.E.2d at 876 (providing the prejudicial effect must be considered in light of the entire record). When considering Newcomer's testimony as a whole, the dissimilarities outweighed the similarities. See McCombs, 410 S.C. at 101, 762 S.E.2d at 750 (providing the weighing of similarities between the bad act and the charged crimes is a factor to consider when analyzing admissibility under Rule 403).

There were also 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. (R. p. 38, ll. 20-R. p. 39, ll. 5). The Solicitor's Office did not have any records on the charges related to Newcomer. (R. p. 39, ll. 13-19). Further, the temporal remoteness between the two acts also adds to the prejudice. See id. (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.² An even more remote period of fifteen years separated Newcomer's abuse from when Daughter Three claimed Perry began abusing her.³ 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.

C. The Admission of Newcomer's Testimony Was Not Harmless Error.

Finally, the admission of Newcomer's testimony was not harmless error. "Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules." State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015). Instead, appellate courts should determine the materiality and prejudicial character of the error in light of the entire case. Id. at 651, 773 S.E.2d at 910. An error is harmless if it did not reasonably affect the result of the trial. Id. The issue is not whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial court contributed to the guilty verdict. State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

This case boils down to the credibility of the two sisters asserting Perry sexually assaulted them. There was no physical evidence in this case, and there was nothing to investigate because the sisters waited years to accuse Perry. Aside from the sisters' testimony, the only other testimony presented by the State was witnesses who testified about the sisters' out-of-court conversations about the sexual abuse. See e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d

² Newcomer was thirty-six years old at the time of trial, which means she was born in 1978. (R. p. 221, ll. 1-3). She testified the abuse began when she was approximately nine years old, or in 1987, and it ended when she was about thirteen years old, which was in 1991. (R. p. 223, ll. 3-6; R. p. 224, ll. 19-22). Daughter Two testified the abuse started when she was five years old. Daughter Two was born in 1994, so she would have been five years old in 1999.

³ Daughter Three testified the abuse began when she was approximately ten years old, which was in 2006. (R. p. 75, ll. 10-14; R. p. 77, ll. 8-13).

91, 94-95 (2011) (“We further find the trial court’s admission of the reports did not amount to harmless error. *There was no physical evidence presented in this case. The only evidence presented by the State was the children’s accounts of what occurred and other hearsay evidence of the children’s accounts.* Because the children’s credibility was the most critical determination of the case, we find the admission of the written reports was not harmless.” (emphasis added) (citation omitted)). Accordingly, the admission of Newcomer’s testimony was not a harmless error.

II. The Trial Court Erred In Allowing Dr. Henderson To Improperly Comment On The Veracity Of Daughter Three’s Testimony.

It is improper for an expert to comment on the veracity of a child’s accusations of sexual abuse. See id. at 480, 716 S.E.2d at 94. For example, a therapist cannot indicate he believed a child’s allegations were genuine. State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989). In Jennings, the Supreme Court concluded the trial court erred in admitting a forensic interviewer’s report that stated each child “provided a compelling disclosure of abuse.” 394 S.C. at 480, 716 S.E.2d at 94. The trial court further erred in allowing the forensic interviewer to testify each of the children provided details consistent with the background information received from their mother, the police report, and the other children. Id. The forensic interviewer’s report and opinions were erroneously used to prove the children were being truthful. Id.

At trial, Dr. Henderson testified her findings from examining Daughter Three were consistent with Daughter Three having experienced sexual abuse, even though Daughter Three’s examination was completely normal. (R. p. 185, ll. 9-19). Dr. Henderson further stated that her opinion was based on “what [Daughter Three] has shared with me” regarding the allegations of abuse. (R. p. 185, ll. 9-15). Here, the trial court erred when it overruled Perry’s objection to Dr. Henderson improperly vouching for Daughter Three. There is no way to interpret Dr.

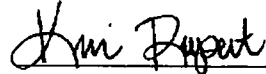
Henderson's testimony other than she believed Daughter Three's allegations were true, despite the fact that Daughter Three had a completely normal examination. Id. ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); see also Dawkins, 297 S.C. at 393-94, 377 S.E.2d at 302. Further, the admission of Dr. Henderson's testimony is not a harmless error when there was no physical evidence in this case and the credibility of Daughter Three was at issue. Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95. Accordingly, the trial court erred in allowing Dr. Henderson to testify about the truthfulness of Daughter Three's testimony.

CONCLUSION

For the reasons of the foregoing arguments, Appellant's convictions should be reversed and this case should be remanded to the Greenville County Court of General Sessions for a new trial.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,



KERRI A. RUPERT
Collins & Lacy, P.C.
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
August 2, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

AUG 03 2016

SC Court of Appeals

The State, ...Respondent,

v.

Wallace Steve Perry, ...Appellant.

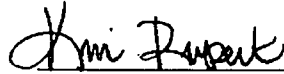
Appellate Case No. 2014-002654

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), of the South Carolina Appellate Court Rules, I certify that the Brief of Appellants and Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007 Supreme Court order regarding personal data identifiers.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,



KERRI A. RUPERT
Collins & Lacy, P.C.
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
August 2, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 03 2016
SC 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

PROOF OF SERVICE

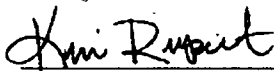
I hereby certify that I served a copy of the Appellant's Final Brief and Final Reply Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on August 3, 2016, addressed to the following:

COUNSEL SERVED:

V. Henry Gunter, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

KERRI A. RUPERT
krupert@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEY FOR APPELLANT

PROOF OF SERVICE

Columbia, South Carolina
August 3, 2016

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-002654

THE STATE,

Respondent,

v.

WALLACE STEVE PERRY,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

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

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

RECEIVED
AUG 04 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-002654

THE STATE,

Respondent,

v.

WALLACE STEVE PERRY,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

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

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT.....	7
I. The trial judge properly admitted evidence of Appellant's prior sexual abuse of his step-daughter 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, the use of threats, and the manner in which the abuse occurred, and the probative value was not substantially outweighed by the risk of unfair prejudice	7
II. The trial judge properly overruled Appellant's objection to Dr. Henderson's testimony where the full context of the testimony reveals that Dr. Henderson was providing permissible medical testimony concerning normal findings in cases involving sexual abuse. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction.....	15
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases:

<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637 (1974).....	18
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991).....	9, 14
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	8
<u>State v. Beck</u> , 342 S.C. 129, 536 S.E.2d 679 (2000).....	14
<u>State v. Chavis</u> , 412 S.C. 101, 771 S.E.2d 336 (2015).....	19
<u>State v. Cutro</u> , 332 S.C. 100, 504 S.E.2d 324 (1998).....	9
<u>State v. Gillian</u> , 373 S.C. 601, 646 S.E.2d 872 (2007).....	14
<u>State v. Green</u> , 261 S.C. 366, 200 S.E.2d 74 (1973).....	14
<u>State v. Hubner</u> , 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005).....	12, 13
<u>State v. Hubner</u> , 384 S.C. 436, 683 S.E.2d 279 (2009).....	13
<u>State v. Jennings</u> , 394 S.C. 473, 716 S.E.2d 91 (2011).....	17
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 368 (1995).....	8
<u>State v. King</u> , 334 S.C. 504, 514 S.E.2d 578 (1999).....	13
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923).....	7, 8
<u>State v. Martucci</u> , 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).....	8
<u>State v. Mathis</u> , 359 S.C. 450, 597 S.E.2d 872 (2004).....	14
<u>State v. McDonald</u> , 343 S.C. 319, 540 S.E.2d 464 (2000).....	8
<u>State v. Mitchell</u> , 286 S.C. 572, 336 S.E.2d 150 (1985).....	19
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	8
<u>State v. Schmidt</u> , 288 S.C. 301, 342 S.E.2d 401 (1986).....	9
<u>State v. Wallace</u> , 384 S.C. 428, 683 S.E.2d 275 (2009).....	8, 9, 10, 14

State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009)..... 14

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)..... 8

Rules:

Rule 401, SCRE..... 9

Rule 403, SCRE..... 7, 13, 15

Rule 404(b), SCRE 8, 9

STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly admitted evidence of Appellant's prior sexual abuse of his step-daughter 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, the use of threats, and the manner in which the abuse occurred, and the probative value was not substantially outweighed by the risk of unfair prejudice.

II.

The trial judge properly overruled Appellant's objection to Dr. Henderson's testimony where the full context of the testimony reveals that Dr. Henderson was providing permissible medical testimony concerning normal findings in cases involving sexual abuse. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction.

STATEMENT OF THE CASE

Appellant was indicted at the October 2012 term of the grand jury for Greenville County for two counts of criminal sexual conduct with a minor in the first degree (2012-GS-23-08496 & 2012-GS-23-08498) and two counts of criminal sexual conduct with a minor in the second degree (2012-GS-23-08495 & 2012-GS-23-08497). Appellant proceeded to a trial by jury from December 1-3, 2014, in Greenville, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable Edward W. Miller to imprisonment for a term of thirty years on each count of criminal sexual conduct in the first degree and imprisonment for a term of twenty years on each count of criminal sexual conduct in the second degree, with all sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant and Mother had two sets of twins, Victim 1 and Sister, and Victim 2 and Brother. R. pp. 51-52. Appellant and Mother began dating in 1993 and separated in 2000. R. pp. 52-53. At the time of their separation, Victim 1 and Sister were five years old and Victim 2 and Brother were three years old. R. p. 54. Upon their Separation, Appellant moved to Greenville and Mother remained in Spartanburg. Mother and Appellant worked out a custody agreement whereby Mother had custody of the children during the week and Appellant had custody on the weekends. R. p. 54. In March of 2012, Victim 2 disclosed that Appellant was sexually abusing her. R. p. 55. Victim 2 told Mother the abuse occurred at Appellant's apartment when they had their visitations with him on the weekends. R. p. 55. After Victim 2 disclosed Appellant's abuse, Victim 1 told Mother she had also been sexually abused by Appellant. R. p. 57. Mother decided to wait to call DSS until Victim 1 and Victim 2 graduated because they were involved in activities at school and she did not want anything to interfere with that. R. pp. 56-57. Following a school play, Mother made the decision to contact DSS. R. p. 59. In May of 2012, Mother was contacted by officers from the Greenville Police Department. R. pp. 60-61.

Victim 1 was born in 1994. R. p. 110. Victim 1's first memory of Appellant sexually abusing her occurred on a Friday night when she went into Appellant's bedroom to watch television. R. p. 114. Victim 1 was seven years old at the time. R. p. 115. Appellant entered the bedroom and told her to move over in the bed. R. p. 115. Victim 1 testified Appellant then stuck his fingers down her pants. R. p. 115. Appellant told her if she told anyone she would get in trouble and she would not be able to see her mother anymore. R. p. 115. After the first incident, the abuse began occurring every weekend. R. p. 115. Victim 1 recounted, "It was every weekend, both Saturday and Sunday, early mornings around 5 or 6 o'clock in the morning. He

would come in there and lay in the bed. And he would finger me. Just like any other time, he would threaten that we'd be taken or we'd get in trouble." R. pp. 115-16. Victim 1 shared an air mattress with Victim 2 and Sister. R. pp. 113-14. Victim 1 stated that she never said anything or made loud noises during the abuse because she was afraid of waking her sisters up. R. p. 116.

When the family moved to a new apartment, Appellant continued to digitally penetrate Victim 1. R. p. 117. Victim 1 also recounted two occasions where Appellant orally penetrated her. R. p. 117. Victim 1 testified that the only weekends Appellant did not sexually abuse her were when she was on her period or when Appellant had a girlfriend. R. p. 120. The abuse stopped when Appellant moved to Columbia. R. p. 120. Victim 1 was fifteen years old at the time the sexual abuse stopped. R. p. 137. Victim 1 testified that she tried to tell Sister about Appellant's abuse on one occasion but she responded, "just be quiet. Just be quiet. I don't want to hear it." R. p. 121. Victim 1 testified she believed that if it was hard for Sister to hear, it would also be hard for Mother to hear. R. p. 121.

Victim 2 was born in 1996. R. p. 70. Victim 2 recounted the first occasion when Appellant sexually abused her, stating:

I remember one night I had a nightmare. I went to my dad's bedroom. I thought he would comfort me like a dad should. I remember waking up with my underwear on the floor. I wasn't sure if I just turned too hard or if I tossed and turned. And then it kept happening and then it happened a lot. It happened probably like on one hand. Then I woke up. It was one early morning. He had his finger in my vagina.

R. pp. 74-75. Victim 2 testified that the abuse occurred less than five times. R. p. 75. All the instances of abuse occurred at home in the early hours of the morning. R. p. 76. Victim 2 could not recall what specific age she was when Appellant abused her, however she recalled the abuse occurred before she was in the sixth grade. R. p. 75. Appellant told Victim 2 that if she ever told anyone about the abuse, she and her sisters would be the ones who got in trouble and they would

be taken away from their mother. R. p. 75. Victim 2 recounted another specific incident where Appellant entered her bedroom, stating:

He would come in our bedroom because he said [Brother] was kicking him and he couldn't sleep. So he came in our bedroom early in the morning and he laid down beside [Victim 1]. I remember hearing her saying, Dad, stop, get away from me. Then I would feel - - I wouldn't feel him pull her towards him, but I could just sense it by the force that was going on in the bed.

R. p. 77-78. Victim 2 later told Victim 1 she knew what Appellant was doing to her. R. p. 78. Victim 2 eventually decided to tell Mother about the abuse following a powerful youth church service. R. p. 81. Victim 2 previously disclosed the abuse to her youth pastor who encouraged her to tell her Mother immediately. R. p. 83. Victim 2 was sixteen years old at the time she finally told Mother about the abuse. R. p. 85.

Detective Mary Ashley Thomas of the Greenville Police Department became involved in Appellant's case after the family made a report to DSS. R. p. 139. The DSS case worker then forwarded the case to the Greenville Police Department. R. p. 139. As part of her investigation, Detective Thomas interviewed both Victim 1 and Victim 2 at the Law Enforcement Center in downtown Greenville. R. p. 141. After completing her investigation, Detective Thomas obtained arrest warrants for Appellant. R. p. 147.

Brandy Newcomer also testified at trial. R. pp. 202-36. Appellant was formerly Newcomer's stepfather. R. p. 215. Appellant and Newcomer's mother married when Newcomer was five years old and separated when she was fourteen. R. pp. 221-22. Newcomer described an incident when she was nine years old when Appellant entered her bedroom, forced his hand into her pajamas, and inserted a finger in her vagina. R. p. 223. Following the incident, Appellant told her not to tell anyone because no one would believe her and it would hurt her family. R. p. 224. Appellant digitally penetrated her on around five occasions. R. p. 225. On one occasion, the

abuse progressed to oral sex by Appellant. R. p. 226. Appellant also forced Newcomer to bathe in front of him on one occasion. R. p. 226. Aside from the incident in the bathtub, all of the instances of abuse occurred in Newcomer's bedroom. R. p. 226. Newcomer testified the abuse continued until she was fourteen years old. R. p. 225. When she was fourteen, Newcomer told her mother about the abuse. R. p. 225. After Newcomer disclosed the abuse, her mother divorced Appellant and the family moved away from Spartanburg. R. p. 226.

ARGUMENT

I.

The trial judge properly admitted evidence of Appellant's prior sexual abuse of his step-daughter 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, the use of threats, and the manner in which the abuse occurred, and the probative value was not substantially outweighed by the risk of unfair prejudice.

Relevant Facts

Prior to trial, the State indicated that it had a Lyle¹ motion. R. p. 21. The State then proffered the testimony of Brandy Newcomer. R. pp. 24-33. Following Newcomer's testimony, the trial judge indicated he would rule at a later time. R. p. 40. The trial judge subsequently found, "the State has shown the prior bad act by clear and convincing evidence that it is probative. It does fit under the 404(b) exception and I'm going to allow it." R. p. 162.

Discussion

Appellant asserts the trial judge erred in finding Newcomer's testimony admissible as evidence of a common scheme or plan. Appellant also contends the trial court erred in finding Newcomer's testimony more probative than prejudicial under Rule 403, SCRE. These arguments lack merit, as there was a close degree of similarity between Appellant's prior sexual abuse of Newcomer 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 Brandy Newcomer was Admissible to Show a Common Scheme or Plan

¹ State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

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 of the 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 Brandy Newcomer. As to the first factor, the age of the victims when the abuse occurred, all of the abuse began when the victims were at a pre-pubescent age. In her direct testimony, Victim 1 testified she was around seven when the abuse began.² R. p. 115, 120. Victim 2 had difficulty determining what her age was when the abuse occurred, but testified it was before she was in the sixth grade. R. p. 75. Newcomer testified the first instance of abuse was when she was nine years old. R. pp. 222-23. All three victims were pre-pubescent. The ages of the victims, even accounting for the minor confusion Victim 1 and Victim 2 had in determining their age when the abuse began, are all within a few years of each other. The ages of Appellant's victims, were thus similar at the time of the abuse.

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 and Victim 2 and the stepfather of Newcomer. Appellant's victims all shared the unfortunate circumstance of having him as a father-figure in their life.

² On cross-examination, Defense Counsel asked Victim 1, "And you testified earlier that you were accusing your father of starting to touch you inappropriately at age 5?" R. p. 126. Victim 1 replied, "Yes ma'am. I think there is some kind of blockage there from the ages of 5 to 7. I tried to block it out for so long. I really can't remember." R. p. 127. At Defense Counsel's further urging, Victim 1 stated she believed Appellant started touching her at age 5. R. p. 127.

As to the third factor, the location where the abuse occurred, the sexual abuse occurred within the home. Victim 1 and Victim 2 testified that the abuse occurred in either their bedroom or in Appellant's bedroom, and Newcomer testified the abuse occurred in her bedroom on every occasion except for one where Appellant watched her bathe.

As to the fourth factor, the use of coercion or threats, Appellant threatened all three victims in order to prevent them from disclosing the abuse to others. Appellant told Victim 1 that if she told anyone she would get in trouble and she would not be able to see her mother anymore. Appellant told Victim 2 that if she ever told anyone about the abuse, she and her sisters would be the ones who got in trouble and they would be taken away from their mother. Appellant told Newcomer not to tell anyone because no one would believe her and it would hurt her family. Appellant's use of threats in order to ensure his victims' silence was commonplace throughout his decades of abuse. The use of threats by Appellant in his abuse of Victim 1 and Victim 2 and Newcomer thus demonstrates further similarity between the prior bad act and the charged offense.

As to the fifth factor, the manner of the occurrence, the type of sexual battery was similar for Victim 1, Victim 2, and Newcomer. The primary manner of abuse for all three victims was digital penetration. Appellant also engaged in oral sex with both Victim 1 and Newcomer. In his brief, Appellant attempts to differentiate the sexual assaults on Victim 1 and Victim 2 and Newcomer by asserting the abuse of Newcomer progressed to actual sexual intercourse while Appellant never had sexual intercourse with Victim 1 or Victim 2. Prior to the hearing on the Lyle motion, the Solicitor stated with respect to Newcomer, "Of course there was digital penetration, oral sex. It did progress into actual vaginal/penile penetration. We understand that that portion of her testimony of her abuse could not be admissible because it goes beyond the

scope of similar.” R. p. 23. Aside from the Solicitor’s statements, there is no clear testimony from Newcomer during the proffer or during her direct testimony at trial that there was penile penetration.³ Newcomer’s testimony during the proffer as well as her testimony during direct examination focused on digital and oral penetration, the exact acts Appellant was accused of committing in this case. Even if Appellant’s abuse of Newcomer progressed to sexual intercourse, the abuse of Victim 1 and Victim 2 and Newcomer are still strikingly similar. If Appellant did engage in sexual intercourse with Newcomer, it was merely the last step in a progression of abuse that included digital and oral penetration. Regardless of whether there actually was penile penetration, Newcomer’s trial testimony consisted only of the identical acts of digital and oral penetration, thus there was no unfair prejudice to Appellant.

In State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose that he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner – over the course of two years – reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim’s testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner – over the course of

³ During the proffer, Newcomer testified, “One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left.” R. pp. 28-29. It is unclear whether Newcomer is referring to digital penetration or penile penetration.

two months – hugged her and fondled her breasts while she was baby-sitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. *Id.* at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness' testimony regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan but found any testimony related to the dissimilar acts was inadmissible. *Id.* at 582, 608 S.E.2d at 467. Following the trial, Hubner appealed his convictions and asserted the prior bad act evidence should not have been admitted. *Id.* at 575, 608 S.E.2d at 464. On appeal, this Court reversed Hubner's convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. *Id.* at 585, 608 S.E.2d at 469. However, the South Carolina Supreme Court subsequently reversed the decision of this Court and affirmed Hubner's convictions after finding the trial judge properly admitted the evidence of the prior sexual assaults. *State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

All five of the aforementioned factors demonstrate the significant degree of similarity between Appellant's prior abuse of Newcomer and Appellant's abuse of Victim 1 and Victim 2. The trial judge properly admitted the prior bad act evidence due to the similarities outweighing any potential 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 extreme similarities between the prior bad acts and the charged offense, 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 child he was in a father figure role with 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. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly overruled Appellant's objection to Dr. Henderson's testimony where the full context of the testimony reveals that Dr. Henderson was providing permissible medical testimony concerning normal findings in cases involving sexual abuse. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction.

Relevant Facts

Dr. Nancy Henderson is a pediatrician employed with the Greenville Health System. R. p. 175. Dr. Henderson conducted an examination of Victim 1 and Victim 2 at the Child Advocacy Center in Spartanburg. R. p. 179.

Prior to physically examining Victim 2, Victim 2 shared details with Dr. Henderson concerning what the abuse entailed. R. p. 183. Based on Victim 2's description of the abuse, Dr. Henderson performed a head-to-toe physical exam and conducted tests related to concerns for sexually transmitted infections. R. p. 183. Dr. Henderson testified that during such an exam she is looking specifically at the genital area for any kind of tears, scars, or discharge. R. p. 184. Dr. Henderson testified that based on what Victim 2 shared regarding the particular sexual assault, she was looking for all of the aforementioned signs during the physical examination. R. p. 184. The Solicitor then asked, "Based on what [Victim 2] shared with you, did you expect to find any

indications of injury." R. p. 184. Dr. Henderson responded, "It would have been very unlikely based on the information that she had shared to find anything on the exam." R. p. 184. Dr. Henderson elaborated:

At the time that I saw her, she was 16. The incidents had happened at least three years prior. So the genital area has incredibly good blood supply and even small tears or even larger tears can heal very, very quickly. So with there being years delay between the last incident and the time of the exam, it would make it unlikely to find something on the exam. Another reason that what she had shared happened often never finds any evidence on exam. So even if I had seen her earlier, the likelihood of seeing a trauma, permanent trauma related to that is extremely uncommon.

R. pp. 184-85.

Dr. Henderson testified that aside from a minor amount of vaginal discharge, Victim 2's exam was normal. R. p. 185. The Solicitor then asked what "normal" meant. R. p. 185. Dr. Henderson responded:

Normal means that there were no tears, no scars, uh, and there were no specific findings on her exam that in and of itself would have linked to allegations of abuse. But in light of what she had shared with me and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case.

R. p. 185. The Solicitor then asked, "So in your opinion, were your findings consistent with [Victim 2] having experienced sexual abuse?" Dr. Henderson responded, "Yes." R. p. 185. Defense Counsel objected, arguing that the testimony amounted to improper vouching by the witness. The trial judge overruled the objection, ruling, "I think she testified that your findings were consistent. So I - - it's close, but I'm going to overrule your objection." R. p. 185.

Dr. Henderson's examination of Victim 1 also yielded normal results. R. p. 187. The Solicitor asked, "Based on what [Victim 1] described to you with respect to the abuse that she experienced, did you expect to find any injuries to [Victim 1]?" R. pp. 187-88. Dr. Henderson responded, "A normal exam would be quite common almost the majority of time with those type

of allegations.” R. p. 188. The Solicitor then asked, “And with respect to [Victim 1], were your findings during that examination consistent with the possibility that she had also experienced sexual abuse.” R. p. 188. Dr. Henderson replied, “Yes, a normal exam would be consistent with those types of findings, with those allegations that she had made.” R. p. 188.

Discussion

Appellant asserts Dr. Henderson improperly commented on the veracity of Victim 2’s testimony. Specifically, Appellant argues, “There is no way to interpret Dr. Henderson’s testimony other than she believed Daughter Three’s⁴ allegations were true despite the fact that Daughter Three had a completely normal examination.” Br. of App. p. 21. This argument lacks merit, as Dr. Henderson’s testimony was merely stating that despite the fact her examination of Victim 2 revealed no injury, that finding could still be consistent with sexual assault due to the substantial time period between the assault and the examination. Even if Dr. Henderson’s comment was deemed inappropriate, any error is insubstantial and not sufficiently prejudicial to warrant a reversal of Appellant’s conviction.

It is improper for an expert to comment on the veracity of a child’s allegations of sexual abuse. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Looking at the full and proper context of Dr. Henderson’s testimony, it is clear that she was not commenting on the veracity of Victim 2’s testimony. Instead, Dr. Henderson provided background medical knowledge on what a “normal” examination would look like in a situation where sexual assault occurred years prior to the examination. Dr. Henderson’s statement, “But in light of what she had shared with me, and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case” related directly to the absence of any physical injury due to the delay in disclosure. Dr. Henderson’s statement was not indicating that she believed Victim 2’s

⁴ “Daughter 3” in Appellant’s brief is the same as “Victim 2” in the Brief of Respondent.

allegations; Dr. Henderson was merely indicating that an absence of sexual injury can still be consistent with sexual assault given the delay in disclosure, that tears to the vagina tend to heal very quickly, and that physical exams often do not reveal injuries from digital and oral penetration. When the trial judge ruled, "I think she testified that your findings were consistent. So I - - it's close, but I'm going to overrule your objection," he recognized what the testimony truly meant when viewed in the context it was made and knew it was not improper even though it could appear to be so when stripped of context.

In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the United States Supreme Court dealt with a question of whether remarks made by the prosecutor during closing argument, in the context of the entire trial, were sufficiently prejudicial to violate the respondent's due process rights. In upholding the respondent's conviction, the Court emphasized, "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Id. at 647. While Donnelly dealt with a closing argument issue, its logic is applicable to the current case. This Court should not infer that Dr. Henderson's testimony concerning what a "normal exam" was given the circumstances and whether a "normal" exam could still be consistent with sexual abuse was actually Dr. Henderson testifying she believed Victim 2's allegations. Instead, the full context reveals an intent to provide admissible expert medical testimony, not to bolster the credibility of the victims. Dr. Henderson's testimony, therefore, did not convey an improper or damaging meaning to the jury, and thus was not erroneously admitted.

Even if this Court were to find that Dr. Henderson's testimony was an improper comment on the veracity of Victim 2's testimony, any error in the case is harmless. 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. The comment made by Dr. Henderson complained of on appeal was rendered harmless by the explanation and context of the remainder of her testimony. Furthermore, Dr. Henderson's statement was isolated, vague, and offered no clear indication she believed Victim 2. Also, the comment was never mentioned again during the remainder of trial, and the solicitor made no reference to it during his closing argument. Dr. Henderson's testimony was therefore not sufficiently prejudicial to warrant a reversal of Appellant's conviction, especially in light of significant strength of the testimony from the other witnesses and the probative prior-bad act evidence. Appellant's convictions and sentences should be affirmed.

CONCLUSION

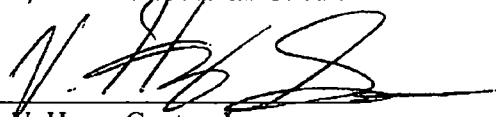
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth 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

May 23, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-002654

RECEIVED

AUG 04 2015

SC Court of Appeals

THE STATE, ...RESPONDENT

v.

WALLACE STEVE PERRY, ...APPELLANT.

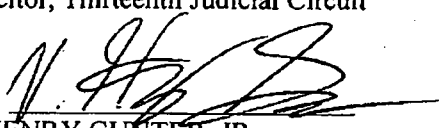
CERTIFICATE OF COUNSEL

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."

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit

BY: 
V. HENRY GUNTER, JR.
S.C. Bar No. 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 4, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

RECEIVED

AUG 03 2016

SC 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

FINAL REPLY BRIEF

KERRI A. RUPERT
Collins & Lacy, P.C.
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

Table of Contents

TABLE OF AUTHORITIES	3
ARGUMENT	4
I. Newcomer's Testimony Was Inadmissible as Evidence of a Common Scheme or Plan. ...	4
A. The State Failed to Acknowledge the Dissimilarities in Newcomer's Testimony from Daughter Two and Daughter Three's Testimony.	4
B. The State Failed to Consider Other Circumstances That Make Newcomer's Testimony More Prejudicial than Probative.	6
II. Dr. Henderson's Testimony Was Used at Trial to Prove Daughter Three Was Truthful, Which Was Not a Harmless Error When Daughter Three's Credibility Was at Issue.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<u>State v. Gillian,</u> 373 S.C. 601, 646 S.E.2d 872 (2007)	6
<u>State v. Hubner,</u> 384 S.C. 436, 683 S.E.2d 279 (2009)	5
<u>State v. Jennings,</u> 394 S.C. 473, 716 S.E.2d 91 (2011)	7
<u>State v. Wallace</u> 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009)	4, 5, 6

Rules

Rule 403, SCORE	6, 7
Rule 404(b), SCORE	4, 5, 6

ARGUMENT

I. Newcomer's Testimony Was Inadmissible as Evidence of a Common Scheme or Plan.

A. The State Failed to Acknowledge the Dissimilarities in Newcomer's Testimony from Daughter Two and Daughter Three's Testimony.

In State v. Wallace, the Supreme Court held evidence of other acts of sexual misconduct was admissible in a trial for criminal sexual conduct with a minor as a common scheme or plan under Rule 404(b), South Carolina Rules of Evidence, if there was a "close degree of similarity" between the two acts. 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009). The trial court should weigh the similarities with the dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Id. at 433, 683 S.E.2d at 278. If the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Id. The Wallace Court provided the following factors to determine whether the bad act and the crime had a close degree of similarity:

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.

Id.

There are at least four factors under Wallace where Newcomer's testimony differed from Daughter Two and Daughter Three's testimony, and thus, the similarities did not outweigh the dissimilarities to make the bad act evidence admissible under Rule 404(b). Perhaps most

dissimilar, the State asserted Perry had sex with Newcomer, but Daughter Two and Daughter Three never testified the abuse progressed to sexual intercourse. When the State admitted the abuse had progressed to sexual intercourse, the trial court erred by failing to take that factor into consideration in its Rule 404(b) analysis.

Further, the trial court erred in allowing the State to redact that portion of Newcomer's testimony to make the acts more similar. The State argues that pursuant to State v. Hubner, 384 S.C. 436, 683 S.E.2d 279 (2009), the trial court did not err in its analysis of the difference in the type of sexual battery and redacting the dissimilar portions of Newcomer's testimony. However, Hubner does not speak to the issue of whether the trial court properly redacted Newcomer's testimony. In Hubner, the Supreme Court only reversed the Court of Appeals in light of Wallace. Although the Hubner opinion did not directly address redacting testimony, Wallace specifically addressed the issue. In Wallace, the Court found the trial court did not err in redacting a portion of the witness's testimony about sexual intercourse because there was never an opportunity for the defendant's sexual abuse of the minor child to progress to the extent as claimed by the witness. This case is factually distinguishable from Wallace because Perry had an even longer period of time with Daughter Two and Daughter Three where the sexual abuse could have progressed into sexual intercourse. Accordingly, the trial court erred in failing to consider the dissimilarities in the type of sexual battery and redacting Newcomer's testimony to make it more similar to Daughter Two and Daughter Three's testimony.

Further, the ages of Newcomer, Daughter Two, and Daughter Three varied. There is a huge difference between Daughter Two stating the abuse began when she was five years old and Newcomer testifying the abuse began in her tween years. The State attributed the difference in ages to a "minor confusion" by Daughter Two, but Daughter Two affirmatively testified at trial

that the abuse began when she was approximately five years old. (Resp. Br. 11; R. p. 115, ll. 17-18; R. p. 127, ll. 1-12). The State also fails to acknowledge the difference in the location and time of day when the abuse occurred by claiming all three alleged the abuse occurred in a home. This is such a bland analogy that any case could be found to be similar under that circumstance. Finally, Newcomer's claim that Perry told her no one would believe the sexual abuse allegations or that the allegations would hurt her family hardly arises to the level of threats allegedly made to Daughter Two and Daughter Three. Accordingly, the trial court erred in finding Newcomer's testimony admissible under Rule 404(b).

B. The State Failed to Consider Other Circumstances That Make Newcomer's Testimony More Prejudicial than Probative.

If the bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. See Wallace, 384 S.C. at 435, 683 S.E.2d at 278. Thus, the prior bad act evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 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).

In its Brief, the State only argued Newcomer's evidence was admissible under Rule 403 because the prior bad act was similar to the charged offenses. (Resp. Br. 13-15). As an initial matter, Perry disputes the alleged prior bad act and charged offenses were similar. Moreover, the State failed to address other facts in this case that make Newcomer's testimony more prejudicial than probative. See id. Perry challenged whether the bad act had even occurred by presenting records from the Solicitor's Office showing no evidence of any charges related to Newcomer.

(R. p. 160, ll. 1-2). The State also admitted Newcomer did not proceed to trial on her allegations, claiming she was pregnant at the time, she was “sexually promiscuous,” and she suffered from mental health issues. (R. p. 38, ll. 20-R. p. 39, ll. 5). Clearly, there were concerns about whether the sexual abuse ever occurred that the trial court failed to address in its Rule 403 analysis. Finally, the trial court should have considered the temporal remoteness of the bad act to the charged offenses. Thus, Respondent’s argument that Newcomer’s testimony was more probative than prejudicial lacks merit because the trial court failed to consider the unique facts of this case.

II. Dr. Henderson’s Testimony Was Used at Trial to Prove Daughter Three Was Truthful, Which Was Not a Harmless Error When Daughter Three’s Credibility Was at Issue.

Our law clearly provides an expert cannot comment on the veracity of a child’s accusations of sexual abuse. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011). In Jennings, the trial court erred in admitting a forensic interviewer’s report that stated each child “provided a compelling disclosure of abuse.” Id. at 480, 716 S.E.2d at 94. Here, despite opining Daughter Three had a normal physical examination that would not support any allegations of sexual abuse, Dr. Henderson testified her findings—from the normal physical examination—supported her opinion that Daughter Three experienced sexual abuse. (R. p. 185, ll. 9-19). There was no physical evidence for Dr. Henderson to determine Daughter Three was sexually abused, but Dr. Henderson nevertheless opined that she believed Daughter Three’s accusations. (See id.). The State argues the trial court did not err in overruling Perry’s objection to Dr. Henderson testimony because the trial court understood what Dr. Henderson “truly meant.” (Resp. Br. 18). This argument only shows how confusing Dr. Henderson’s testimony may have been to a jury if those jurors also had to decipher what Dr. Henderson “truly meant.” Dr. Henderson’s testimony was erroneously used to prove Daughter Three was being truthful.

CONCLUSION

For the reasons stated within the arguments of Appellant's Brief and Reply Brief, Appellant respectfully requests this Court reverse his convictions.

Respectfully Submitted,



KERRI A. RUPERT
Collins & Lacy, P.C.
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
August 2, 2016

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), of the South Carolina Appellate Court Rules, I certify that the Brief of Appellants and Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007 Supreme Court order regarding personal data identifiers.

[SIGNATURE PAGE TO FOLLOW]

RECEIVED

AUG 03 2016

SC Court of Appeals

Respectfully Submitted,



KERRI A. RUPERT
Collins & Lacy, P.C.
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
August 2, 2016

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

PROOF OF SERVICE

I hereby certify that I served a copy of the Appellant's Final Brief and Final Reply Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on August 3, 2016, addressed to the following:

COUNSEL SERVED:

V. Henry Gunter, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

RECEIVED
AUG 03 2016
SC Court of Appeals

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,
COLLINS & LACY, P.C.

By: Keri Rupert

KERRI A. RUPERT
krupert@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEY FOR APPELLANT

PROOF OF SERVICE

Columbia, South Carolina
August 3, 2016

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Wallace Steve Perry, Appellant.

Appellate Case No. 2014-002654

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 5503
Heard April 11, 2017 – Filed July 26, 2017

AFFIRMED

Kerri Brown Rupert, of Murphy & Grantland, PA, and
Chief Appellate Defender Robert Michael Dudek, both of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Vann Henry Gunter, Jr., both of
Columbia; and Solicitor William Walter Wilkins, III, of
Greenville, for Respondent.

GEATHERS, J.: Wallace Steve Perry appeals his convictions for two counts of first-degree criminal sexual conduct (CSC) and two counts of second-degree CSC. He argues the trial court erred in (1) finding his former stepdaughter's testimony was admissible as evidence of a common scheme or plan and (2) allowing a doctor to improperly comment on the veracity of his daughter's testimony. We affirm.

FACTS/PROCEDURAL HISTORY

In 1993, Perry met and began dating Laura Jones (Mother). Perry and Mother had two sets of twins: Daughter One and Daughter Two born in 1994 and Daughter Three and Son born in 1996. After Mother and Perry separated in August 2000, they agreed Perry would have visitation with the children on weekends and holidays. In March 2012, Daughter Three revealed to Mother that Perry had sexually abused her during visitation. After Daughter Three's disclosure, Daughter Two informed Mother that she had also been sexually abused by Perry.¹ Mother later contacted the Department of Social Services (DSS) to report the abuse, and DSS reported the incident to the Greenville Police Department. Perry was subsequently indicted for two counts of first-degree CSC and two counts of second-degree CSC. His trial was held in December 2014.

Before the trial began, the State proffered the testimony of Brandy Newcomer, Perry's stepdaughter from a prior marriage, regarding abuse Perry allegedly inflicted on her. The State proffered this testimony under Rule 404(b), SCRE, as evidence of a common scheme or plan. During a discussion with the trial court before the proffer, the solicitor noted that unlike with Daughter Two and Daughter Three, Perry's abuse of Newcomer "progress[ed] on into actual vaginal/penile penetration." However, the solicitor acknowledged that portion of Newcomer's account of the abuse would "not be admissible because it [went] beyond the scope of similar" and could be excluded by the court pursuant to *State v. Wallace*.²

During the proffer, Newcomer³ testified her mother married Perry when Newcomer was five years old. She stated that when she was nine years old, Perry entered her room one night and digitally penetrated her vagina. According to Newcomer, Perry continued to abuse her periodically over the next four years, and she estimated he digitally penetrated her about twenty times. Newcomer testified the abuse progressed when she was thirteen or fourteen. She stated, "One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left." Newcomer testified that around that

¹ Daughter One and Son never alleged they were abused by Perry.

² 384 S.C. 428, 434–35, 683 S.E.2d 275, 278–79 (2009) (finding evidence that the appellant abused the victim's older sister was properly admitted under Rule 404(b), SCRE, as evidence of a common scheme or plan and permitting the trial court to redact dissimilar particulars of sexual conduct to avoid unfair prejudice).

³ Newcomer was thirty-six years old at the time of Perry's trial.

time, Perry also came into the bathroom while she was taking a bath and "had to bathe [her] before [she] could go." She stated the abuse ended when she was fourteen.

Newcomer stated she did not disclose the abuse right away because Perry had told her no one would believe her and her accusations would hurt the family. Newcomer told her mother about the abuse when she was fourteen years old, and her mother divorced Perry shortly thereafter. When asked why the case did not go to trial, Newcomer stated she had told her mother she did not want to go to court because she was afraid Perry would kill her family.

According to the State, Newcomer's testimony was proper under the common scheme or plan exception of Rule 404(b) because of the similarities between Perry's abuse of Newcomer and his abuse of Daughter Two and Daughter Three. In response, Perry contended Newcomer's testimony was inadmissible propensity evidence. When the court inquired whether DSS had any records of Perry's abuse of Newcomer, the State said it had some records that indicated the allegations were investigated. However, the State noted Perry was not tried for the charges of abuse against Newcomer because, at the time, Newcomer was pregnant, she suffered from some mental health issues, and there were concerns that the defense would characterize her as sexually promiscuous. As a result, Perry completed a pretrial intervention program and did not admit any guilt. After hearing the proffer and the parties' arguments, the trial court decided to reserve its ruling on whether Newcomer would be permitted to testify.

During the trial, Daughter Three⁴ testified that after Mother and Perry separated, Perry moved into a three-bedroom apartment and she shared a room and an air mattress with Daughter One and Daughter Two. According to Daughter Three, around five or six o'clock in the morning, Perry would come into the bedroom Daughter Three shared with her sisters and would get in bed with them. When asked to describe the abuse, Daughter Three recalled Perry digitally penetrating her vagina about five times but stated the abuse did not progress beyond that. According to Daughter Three, the abuse occurred when she was around ten or eleven years old.

After the abuse ended, Daughter Three continued visiting Perry on the weekends until she disclosed the abuse when she was around sixteen years old. Daughter Three explained that she waited to tell Mother what was going on

⁴ Daughter Three was eighteen years old at the time of the trial.

because Perry had told her "that if we told anybody, we would be the ones who got in trouble and [would] get taken away from my mom." Daughter Three stated she initially disclosed the abuse to her youth group leader, who encouraged her to tell Mother.

Daughter Two⁵ subsequently testified. She stated Perry first molested her when she was between five and seven years old.⁶ When asked about the first time Perry abused her, Daughter Two stated she was lying on Perry's bed watching television when he entered the room, lay down next to her, and digitally penetrated her vagina. According to Daughter Two, Perry stated that if she told anyone about what had happened, she "would get in just as much trouble as he would" and would be taken away from Mother. Daughter Two testified that after the first incident, Perry began molesting her almost every weekend during visitation. She stated that around five or six a.m. on Saturday and Sunday mornings, Perry would get in the bed Daughter Two shared with her sisters or lie on the floor next to the bed and digitally penetrate her. Daughter Two testified she never tried to wake up her sisters because she was scared they would tell Mother.

Daughter Two recalled Perry moved into a two-bedroom apartment in 2007, where she shared a room and a bed with Daughter Three, Perry shared a room with Son, and Daughter One slept on the couch. Daughter Two testified Perry continued digitally penetrating her in the early morning hours at the new apartment; however, the abuse also progressed to oral sex on two occasions. According to Daughter Two, Perry orally penetrated her vagina late one night while she was sitting in a chair and early one morning while she was in bed with Daughter Three. Daughter Two stated the abuse ended when she was fifteen years old, and she disclosed the abuse to Mother after Daughter Three's disclosure.

Before beginning the second day of trial, the trial court informed the parties that after considering Newcomer's proffer, it was inclined to allow her to testify.

⁵ Daughter Two was twenty years old at the time of the trial.

⁶ Daughter Two initially testified Perry began molesting her when she was seven years old. However, on cross-examination, Perry's counsel asked Daughter Two whether she "testified earlier that [she was] accusing [Perry] of starting to touch [her] inappropriately at age [five]." Daughter Two replied, "Yes, ma'am. I think there is some kind of blockage there from the ages of [five] to [seven]. I tried to block it out for so long. I can't really remember." She later admitted she was not sure of the age and stated she remembered Perry first sexually abusing her when she was seven years old.

Perry again objected, arguing Newcomer's testimony was prejudicial and would confuse the jury. He further argued Newcomer's testimony was inadmissible to show a common scheme or plan because it was not similar enough to Daughter Two's and Daughter Three's testimony. Additionally, Perry argued he could not determine whether Newcomer had changed her story about the abuse because the records from the solicitor's office relating to the previous charges against him had been destroyed. The trial court subsequently found there was clear and convincing evidence that the prior bad act had occurred and Newcomer's testimony was probative and admissible under the 404(b) exception.

Newcomer's testimony before the jury was substantially similar to her proffered testimony, including that (1) the abuse began when she was nine years old and ended when she was fourteen; (2) Perry was her stepfather at the time of the abuse; (3) the abuse typically occurred in her bedroom, except for one incident when she was fourteen when Perry bathed her; (4) Perry told her that if she disclosed the abuse, no one would believe her and her accusations would hurt the family; and (5) the abuse typically consisted of digital penetration. However, Newcomer added that the abuse had progressed to oral sex one time, which she failed to specifically discuss in her proffer. She also estimated Perry had digitally penetrated her five times, rather than the estimate of twenty she made during the proffer.

The State also called Dr. Nancy Henderson, a pediatrician for Greenville Health System, to testify. After being qualified as an expert in the field of pediatric medicine and child sexual assault examinations, Dr. Henderson testified about examining Daughter Two and Daughter Three after they disclosed the sexual abuse. Dr. Henderson stated that before the examinations, she spoke to Daughter Two and Daughter Three about what had occurred.

During her discussion of her examination of Daughter Three, Dr. Henderson testified the results were normal and noted "[i]t would have been very unlikely . . . to find anything on the exam" because of the delayed disclosure. Dr. Henderson was subsequently asked whether her findings were consistent with Daughter Three having experienced sexual abuse. She responded, "Yes." Perry objected, arguing Dr. Henderson was improperly vouching for Daughter Three. The trial court noted the issue was "close"; however, it ultimately overruled the objection, stating Dr. Henderson had merely "testified that [her] findings were consistent."

After the State rested, Perry took the stand and denied molesting Daughter Two and Daughter Three. At the conclusion of the trial, the jury found Perry guilty of all charges. The trial court sentenced Perry to concurrent sentences of thirty years' imprisonment for each conviction of first-degree CSC and twenty years' imprisonment for each conviction of second-degree CSC. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err in finding Newcomer's testimony was admissible as evidence of a common scheme or plan?
- II. Did the trial court err in finding Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony?

STANDARD OF REVIEW

In criminal cases, an appellate court may review only errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the decision of the trial court is controlled by an error of law or lacks evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Newcomer's Testimony

Perry argues the trial court erred in finding Newcomer's testimony admissible as evidence of a common scheme or plan. He further contends the trial court erred in finding Newcomer's testimony more probative than prejudicial under Rule 403, SCRE. We disagree.

To admit evidence of prior bad acts, the trial court must first determine whether the proffered evidence is relevant.⁷ *State v. Clasby*, 385 S.C. 148, 154,

⁷ Perry did not challenge the relevance of Newcomer's testimony during his trial or on appeal. Therefore, we have not addressed this issue. See *State v. Scott*, 405

682 S.E.2d 892, 895 (2009). If the trial court finds the evidence relevant, the court must then determine whether the bad act evidence is admissible under Rule 404(b) to show, *inter alia*, the existence of a common scheme or plan. *Id.* Even if the testimony is relevant and admissible under Rule 404(b), the trial court must apply Rule 403 and exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.* at 155–56, 682 S.E.2d at 896.

A. Rule 404(b), SCRE

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* For evidence of a prior bad act to be admissible to show the existence of a common scheme or plan, the trial court must find the evidence (1) is clear and convincing and (2) bears a close degree of similarity to the crimes charged. *Clasby*, 385 S.C. at 155, 682 S.E.2d at 895–96.

i. *Clear and Convincing Evidence*

Perry contends there are "clear issues with whether the prior bad act occurred." He points to the fact that there was no trial and the solicitor's office did not have any records for the charges related to Newcomer's allegations.

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "[W]e do not review a trial [court's] ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing." *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 the bad act evidence, the trial [court's] ruling will not be disturbed on appeal." *Id.*; *see also Wallace*, 384 S.C. at 432 n.2, 683 S.E.2d at 277 n.2 ("Bad act evidence that is not subject to a conviction must be shown by clear and convincing evidence and is reviewed under an 'any evidence' standard on appeal.").

S.C. 489, 498 n.10, 748 S.E.2d 236, 241 n.10 (Ct. App. 2013) (declining to address the issue because the appellant "never argued the bad act testimony was not relevant").

In *Wilson*, our supreme court applied the any evidence standard of review and found a witness's testimony that she saw the defendant give a woman a plastic bag containing a white rock substance in exchange for twenty dollars was admissible evidence of a prior bad act. 345 S.C. at 6–7, 545 S.E.2d at 829–30. Focusing on the contents of the witness's testimony, our supreme court found the testimony amounted to "evidence of a prior drug transaction" and determined the issue of the witness's credibility was for the jury's consideration. *Id.*

Here, the trial court found there was clear and convincing evidence that the prior bad act had occurred. During the proffer, Newcomer provided a detailed description of the abuse, including where and when the abuse occurred and specific details of the sexual battery. As in *Wilson*, Newcomer's testimony was sufficient to provide evidence of the prior bad act and her credibility was an issue for the jury's consideration. *See id.* Thus, there is evidence to support the trial court's ruling.

ii. *Close Degree of Similarity*

Perry argues the trial court erred in finding Newcomer's testimony was admissible under Rule 404(b), SCRE, because there was not a close degree of similarity between the alleged abuse of Newcomer and the alleged abuse of Daughter Two and Daughter Three. We disagree.

If the trial court concludes there is clear and convincing evidence that the defendant committed the prior bad act, the court must determine whether the prior bad act falls within the common scheme or plan exception. *Clasby*, 385 S.C. at 155, 682 S.E.2d at 896. "When determining whether evidence is admissible as [part of a] 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." *Wallace*, 384 S.C. at 433, 683 S.E.2d at 277–78. "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." *Id.* at 433, 683 S.E.2d at 278.

In cases involving sexual abuse, the trial court should consider the following non-exhaustive list of factors when determining whether there is a close degree of similarity 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.* at 433–34, 683 S.E.2d at 278.

Our supreme court applied the above factors in *Wallace* and found that because of the close degree of similarity between the abuse suffered by both the victim of the charged offense and her sister, the sister's testimony about the prior bad act was admissible under Rule 404(b). *Id.* at 434, 683 S.E.2d at 278. Specifically, the court noted the similarities included the defendant'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." *Id.*

The *Wallace* court noted there was a difference in the type of sexual battery inflicted on the victim and her sister. *Id.* The victim testified the defendant had touched her breasts and had digitally penetrated her before she reported the abuse. *Id.* at 431, 683 S.E.2d at 276-77. However, the sister testified during an in camera hearing that digital penetration and oral sex eventually progressed to sexual intercourse. *Id.* at 434, 683 S.E.2d at 278. The trial court determined that to avoid unfair prejudice to the defendant, any testimony regarding sexual intercourse would not be allowed when the sister testified before the jury. *Id.* Our supreme court agreed with the trial court's decision to redact a portion of the sister's testimony and found it did not make the two acts seem more similar than they actually were. *Id.* Rather, our supreme court noted the trial court had "redacted only the last step in a progressive course of abuse" and "[t]he fact that [the victim's] abuse was interrupted before it could culminate in intercourse [did] not diminish the similarity between the progression the abuse took in each case." *Id.* at 435, 683 S.E.2d at 278. Our supreme court also approved of trial courts redacting "dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant." *Id.*

In the instant case, there was a close degree of similarity between the testimony of Newcomer and that of Daughter Two and Daughter Three. Applying the *Wallace* factors to Perry's abuse of all three victims, we find the following similarities: (1) the abuse primarily occurred during the victims' preteen and early teenage years; (2) Perry had a parent-child relationship with the victims; (3) the abuse always occurred at Perry's house and typically occurred in the victims' bedrooms while they were sleeping; (4) Perry used threats to prevent the victims from disclosing the abuse; and (5) the abuse primarily involved digital penetration.

Perry contends there are several dissimilarities between the charged crimes and the prior bad act. In terms of his first argument regarding the victims' ages, we acknowledge the victims' abuse did not occur for an identical length of time or at the exact same ages: (1) Newcomer stated she was abused between the ages of nine

and fourteen; (2) Daughter Three testified she was ten or eleven years old when Perry abused her; and (3) Daughter Two stated the abuse began when she was between five and seven years old and ended when she was fifteen years old.⁸ There was a discrepancy regarding when Daughter Two was first abused—Daughter Two stated the abuse could have begun when she was five years old but explained that she remembered Perry first sexually abusing her when she was seven years old. Regardless of whether the abuse began when Daughter Two was five or seven, her abuse began at an earlier age than the abuse of Newcomer and Daughter Three. However, we find this factor still amounts to a similarity in light of the fact that the abuse of all three victims primarily occurred during the victims' preteen and early teenage years.

Perry also asserts (1) the abuse allegedly occurred at different locations and times and (2) the content of the threats he allegedly made was different. All of the abuse took place at Perry's then-current home and primarily occurred in the victims' bedrooms. The abuse also occurred at night or early in the morning⁹ when the victims were in bed. In terms of threats, we note that Newcomer testified Perry told her that no one would believe her and that her accusations would hurt the family, while the threats to Daughter Two and Daughter Three focused on the fact that they would get into trouble and would be taken away from Mother. These threats all share a common thread—potential harm to the family unit. Furthermore, although the threats were not identical, the wording is less important than the fact that all of the threats were made in an attempt to prevent the victims from disclosing the abuse.

Finally, Perry points to the fact that Newcomer and the State "indicated the sexual abuse progressed to intercourse" and the court redacted that portion of her testimony, but Daughter Two and Daughter Three did not make similar allegations. However, Newcomer never testified that intercourse occurred. During a discussion

⁸ According to Perry, Daughter Two claimed she was abused until she was almost seventeen years old. However, Daughter Two was explaining how old she was when Perry moved to Columbia when she referred to being almost seventeen years old. Daughter Two stated Perry did not abuse her when he lived in Columbia, and she explicitly stated on cross-examination that the abuse ended when she was fifteen years old. We note other witnesses stated she informed them the abuse ended when she was sixteen years old.

⁹ Newcomer never stated a specific time the abuse occurred, only that it occurred at night; however, Daughter Two and Daughter Three testified the abuse occurred between five and six a.m., when it was still dark outside.

with the trial court before the proffer, the solicitor noted that unlike with Daughter Two and Daughter Three, Perry's abuse of Newcomer "progress[ed] on into actual vaginal/penile penetration." The solicitor acknowledged that portion of Newcomer's account of the abuse would "not be admissible because it [went] beyond the scope of similar" and could be excluded by the court pursuant to *Wallace*. During the proffer, Newcomer testified that Perry had digitally penetrated her numerous times and then stated the abuse progressed when she was thirteen or fourteen. She stated, "One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left." Before the jury, Newcomer testified regarding the digital penetration and included the fact that the abuse had progressed to oral sex once. Although Newcomer's proffered testimony regarding the abuse progressing and the penetration starting could have been a reference to sexual intercourse, it is not clear from her testimony whether sexual intercourse occurred. Because the only information in the record about Perry and Newcomer engaging in sexual intercourse came from the solicitor, this court cannot consider that information when determining whether Newcomer's testimony was admissible under Rule 404(b). See *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."). However, even assuming arguendo that sexual intercourse occurred and can be considered by this court, it was permissible for the trial court to redact any dissimilar portions of Newcomer's testimony in light of all of the existing similarities. See *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278 ("[T]he trial court may properly redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant.").

In light of the foregoing, the similarities of the prior bad act and the charged crimes outweigh the dissimilarities. See *id.* at 433, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)."). Accordingly, the trial court did not abuse its discretion in finding Newcomer's testimony was admissible under Rule 404(b), SCRE. See *Saltz*, 346 S.C. at 121, 551 S.E.2d at 244 (stating "[t]he admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion").

B. Rule 403, SCRE

Perry next contends that if this court finds Newcomer's testimony admissible under Rule 404(b), it should still be excluded because the probative value of the

testimony was substantially outweighed by the danger of unfair prejudice. We disagree.

Once the prior bad act is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278. Rule 403 states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" "[E]ven though we have already considered, pursuant to Rule 404(b), whether the similarities outweighed the dissimilarities, we must now reconsider the similarities and dissimilarities, as well as temporal remoteness and other factors, pursuant to Rule 403" *Scott*, 405 S.C. at 506, 748 S.E.2d at 245; *see also State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601–02 (Ct. App. 2012) (reconsidering the similarities of the prior bad act and the charged crime to ascertain total probative value and, subsequently, comparing this probative value to the danger of unfair prejudice).

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "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. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

Perry first argues the trial court, when performing its Rule 403 analysis, failed to consider the fact that Newcomer testified the abuse progressed to intercourse, which was different from Daughter Two's and Daughter Three's testimony. As noted above, the only information in the record about Perry and Newcomer engaging in sexual intercourse came from the solicitor during a discussion with the trial court before the proffer; Newcomer never explicitly testified intercourse occurred. Therefore, the trial court was not permitted to consider this information. *See Ex parte Morris*, 367 S.C. at 64, 624 S.E.2d at 653 ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.").

Perry also contends the prior bad act testimony was inadmissible under Rule 403 because there was an issue regarding whether the prior bad act actually occurred. We are cognizant of the fact that Perry was never convicted of the prior bad act; however, as stated above, the trial court correctly found there was clear and convincing evidence that the prior bad act occurred.

Perry next asserts the prior bad act testimony was inadmissible under Rule 403 because of the temporal remoteness between the prior bad act and the charged offenses. When remoteness is an issue in a case, it "is pertinent to determining total probative value." *Scott*, 405 S.C. at 506, 748 S.E.2d at 245. Nonetheless, the trial court does not necessarily err when it permits testimony about a bad act occurring many years prior to the charged crime. See *State v. Tutton*, 354 S.C. 319, 332 n.5, 580 S.E.2d 186, 193 n.5 (Ct. App. 2003) ("Remoteness in time, however, is not dispositive."); see also *Scott*, 405 S.C. at 509, 748 S.E.2d at 247 ("The trial court did not abuse its discretion in admitting evidence of [the appellant's] bad acts, occurring some eleven to twenty years prior to the crimes charged."); *State v. Blanton*, 316 S.C. 31, 33, 446 S.E.2d 438, 440 (Ct. App. 1994) ("That the alleged acts perpetrated against the two witnesses occurred some seven to eight years prior to the alleged molestation of [the victim] is not alone dispositive."). Although the prior bad act occurred seven to nine years before the abuse of Daughter Two and fourteen or fifteen years before the abuse of Daughter Three,¹⁰ we do not believe this gap diminishes the probative value of Newcomer's testimony, especially when considering the fact that Daughter Two and Daughter Three were not born until approximately two and four years, respectively, after the abuse of Newcomer ended.

Furthermore, the similarities between the prior bad act and the charged crimes outweigh the dissimilarities, and the dissimilarities do not result in the danger of unfair prejudice substantially outweighing the probative value. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ."). Accordingly, the trial court did not abuse its discretion in admitting Newcomer's testimony. See *Saltz*, 346 S.C. at 121, 551 S.E.2d at 244 (stating "[t]he admission or exclusion of evidence is left to the sound discretion of the trial [court]," and the court's "decision will not be reversed on appeal absent an abuse of discretion").

II. Improperly Commenting on Veracity of Testimony

¹⁰ Newcomer was thirty-six at the time of the December 2014 trial and testified the abuse ended when she was fourteen years old, or in approximately 1992. Daughter Two testified she was born in 1994 and the abuse began when she was between five and seven years old, or between approximately 1999 and 2001. Daughter Three testified she was born in 1996 and the abuse began when she was about ten or eleven years old, or in approximately 2006 or 2007.

Perry argues the trial court erred in finding Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony. We disagree.

"While experts may give an opinion, they are not permitted to offer an opinion as to the credibility of others." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013).

In *State v. Jennings*, our supreme court considered the admission of a forensic interviewer's reports, which included statements that each child victim had provided "a compelling disclosure of abuse" and had provided details that were consistent with the background information the forensic interviewer had received from their mother, the police report, and the other children. 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Our supreme court found the trial court erred in admitting the reports, stating, "There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." *Id.*; see also *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (finding the forensic interviewer's testimony about a "compelling finding" was inappropriate because it "was the equivalent of [the forensic interviewer] stating [the victim] was telling the truth"); *State v. Dawkins*, 297 S.C. 386, 387, 393–94, 377 S.E.2d 298, 299, 302 (1989) (finding improper a psychiatrist's affirmative response when asked his opinion as to whether the victim's symptoms of sexual abuse were "genuine"); *State v. Dempsey*, 340 S.C. 565, 568–69, 571, 532 S.E.2d 306, 308–09 (Ct. App. 2000) (finding an expert in child sexual abuse improperly vouched for the victim when he testified that children are truthful in ninety-five to ninety-nine percent of the instances in which sexual abuse is alleged).

However, when the expert witness gives no indication about the victim's veracity, it does not amount to bolstering. In *State v. Douglas*, a forensic interviewer described the method she generally used to interview child sexual abuse victims and stated that after she interviewed Douglas's victim, she recommended the victim be taken for a medical examination. 367 S.C. 498, 516–17, 626 S.E.2d 59, 68–69 (Ct. App. 2006). This court considered the forensic interviewer's testimony and found "[t]he only reasonable inference the jury could have drawn from [the interviewer's] testimony [was] that she believed the victim told the truth about being sexually assaulted." *Id.* at 520, 626 S.E.2d at 71. Despite this finding, this court determined the defendant had not shown the jury's verdict was influenced by the interviewer's testimony, and it ultimately affirmed the defendant's conviction. *Id.* at 520–21, 527, 626 S.E.2d at 71, 74. Our supreme

court granted certiorari and affirmed the result; however, it determined the court of appeals erred in concluding the only reasonable inference to be drawn from the forensic interviewer's testimony was that she believed the victim was telling the truth. 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009). Our supreme court noted the forensic interviewer described her general procedure for conducting a forensic interview, stating she and the child she was interviewing would talk "a lot about telling the truth" and would make "an agreement with each other that [she would] tell [the child] the truth and that [the child would] tell [her] the truth[;] if [they got] past that, if the child [agreed] to do that, [they would] go on." *Id.* at 504, 671 S.E.2d at 609. However, our supreme court noted that when the forensic interviewer described her interview with the victim in the case at issue, she "never stated she believed [the victim]; she did not even state the [victim] . . . agreed to tell her the truth, and she gave no indication concerning [the victim's] veracity." *Id.* at 503–04, 671 S.E.2d at 609; *see also State v. Smith*, 411 S.C. 161, 172–73, 767 S.E.2d 212, 218 (Ct. App. 2014) (finding the State's question regarding whether the length of a delay affects the credibility of a disclosure of abuse was inappropriate because it invited vouching and the social worker's initial response, when viewed in isolation, would constitute vouching, but ultimately finding no reversible error after considering the entirety of the social worker's testimony and recognizing the social worker had qualified his response and had never given an opinion regarding whether the victim was telling the truth).

In the instant case, the following exchange occurred during Dr. Henderson's discussion of her examination of Daughter Three:

Q. Okay. Based on what Daughter Three shared with you, did you expect to find any indications of injury?

A. It would have been very unlikely based on the information that she had shared to find anything on the exam. . . . The incidents had happened at least three years prior. So the genital area has incredibly good blood supply and even small tears or even larger tears can heal very, very quickly. So with there being years delay between the last incident and the time of the exam, it would make it unlikely to find something on the exam. . . .

Q. [W]hat were the findings of your examination?

A. She had a little bit of discharge. . . . [T]he rest of her exam was normal.

Q. And what is -- what does normal mean?

A. Normal means that there were no tears, no scars, . . . and there were no specific findings on her exam that in and of itself would have linked to allegations of abuse. But in light of what she had shared with me and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case.

Q. So in your opinion, were your findings consistent with Daughter Three having experienced sexual abuse?

A. Yes.¹¹

Although the "consistent with sexual abuse" question was inartfully worded, the response it elicited did not amount to improper bolstering. Arguably, when considered in isolation, Dr. Henderson's response could be interpreted as she believed Daughter Three's allegations and, therefore, also believed Daughter Three could have been sexually abused despite her normal examination. However, when reviewing the entirety of Dr. Henderson's testimony, it is unlikely her response would reasonably be viewed by the jury as a comment on the credibility of Daughter Three. *See Smith*, 411 S.C. at 172-73, 767 S.E.2d at 218 (considering the objected-to response of the expert witness in the context of his entire testimony and finding the expert's testimony did not improperly bolster the victim's credibility). Dr. Henderson explained that Daughter Three's examination was normal and "there were no specific findings on her exam that . . . would have

¹¹ Dr. Henderson also testified that Daughter Two had a normal examination, which she said was "quite common . . . with those type of allegations." When asked whether her findings regarding Daughter Two were consistent with the possibility that Daughter Two had also experienced sexual abuse, Dr. Henderson stated, "Yes, a normal exam would be consistent with those types of findings, with those allegations that she had made." She explained that even with long-term abuse, it is very uncommon to see evidence of the abuse during the examination. Perry did not object to this testimony during the trial and has not challenged this testimony on appeal.

linked to allegations of abuse." She also noted that normal results are common in instances where there is a delayed disclosure. In light of this testimony, the most likely interpretation of Dr. Henderson's response to the "consistent with sexual abuse" question is that normal examination results do not rule out a sexual assault in delayed disclosure cases. *Cf. Chavis*, 412 S.C. at 109, 771 S.E.2d at 340 (finding the expert's recommendation that the appellant not be around the victim for any reason could "*only be interpreted* as [the expert] believing [the victim's] claim that [the appellant] sexually abused her" (emphasis added)); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding the trial court erred in admitting the forensic interviewer's reports because "[t]here [was] no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the [child victims] were being truthful" (emphasis added)).

Moreover, although Dr. Henderson mentioned that she considered Daughter Three's history, Dr. Henderson did not comment on the truthfulness of that history or repeat to the jury the details of what Daughter Three had told her. Additionally, she never commented on Daughter Three's veracity. *See Douglas*, 380 S.C. at 503-04, 671 S.E.2d at 609 (finding the forensic interviewer did not vouch for the victim's veracity when the interviewer never stated she believed the victim and gave no other indication concerning the victim's veracity). Furthermore, Dr. Henderson was permitted to provide this opinion, as it could assist the jury in understanding the effect of a delayed disclosure on the results of a medical examination. *See Rule 702, SCRE* ("If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). Accordingly, we affirm the trial court's determination that Dr. Henderson did not improperly comment on the veracity of Daughter Three's testimony.

CONCLUSION

For the foregoing reasons, we affirm Perry's convictions.

AFFIRMED.

MCDONALD and HILL, JJ., concur.

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,



KERRI A. RUPERT
krupert@murphygrantland.com
Post Office Box 6648
Columbia, South Carolina 29260
(803) 454-1253 (voice)
(803) 782-4140 (facsimile)

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 10 2017

SC 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

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:

Vann Henry Gunter, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,
MURPHY & GRANTLAND, P.A.

By: 
KERRI A. RUPERT
krupert@murphygrantland.com
Post Office Box 6648
Columbia, South Carolina 29260
(803) 454-1253 (voice)
(803) 782-4140 (facsimile)

ATTORNEY FOR APPELLANT

PETITION FOR REHEARING

Columbia, South Carolina
August 10, 2017

The South Carolina Court of Appeals

The State, Respondent,

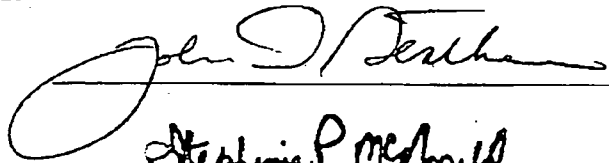
v.

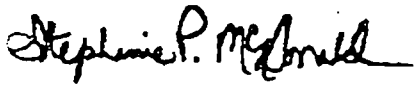
Wallace Steve Perry, Appellant.

Appellate Case No. 2014-002654

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Kerri Brown Rupert, Esquire
Vann Henry Gunter, Jr., Esquire

FILED

August 24, 2017

William Walter Wilkins, III, Esquire
The Honorable Edward W. Miller