STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Pickens County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS KELLY PHILLIPS,

APPELLANT

APPELLATE CASE NO. 2016-001875

FINAL BRIEF OF APPELLANT

RECEIVED

JAN 08 2018

SC Court of Appeals

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A. The State failed to prove the existence of the alleged prior bad acts by a preponderance of the evidence.

B. The trial court erred in admitting testimony from Minor that Appellant molested her when Appellant first started dating Minor's mother as Minor's testimony constituted inadmissible propensity.

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Appellant for two counts of criminal sexual conduct with a minor, second degree, and one count of criminal sexual conduct with a minor, third degree. Appellant's case proceeded to a jury trial before the Honorable Thomas A. Russo on July 25, 2016. R. 1. Cheryl Aaron represented Appellant. Assistant Solicitor Christopher Jones represented the State. R. 1.

After a two-day trial, the jury found Appellant guilty. R. 217, ll. 14-24. Judge Russo sentenced Appellant to twenty years' imprisonment. R. 218, ll. 8-25. Appellant appealed his conviction and sentence. This appeal follows.

ARGUMENT

The trial court erred in ruling, in a child molestation case, that testimony from the complainant Minor that Appellant had molested her on prior occasions was admissible under *State v. Lyle* and the Rule 404, SCRE.

Relevant Facts

During a doctor's appointment on July 30, 2013, Minor, then thirteen years old, disclosed to her pediatrician that she had been having sex with at least one and possibly up to three adult men. R. 92, ll. 6-25. In response to Minor's claims, the pediatrician called the police.

Pickens County Investigator Jonathan Hamby interviewed Minor later that day. R. 149, l. 3 – 151, l. 7. Minor first disclosed that she had had sex with an adult man, not Appellant. Supp. R. 1, ll. 6 – 2, l. 16. Only after making this first allegation, did Minor then accuse Appellant, Minor's mother's longtime boyfriend, of also having sex with her. *Id.*

At trial, Investigator Hamby recalled that Minor claimed Appellant last had sex with her on July 28, 2013. R. 149, l. 18 – 150, l. 24. According to Hamby, Minor also alleged that Appellant had sex with her on July 26, 2013. *Id.* Hamby further recollected that Minor claimed a third sexual encounter with Appellant occurred sometime during the week of July 14-20, 2013.

In the first instance of what would become a recurring issue with the State's allegations against Appellant, Minor could not remember the day that Appellant first purportedly raped her. *Id.* After disclosing these three specific instances, Hamby stated that Minor expanded her allegations accusing Appellant of having abused her for years, "then [the allegations of abuse] spread over a course of years of different variety of abuse." R. 150, ll. 21-24.

When questioned by law enforcement starting around 10:00 a.m. on July 30, 2013, Appellant denied having sex with Minor. R. 154, l. 1 – 158, l. 20. Appellant told police that

Minor may have seen Robinson and him having sex on the previous Sunday. Appellant explained that he and Minor had been watching a movie in her room and that Robinson had joined them to watch the movie. *Id.*

Appellant and Robinson, believing that Minor had fallen asleep, began having sex in Minor's room. *Id.* They stopped when Minor woke up. *Id.* Appellant denied sexually touching Minor, but explained that – about a year before Minor made her allegations – she had tried on several occasions to touch him in his genitals. *Id.*

Each time, he had stopped Minor and told her that she was not supposed to do that. *Id.* Appellant told Robinson about these incidents and Robinson disciplined Minor. Appellant was arrested when the interrogation ended. The State filed three charges against Appellant, all stemming from Minor's allegation that Petitioner had sex with her three times from July 14-28, 2013. R. 221 – 226.

Robinson, Minor's mother and Appellant's girlfriend, was at the doctor's office when Minor made the allegations. She was also interrogated by police. Robinson confirmed that she and Appellant had started having sex in front of Minor on July 28, 2013 and that Minor had woken up while they were having sex. She recalled that the sex was spontaneous, "it's not like we [doing] it on purpose." R. 146, l. 15.

Pre-Trial Hearing on alleged prior, uncharged incidents of sexual molestation.

The State moved pretrial to introduce allegations from Minor that Appellant had sexually abused her over a period of six to seven years prior to allegedly having sex with her three times in July, 2013. R. 89, l. 7 – 90, l. 9. The State alleged that the uncharged, prior bad acts were admissible under as evidence of a common scheme or plan Rule 404(b), SCRE, and first established in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). *Id.*

At the proffer Minor testified that she met Appellant when he and her mother, Robinson, started dating. Minor first claimed the two started dating when she was six or seven in 2006-2007. R. 97, ll. 6-8. Under this version of events, Minor claimed that Appellant began touching "her breasts and vaginal area" almost immediately after he started dating her mother. R. 98, ll. 1-13. This continued for "a while." *Id.* Minor did not provide a start date, an end date, or in any way indicate how often the sexual touching occurred or for how long. *Id.* Minor alleged that she told her mother, but that her mother did not believe her. R. 99, ll. 3-6.

Later in the same hearing, Minor testified to an entirely different version of events. In this second scenario, she met Appellant in 2009-2010, six or seven years before Appellant's July, 2016 trial. R. 106, l. 22 – 108, l. 9. *Id.* Complicating matters, Minor repeatedly, and incorrectly, stated that she met Appellant when she was nine; only to then deny meeting Appellant in 2009, when she would have been nine years old, "I wasn't saying 2009. I was nine years old." R. 106, l. 14.

The times and descriptions of the alleged, uncharged prior bad acts were as nebulous and contradictory as Minor's recollection of when she first met Appellant. The only prior molestation described in any detail allegedly occurred during a visit to a lake in McCormick County.

Minor claimed that Appellant forced her to perform oral sex on him while he touched her "breasts and vaginal area." She averred this incident occurred when she was nine years old. R. 99, l. 9 – 104, l. 14. Minor said this incident occurred in Appellant's camper and that no one else was witnessed it. *Id.*

Defense counsel asked Minor why she thought she was nine years old when incident in McCormick County occurred. The following exchange revealed that Minor, born in 2000 and

seventeen years old at the time of trial, had significant difficulty remembering when Appellant purportedly started molesting her:

Q: Why do you think -- why do you think that that – why does that stick out in your mind that you were nine if you went there many times?

A: I mean, because we went down there a lot, but like I know I was nine.

Q: How do you know you were nine?

A: Because that's my age. I know my age.

Q: So would that been – what month would that have been?

A: Like – it was like we went down there for the 4th of July.

Q: **So this 4th – it would have been July of 2009?**

A: **No.**

Q: **When would that have been?**

A: **Like – in like August.**

Q: **What year?**

A: **What year? 2013.**

Q: **So in 2013 you – in August of 2013 is when you're alleging this McCormick [incident] happened?**

A: **Yes, ma'am.**

Q: Okay. And you say that you met Kelly Phillips six or seven years ago?

A: Yes, ma'am.

Q: So that would have been 2010, ---

A: Yes, ma'am.

Q: -- 2009? So you're talking about six or seven years from now?

A: Yes, ma'am.

Q: The solicitor asked you before, I guess, of July 2013 ---

A: Yes, ma'am.

Q: --- if Mr. Phillips had ever touched -- well, [the solicitor] says touched you inappropriately. So you said breasts and vaginal area?

A: **Yes, ma'am.**

Q: **And when did you say that that happened?**

A: **It was in July.**

Q: **In July of 2013?**

A: **Yes, ma'am.**

Q: **Okay. So you met him in 2010 and he touched your vaginal area and your breasts in 2013?**

A: **Yes.**

Q: Okay. Any time before then?

A: Yes.

Q: All right. When before then?

A: Like when I was young. I was like seven. Well, I was seven.

Q: How do you remember you were seven?

A: Because I remember my age.

Q: **And what happened when you were seven?**

A: **He touched me inappropriately.**

Q: **And that would have been what year?**

A: **Like it was in 2013.**

Q: It was in 2013 ---

A: Yes.

Q. --- was the first time that he touched you inappropriately?

A: Yes.

R. 105, l. 23 – 108, l. 9. (*emphasis added*). Minor was the State's only witness at the pretrial hearing.

Pickens County Public Index records reflect[1] that Appellant was arrested on July 28, 2013 and did not obtain pretrial release until September 6, 2013. **Appellant spent all of August, 2013 in pretrial detention.**

Despite the obvious problems with Minor's testimony, the State argued that Minor had "alleged touching for several years culminating" in Appellant having sex Minor three times in July, 2013. R. 108, ll. 18-25. The State excused Minor's incoherent and contradictory testimony about the alleged prior bad acts reasoning that, "she's low I.Q." R. 110, ll. 3-7.

The Assistant Solicitor conceded, "I think it was obvious [Minor] got confused as to some of the dates, Your Honor. . . . I think it was clear that she indicated there were several years of sexual touching." R. 109, ll. 1-7. Nevertheless, the State argued that Minor's inability to provide a coherent time frame for the prior uncharged incidents abuse was irrelevant to determining whether the acts were admissible. Instead, the State advanced that once Minor alleged that sexual touching began when Appellant and Robinson started dating, the alleged prior bad acts were admissible irrespective of the rest of Minor's testimony. *Id.*

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[1]These records are available at http://publicindex.sccourts.org/Pickens/PublicIndex/CaseDetails.aspx?County=39&CourtAgency=39001&Casenum=2013A3920400817&CaseType=C&HKey=52101110821147798102491191031071131044947971049052119518910884671071191214879701148055865710386111501026 9.

The defense countered that Minor's testimony was a series of contradictory, summary allegations using almost clinical terms to describe the abuse. The only definite statement Minor made alleged that the sexual abuse began in July, 2013. R. 109, l. 9 – 111, l. 2. Defense counsel further argued that Minor had unequivocally dated the McCormick County incident to August, 2013. R. 97, l. 2 – 108, l. 9. It was chronologically impossible for Appellant to have forced Minor to perform oral sex on him in McCormick County in August, 2013. Appellant was incarcerated the entire month.

The trial court ruled that the prior bad act testimony was admissible. The court believed that since Minor had, at one point during her testimony, "stated that the touching started when [Appellant] started seeing her mother," the existence of the prior bad acts was sufficiently proven, even if Minor provided two different dates for when Appellant and her mother started dating. R. 109, l. 22 – 111, l. 2.

Discussion

The purpose of Rule 404 is to prevent the admission of propensity evidence. Rule 404(a) plainly states that evidence "of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith. . . ." SCRE 404(a).

Rule 404(b) repeats this logic. 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 404(b). However, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan,* 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

The "acid test of admissibility is the logical relevancy of the other crimes." *State v. Timmons*, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). To be admissible, the bad act must

logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000).

Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 404(b), SCRE; *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007) (trial court must gauge logical relevancy of prior bad act, whether it reasonably tends to prove a material fact in issue, to the particular purpose for which it is sought to be introduced).

In admitting the alleged prior bad acts, the trial court failed to evaluate whether the State had proven the prior bad acts by a preponderance of the evidence. The trial court's analysis also skipped the important sentences of Rule 404, SCRE, prohibiting the admission of propensity evidence.

Instead, the trial court examined only the exceptions, specifically the exception for common scheme or plan. The trial court failed to ask whether the evidence was being offered to prove "action in conformity therewith"—propensity evidence.

A. The State failed to prove the existence of the alleged prior bad acts by a preponderance of the evidence.

Where alleged prior bad acts are not the subject of a conviction, they must first be proven by clear and convincing evidence. *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous." *State v. Tutton,* 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct.App.2003) (citing *State v. Wilson,* 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)).

Clear and convincing evidence is defined as:

> [T]hat degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 483 (2008) *citing Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282, 283 n. 4 (1996).

Fletcher is instructive. In *Fletcher*, our Supreme Court reversed the defendant's conviction for homicide by child abuse based on the trial court's admission of prior bad acts that the State failed to prove occurred by clear and convincing evidence. *Id.* at 24, 664 S.E.2d at 483.

Fletcher was convicted in the death of his girlfriend's nine-month old son. *Id.* at 20-21, 664 S.E.2d at 481-482. The child died as a result of injuries sustained to his abdomen. *Id.* Fletcher and his girlfriend were tried jointly. *Id.* At trial, Fletcher's friend, Carlos Jenkins, testified that two weeks prior to the child's death, he found the child sitting in a walker in the attic of the girlfriend's house. The child was sweating and in obvious distress. *Id.*

Jenkins further testified that he once found the child handcuffed to Fletcher and his girlfriend's bed. This occurred also occurred around two weeks before the child's death. In both instances, Fletcher and the girlfriend were home. However, Jenkins admitted that he did not know who placed the child in the attic or handcuffed the child to the bed. *Id.*

The Supreme Court held that these two prior bad acts were inadmissible. "[T]here is simply not clear and convincing evidence in the record that Fletcher committed the prior bad acts testified to by Jenkins. . . . [T]here was no evidence whatsoever introduced at trial that Fletcher was either the person who placed Jaquan in the attic, or that he handcuffed him to the bed." *Id.* at 24, 664 S.E.2d at 483.

In reversing Fletcher's conviction, the Supreme Court cited to *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998). Cutro and her husband ran a daycare center. In 1993, two children died while in their care. The first died in January, the second in September. In June, 1993, a third child was diagnosed with shaken baby syndrome. 332 S.C. at 104-105, 504 S.E.2d at 324-325. Cutro was only indicted for the murder of the child that died in September. *Id.*

Cutro's murder conviction for the death of the one child was reversed based on the trial court's erroneous admission of evidence of the second child's death and the third child's diagnosis as prior bad act evidence. *Id.* The evidence presented at trial showed that on the day that first child died, Cutro spent most of the day running errands and that the child was left in her husband's care. *Id.* at 104, 504 S.E.2d at 326.

Similarly, the injuries sustained by the child diagnosed with shaken baby syndrome had to have occurred within seventy-two hours prior to the child being taken to the hospital. *Id.* Medical experts further concluded that it was likely the injuries were sustained within twenty-four hours of the child's admission to the hospital. *Id.*

Looking at the twenty-four hour time period before the child's admission to the hospital, the Court concluded that Cutro, her husband, and the child's mother all had access to the child. Testimony at trial suggested that the child appeared sick when he arrived at Cutro's daycare six hours before he was admitted to the hospital. *Id.*

The Court determined that evidence that other people had access to the children during the window of time when the injuries or death occurred prevented the State from sufficiently proving the prior bad acts. The Court concluded that the evidence was insufficient to establish that Cutro "was the actor" in either the first child's death or the second child's injuries. *Id.* at 106, 504 S.E.2d at 327.

Taken together, *Cutro* and *Fletcher*, illustrate the "degree of proof" required under the clear and convincing evidence standard. In both cases, it was not enough for the State to show that the defendant was one of several potential people who could have committed the prior bad acts. Rather the State had to present evidence that the defendants, and the defendants alone, were responsible for the alleged prior bad acts. *State v. Cutro*, 332 S.C. at 106, 504 S.E.2d at 327.

Here, the trial court admitted the uncharged, alleged prior bad acts without considering whether or not the State had proven the existence of the act by clear and convincing evidence:

> Well, I mean, I'm just pointing out that I think there's – if not, there is – there's testimony somewhere in this record, because I recall somebody saying it, that he started seeing her mother about six or seven years before this charge came down. And she said that the inappropriate touching began once he – when he started dating her mother. . .
>
> [H]e asked her when did that begin. And she said when he started dating her mama. . . .
>
> I'm going to allow it in.

R. 110, ll. 8-22. Appellant was charged with three specific instances of sexual conduct with Minor. All of the indicted offenses were alleged to have occurred in July, 2013 when Minor was thirteen years old.

At the pre-trial hearing, Minor was unable to provide a consistent, chronologically possible timeline for the alleged prior bad acts of sexual touching. First she claimed the abuse started when she was six or seven when she was six or seven years old. R. 103, l. 14 – 108, l. 9. Later, she stated that the abuse started when she was nine. *Id.* Finally, when asked to give a specific year for the start of the abuse, she stated that the abuse began in July, 2013. *Id.*

Furthermore, Minor alleged that Appellant forced her to perform oral sex on him during a visit to a lake in McCormick County. *Id.* When asked to provide a date for this alleged incident, Minor claimed that it occurred in August, 2013. *Id.* This was impossible. Minor disclosed the abuse on July 30, 2013. Appellant was arrested on July 31, 2013 and spent all of August, 2013 incarcerated.

The State and the trial court cited to *State v. Kirton*, 381 S.C. 7, 671 S.E.2d107 (Ct. App. 2007) to support the admissibility of the alleged prior bad acts as evidence of a prolonged pattern of "grooming and continuous illicit activity." *Kirton* is readily distinguishable and aptly illustrates how the prior bad acts in Appellant's case were not proven by clear and convincing evidence.

In *Kirton*, this Court upheld admission of prior, uncharged acts of sexual abuse admissible under Rule 404(b) and *Lyle*, this Court noted that:

> The **six to seven year pattern of escalating abuse** of Victim by Kirton is the essence of grooming and continuous illicit activity. Kirton began by rubbing the minor victim's breasts, proceeded to make her touch his penis, began touching her vagina as she got older, and finally culminated the sexual abuse by engaging in the intercourse for which he was charged. **The prior sexual acts did not take place just once or twice, six or seven years ago. Victim indicated they happened several times a month for years.** While the prior sexual acts are not the same as the exact crime for which Kirton was charged, **Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents.**

Id. at 24, 671 S.E.2d at 114-115.

Minor's testimony gave no evidence "continuous illicit activity" or a "clear pattern of escalating abuse." Rather, even in the light most favorable to the State, Minor testified that Appellant touched her "breasts and vaginal area" when Appellant and her mother first began dating. This was either in 2006 or 2009. R. 97, l. 6 – 98, l. 16.

Under both of these versions of events, Minor testified that the touching stopped until July, 2013. *Id.* Moreover, under Minor's third version of events, there were no prior bad acts, Appellant began touching her sometime during July, 2013 and then proceeded to have sex with her on three occasions. . R. 103, l. 14 – 108, l. 9.

Minor's allegations of prior bad acts of sexual touching cannot be equated with the specific "continuous illicit activity" testified to in *Kirton*. 381 S.C. at 24, 671 S.E.2d at 114-115. The *Kirton* victim's testimony was chronologically conceivable, supported by the testimony of a forensic interviewer, and provided significantly more detail on the "continuous illicit activity. . . demonstrating a clear pattern of escalating abuse" than Minor's allegations of isolated, infrequent, and seemingly chronologically impossible instances of sexual abuse. *Id.*: R. 97, l. 2 – 108, l. 9.

The trial court erred in concluding that the State had proven the alleged prior bad acts of sexual touching by clear and convincing evidence. The trial court's acceptance of three mutually exclusive allegations of uncharged prior bad acts cannot be dismissed as an exercise of "sound discretion." *State v. Kirton*, 381 S.C. at 24, 671 S.E.2d at 114-115.

Nor can this Court affirm the trial court's admission of testimony regarding the August, 2013, incident where Minor alleged Appellant forced her to perform oral sex on him. R. 97, l. 6 – 108, l. 9. This incident could not have happened. Appellant was incarcerated for all of August, 2013. *Id.* Admitting this evidence was an error amounting to an abuse of discretion requiring reversal. *See State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

Accordingly, the State failed to present clear and convincing evidence establishing a firm belief that the alleged prior – and subsequent – bad acts occurred. Appellant is entitled to a new trial.

B. The trial court erred in admitting testimony from Minor that Appellant had molested her when Appellant first started dating Minor's mother as Minor's testimony constituted inadmissible propensity.

The trial court committed a legal error by not beginning its Rule 404(b), SCRE and *Lyle* analysis of the prior bad act evidence by asking: what is this evidence being offered to prove? R. 110, ll. 8-24; *see also* Rule 403, SCRE; Rule 404(a), SCRE. Instead, the trial court determined the admissibility of the alleged, uncharged prior bad acts as if the only bar to admission was whether the charged offenses and the alleged uncharged prior bad acts were similar. *Id.*

Further, the trial court seemed to conclude that since Minor was the complaining party in both the charged acts and the uncharged, prior bad acts, the prior bad acts were sufficiently similar to the charged offenses and that any discrepancies in Minor's testimony went to weight, not admissibility. *Id.*

Had the trial court started its analysis of the alleged, uncharged prior bad acts by asking: what is the evidence being offered to prove? It would have been clear that the only possible reason for eliciting this evidence was to implant in the minds of the jurors a single poisonous thought: "he did it before to Minor, so he probably did it again." This conclusion is "action in conformity herewith." It is propensity evidence. It is irrelevant. It is inadmissible.

The three South Carolina cases most relevant to this issue are *State v. Fonseca* 383 S.C. 640, 681 S.E.2d 1 (Ct. App 2009) *affirmed and adopted by State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (2011) ; *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009) and *State v. Cope*, 405 S.C 317, 748 S.E2d 194 (2013). In *Fonseca*, this Court held that the trial court reversibly erred in admitting evidence of an alleged, uncharged prior bad act. 383 S.C. at 647-649, 681 S.E.2d at 4-5. Fonseca originally proceeded to trial on two counts of committing a lewd act on a minor. *Id.*

The first incident allegedly occurred in 2001 when Fonseca exposed himself to minor, his wife's younger sister, and touched her genitals. *Id.* The second incident allegedly occurred in 2003 when minor alleged that Fonseca followed her into a room where he forced her to the ground, and simulated intercourse with her. *Id.* There were no allegations of a continuous course of abuse, the State alleged only these two isolated incidents. *Id.*

The trial court forced the State to elect which of the two charges it wanted to proceed on. The State proceeded on the charge relating to the 2003 incident. *Id.* However, the State successfully moved to have evidence of the 2001 incident submitted under the Rule 404(b), SCRE, exception for evidence of intent or motive. *Id.*

On appeal, this Court rightly rejected the State's motive and intent reasoning as "a thin disguise" for admitting improper character evidence. *Id.* This Court started its analysis by asking: why was the bad act evidence being introduced? *Id.* After determining that the 2001 incident constituted character evidence, this Court then evaluated whether any of the exceptions found in Rule 404(B), allowing character evidence applied. *Id.*

The Court concluded that motive and intent were not material issues as sexual gratification is almost always the obvious motive in sexual assault cases and Fonseca's defense was to deny any sexual contact occurred. *Id.* Next this Court rejected the State's alternate sustaining ground argument that the 2001 incident was admissible as evidence of a common scheme or plan. *Id.* at 649-650, 681 S.E.2d at 5.

Despite the complainant being the same in the 2001 and 2003 incidents, this Court held that "the State provides no compelling arguments of any similarities between the two occurrences or any argument to overcome the fact that the two incidents are remote in time." *Id.*

Accordingly, this Court concluded that the 2001 incident could not have formed part of a common scheme or plan culminating in the 2003 incident. *Id.*

In *Wallace*, the Supreme Court held that evidence from the complainant's sister alleging that Wallace sexually abused her beginning when she was in the seventh grade was admissible as evidence of a common scheme or plan. 384 S.C. at 433-434, 683 S.E.2d at 277-278. The complainant testified that Wallace sexually abused her once she reached the seventh grade. *Id.*

The two accounts of sexual abuse were broadly similar. The abuse began at the same age, the complaints had the same relationship to Wallace (stepdaughters), the abuse occurred in the family home when the mother was absent, and Wallace reportedly always gave the sisters the same admonishment not tell anyone about the abuse. *Id.*

The Court concluded, applying the maxim that "proof of one was strong proof of the other," that the "close degree of similarity" made the sister's allegations relevant and admissible under Rule 404(b), SCRE. *Id.* Curiously, whether by omission of the parties or the Court, *Wallace* does not address the general prohibition on character evidence found in Rule 404(a), SCRE.

Following *Wallace*, the Supreme Court granted certiorari to review this Court's *Fonseca* opinion. 393 S.C. at 229, 711 S.E.2d at 906. The Supreme Court affirmed and adopted *Fonseca*, "[t]he Court of Appeals properly held that the circuit court erred in permitting the State to introduce evidence of the 2001 incident, and properly summarily disposed of the State's additional sustaining ground, and in doing so anticipated our decision in *State v. Wallace*." *Id.* (*internal citations omitted*).

More recently, in *State v. Cope*, the Supreme Court affirmed Cope's conviction for the rape and murder of his daughter by Cope's co-defendant. 405 S.C. at 335, 748 S.E.2d at 203.

Cope sought to admit evidence that his co-defendant had committed other sexual assaults after breaking into women's homes. *Id.*

As with *Fonseca*, the Court first asked whether the disputed evidence was relevant or "thinly disguised" character evidence of the co-defendant. *Id.* This was the step unaddressed in *Wallace*. A majority of the Court concluded that the disputed evidence was not relevant to the issue of whether the co-defendant acted alone with respect to the charges against Cope. *Id.* at 354-355, 748 S.E.2d at 213-214.

Only after deciding that the evidence was not relevant did the Court also conclude that the unrelated burglaries and sexual assaults were not sufficiently similar so as to be admissible. *Id.* Specifically, the Court noted that the other burglaries and sexual assaults never resulted in murder and that there were no male members of the victims' household present. *Id.*

Fonseca is the controlling precedent in Appellant's case as the State sought to introduce evidence of prior, uncharged bad acts by the defendant against the complainant. 384 S.C. at 433-434, 683 S.E.2d at 277-278 By contrast, *Wallace* and *Cope* evaluate the admissibility of uncharged bad acts committed against third parties.

Under *Fonseca*, logical relevance – determining what the evidence is being offered to prove – is the first step regardless of the exception being claimed by the State under Rule 404(b), SCRE. *Id.* In Appellant's case, the trial court failed to ask this crucial foundational question. Tr. p. 135, ll. 8-24. This was a legal error mandating reversal.

Had the trial court done so, it would have been clear that the bad act evidence presented in this case has no more legal relevance than any other form of inadmissible character evidence. The alleged prior, uncharged bad acts evidence was offered for the sole purpose of suggesting to jurors that Appellant was inclined to have sex with Minor because he had previously sexually

abused her at the beginning of his relationship with her mother. *See Fonseca*, 383 S.C. at 647-649, 681 S.E.2d at 4-5.

The bad act evidence in this case has the same relevance as an expert witness testifying about the criminal profile of child abusers or that children of single mothers who have live-in boyfriends are statistically most likely to be sexually abused by the boyfriend. R. 179, l. 20 – 193, l. 2. The chain of logical inferences is the same. *See* David P. Leonard, *Use of the "Plan" theory to Prove that the Act at Issue Occurred*, The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct and Similar Events § 9.4 (explaining in detail the chain of logical inferences in common scheme or plan cases and concluding they are virtually identical to the logical chain prohibiting propensity evidence).

Even if this evidence has some marginal relevance, the uncharged prior bad acts were not sufficiently similar to the charged acts so as to be admissible. *See Fonseca*, 384 S.C. at 433-434, 683 S.E.2d at 277-278. As with the required relevancy inquiry, the trial also failed to apply the similarity factors when ruling the evidence admissible.

Had the Court done so, the differences between the two incidents would have outweighed the similarities. Again, *Fonseca* is controlling. The factors weighing in favor of admission are obvious and will almost always be the same in cases where the complainant is alleging uncharged prior bad acts: the relationship between Appellant and Minor was unchanged and there was some overlap in locations where the charged acts and uncharged acts purportedly occurred. *See Fonseca*, 384 S.C. at 433-434, 683 S.E.2d at 277-278.

However, the most important factors weighed against admitting the prior uncharged bad act evidence. *Id.* The manner of occurrence or the type of sexual assault was drastically different

in the uncharged prior bad acts than in the charged acts. R. 97, l. 2 – 108, l. 9. There was also a significant age difference – a temporal gap – between the charge acts and the uncharged acts. *Id.*

The uncharged prior bad acts consisted, in the light most favorable to the state, of sexual touching and oral sex when Minor was between either ages six and seven or nine and ten. Appellant was on trial for having sex with Minor when she was thirteen years old.

Accordingly, temporal remoteness and age, as well as, manner of occurrence weigh against admission. *Fonseca* and *Kirton* make clear that, in cases where the complainant is alleging prior uncharged bad acts by the defendant, the State must establish a "continuous course of illicit conduct." *See Kirton*, 381 S.C. at 24, 671 S.E.2d at 114-115; *see also Fonseca*, 383 S.C. at 647-649, 681 S.E.2d at 4-5. Allegations of one or two isolated, uncharged isolated bad acts lack the necessary connection to the charged offenses to be admissible.

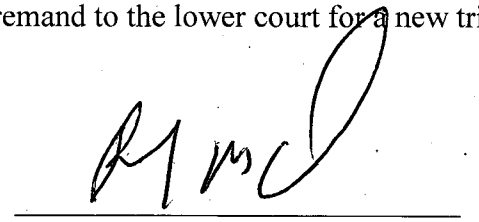
In summation, the trial court committed a reversible error of law by failing to conduct the Rule 404(b), SCRE, and *Lyle* analysis prior to admitting Minor's testimony regarding the uncharged, prior bad acts. Had the court done so it would have been clear that the uncharged prior bad acts constituted impermissible character evidence "thinly disguised" as evidence of a common scheme or plan.

The uncharged prior bad act evidence was offered solely to suggest that Appellant was guilty of the charged offenses because it would be "in conformity" with the prior uncharged bad acts. In addition, had the trial court conducted the similarities test required by *Wallace*, *Fonseca*, and *Cope*, it would have likewise concluded that the similarities between the uncharged prior bad acts and the charged acts were outweighed by the differences.

Therefore, Appellant is entitled to a new trial.

CONCLUSION

For the reasons argued above, Appellant Douglas Kelly Phillips respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial.



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ATTORNEY FOR APPELLANT

This 8th day of January, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 8, 2018

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