THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

The State,..... Respondent

v.

Larry Durant,..... Appellant.

Final Reply Brief of Appellant

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Question I

Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?

The State argues this issue is not preserved for appellate review. Brief of Respondent, p. 17-18. "An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). All our Supreme Court "has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011). Here, trial counsel raised this issue to the trial judge and obtained a ruling prior to the jurors being selected, thereby giving the trial judge a fair opportunity to rule on this issue and grant the relief requested. This issue, accordingly, is preserved for appellate review.

The State additionally argues that "[t]rial counsel did not request a mistrial." Trial counsel, however, argued that the trial judge announcing the other charges "tainted the jury panel." Trial counsel expressly asked the trial judge to provide "a new jury panel." R. 11-13. The less than artful reference to a mistrial notwithstanding, trial counsel moved to terminate the current trial and for the trial court to call the case in front of non-tainted jurors. This request, by definition, is a motion for a mistrial.

The State next argues the trial judge's curative instruction cured the error and prevented prejudice. Brief of Respondent, p. 19. This argument must be rejected. Cura-

tive instructions do not cure every error in a case because in some situations "it is difficult, if not impossible, to unring a bell." *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted). Once the jurors learned about the other charges, the prejudice was irreversible.

Finally, the State argues, "[A]ny alleged error in failing to order a mistrial is ultimately harmless because a new set of jurors would still have been made aware that Appellant was behind other incidents of sexual assaults against minors and the alleged forgery of the deed." Brief of Respondent, p. 19. This argument must be rejected. Pastor Durant, of course, does not agree that testimony about the other sexual assaults was admissible. *See* Brief of Appellant, Questions II and III. Additionally, when Rule 404(b), SCRE testimony is admitted during a trial, the jurors do not learn whether those allegations are the subject of a pending indictment. Here, the trial judge announcing the pending indictments and emphasizing the significance of the grand jury process enhanced the credibility of those witnesses and diminished the role of the jurors in determining the credibility of that testimony.

Question II

When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009), *b*ecause our Supreme Court's holding in *State v. Wallace* is contrary to Rule 404(b) and *State v Lyle* and should be overruled?

The State argues, "Appellant's argument that the Supreme Court will, in the future, find evidence of other bad acts is inadmissible propensity evidence is highly unlikely."[1] Brief of Respondent, p. 23. The State, however, never addressed Pastor Durant

[1] Pastor Durant does not argue that evidence of other bad acts is never admissible under Rule 404(b), SCRE and *State v. Lyle,* 125 S.C. 406, 118 S.E. 803 (1923). Rather,

pointing out that our Supreme Court, in *State v. Venancio Diaz Perez,* Appellate Case Number 2015-001576, granted Mr. Perez's motion to argue against precedent and convened an oral argument on November 30, 2016, during which Mr. Perez asked the Court to overrule *State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009).[2] Over fourteen months after the oral argument, our Supreme Court still has *Perez* under advisement. If our Supreme Court overrules *Wallace* in *Perez*, then Pastor Durant will be entitled to the benefit of that ruling because he preserved this issue at trial and raised it on appeal. R. 83-87. *See, e.g., State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved").

Question III

Did the trial judge err in admitting the testimony of A.R., T.H., and D.B. since that testimony was inadmissible under *State v. Wallace* and other valid precedent when the dissimilarities of the witnesses' testimony outweighed the similarities and the danger of unfair prejudice from the testimony substantially outweighed the probative value?

The State argues, "The trial judge did not abuse his discretion in admitting Appellant's prior *convictions* into evidence." Brief of Respondent, p. 27 (emphasis added). In reality, Pastor Durant has not been *convicted* of any of the allegations made by the other complaining witnesses. In fact, the trial judge informing the jurors about the existence of these other pending charges is the very issue Pastor Durant raises in Question I.

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he argues for an interpretation of Rule 404(b) that is consistent with *Lyle* and that the Rule 404(b) testimony was not admissible in his case.

[2] The oral argument in *State v. Perez* is found at http://media.sccourts.org/videos/2015-001576.mp4 (last viewed Feb. 4, 2018).

The State argues these "other alleged assaults shared *striking similarities* with his current charges." Brief of Respondent, p. 27 (emphasis added). The purported "striking similarities," however, militate in favor of excluding the evidence. *See, e.g. State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994) ("When the prior bad acts are 'strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.'"); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) ("When, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.").

The State, furthermore, never addressed the numerous dissimilarities between the allegations pointed out by Pastor Durant at trial and in his opening brief, at pp. 11, 32-33. As trial counsel pointed out, *Wallace* reduces the inquiry to a "counting contest" or "math equation." R. 88, 93. At least one Justice hearing the oral argument in *Perez* was concerned about "cherry picking" facts to support admissibility of Rule 404(b), SCRE testimony. Even if *Wallace* survives the ruling in *Perez*, trial courts must be mindful in the application of *Wallace*. The trial judge in this case seemed to believe *Wallace* created a *per se* rule in favor of admitting the Rule 404(b) testimony.

Even if these allegations were admissible under Rule 404(b), SCRE, Pastor Durant additionally challenges the admissibility of the testimony under the Rule 403, SCRE analysis required as part of the *Wallace* analysis.[3] Brief of Appellant, pp. 33-34. Alt-

[3] The State, as an afterthought in the penultimate sentence of this section of its brief, at p. 28, suggests, "[T]o the extent Appellant argues the prejudicial effect of admitting the other bad act evidence substantially outweighed its probative value, this argument was not made to the trial judge and is not preserved for appellate review." This suggestion overlooks the fact that the prosecution, as part of its motion to admit the Rule 404(b) evidence, asked the trial judge to consider the Rule "403 balancing test, which is whether or not the danger of unfair prejudice suggest a result based on an improper basis,

hough acknowledging this standard in its brief, at pp. 26 and 28, the State never explained why the prosecution's use of this testimony did not violate Rule 403. The prosecution urged the jurors to convict Pastor Durant because of allegations of *all* of the complaining witnesses, including the Rule 404(b) witnesses, thereby creating an unfair danger that Pastor Durant would be convicted based on considerations other than proof of the elements of the crime alleged in the indictment being tried.

Question IV

After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

The State argues, "[T]he trial judge clearly communicated he was not forcing any of the jurors, including the holdout, in any specific manner." Brief of Respondent, p. 30. This assertion is not supported by the record. The trial judge instructed the non-voting juror that s/he must vote with the majority to render a unanimous verdict and that the judge was willing to wait as long as it took to reach that result.

The State's suggestion that the trial judge not knowing the identity of the non-voting juror makes a difference in resolving the question before this Court must be rejected. The trial judge specifically addressed the non-voting juror—not by name but as the sole juror not voting. Based on the record before this Court, there can be no doubt that the non-voting juror was aware s/he was being singled out by the trial judge.

Your Honor, which would be when the probative value is substantially outweighed by danger of unfair prejudice." R. 83, lines 1-6. The trial judge expressly based his decision to admit the evidence on our Supreme Court's opinion in *Wallace,* which mandates "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. The issue of whether the prejudicial effect of admitting the Rule 404(b) testimony outweighed the danger of unfair prejudice to pastor Durant was squarely before the trial court.

Finally, pursuant to the trial judge's instructions,

> [the] presumption of innocence accompanies the Defendant from the time he is charged throughout the trial and unless and until you reach a verdict of guilt beyond – based on evidence satisfying you of that guilt beyond a reasonable doubt.

R. 699. The non-voting juror should be treated as a juror that is not satisfied the State has negated the presumption of innocence with evidence proving Pastor Durant's guilt beyond a reasonable doubt. The *Allen*[4] charge instructed the non-voting juror s/he must vote guilty if the other eleven jurors voted guilty.

Question V

Did the trial judge err by denying Pastor Larry Durant's new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

Pastor Durant asserts a *Brady*[5] violation, but the State begins its argument by reciting a Rule 5, SCRCrimP standard. Brief of Respondent, p. 32. This issue should be resolved under the *Brady* line of cases, including but not limited to *Kyles v. Whitley*, 514 U.S. 419, (1995) and *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006). As the Supreme Court of the United States held:

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

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[4] *Allen v. United States*, 164 U.S. 492 (1896).

[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

Kyles, at 437-38 (internal citations omitted).

The State argues, "Appellant fails to prove McCrae's criminal history rose to a level of a *Brady* violation." Brief of Respondent, p. 34. The State, however, overlooks the fact that failure to disclose impeachment material constitutes a *Brady* violation. *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence."); *Giglio v. United States,* 405 U.S. 150 (1972). McRae was a key witness for the prosecution. Impeaching her credibility calls into question the State's evidence of how the allegations by these complaining witnesses came to the attention of law enforcement, thereby impeaching the State's entire case, including the credibility of the complaining witnesses.

In footnote 12 of its brief, at p. 34, the State argues Pastor Durant's case is distinguishable from *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) because "*Gibson* involved a factually-distinguishable situation in which the State disclosed some, but not all of the exculpatory information in its possession." The State fails to explain how a complete failure to disclose exculpatory information could ever be mitigating; nor could it.

Question VI

Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?

In its heading to Argument VI, the State asserts the Cumulative Error Doctrine "is not recognized under South Carolina law." Brief of Respondent, p. 36. The State not only abandons this assertion in the body of its brief but, in fact, acknowledges, "[T]he cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing a party from receiving a fair trial, and

the cumulative effect of these errors affects the outcome of the trial." Brief of Respondent, p, 36. This Court, therefore, should not entertain the suggestion that Cumulative Error Doctrine does not exist for review of direct appeals in our state.

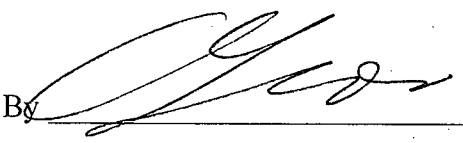
As discussed in Pastor Durant's opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. Respondent's brief, at pp. 36-38, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying this Court's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013). Beekman asked this Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded Beekman was attempting to invoke the "plain error rule" that is not recognized in our State. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, Pastor Durant raised all issues at trial that he asserted in his opening brief, thereby preserving for appeal the cumulative effect of these issues.

Conflation of the "cumulative error doctrine" and the "plain error rule" seems to be an office-wide misunderstanding within the Attorney General's Office. Undersigned counsel has encountered the same argument in two other direct appeals. *State v. Michael Beaty*, S.C. Supreme Court Appellate Case Number 2016-001305 and *State v. Nakia Johnson,* Court of Appeals Appellate Case No. 2015-001436. This Court's guidance, therefore, is needed to resolve this confusion in this case and future cases.

CONCLUSION

For the reasons set forth in the Brief of Appellant and this Reply Brief, this Court should reverse Pastor Durant's convictions and order a new trial.

Respectfully Submitted,

By 

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Rule 211, SCACR Certification

This Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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