

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Darlington County
Hon. J. Michael Baxley, Circuit Court Judge
Appellate Case Tracking No. 2017-002402

RECEIVED

JUL 31 2018

S.C. SUPREME COURT

The State,

Respondent,

v.

Damyon M. Cotton,

Petitioner.

Opinion No. 2017-UP-356 (S.C. Ct. App. filed 9/6/17)

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly admitted the testimony of the prior victim as a common scheme or plan and to prove identity of the perpetrator when Petitioner's defense was that he was not with the current victim on the night she was raped.

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted in Darlington County in July of 2013 for criminal sexual conduct in the first degree and kidnapping. On February 24, 2014, Petitioner proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Appellant guilty of both offenses, and Judge Baxley sentenced him to fifteen years, concurrent, on each charge.

On September 6, 2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. State v. Cotton, Op. No. 2017-UP-356 (S.C. Ct. App. filed September 6, 2017). Petitioner subsequently filed a petition for rehearing, which was denied on October 19, 2017. Petitioner timely submitted a Petition for Writ of Certiorari, which was granted by this Court. Petitioner served his Brief of Petitioner on June 11, 2018. This Brief follows.

Factual Background

The victim, age nineteen at the time of trial, testified that she first met Petitioner through a "chat line" over the phone.¹ (App.10-11). After exchanging numbers on the chat line, the victim and Petitioner talked on the phone and ultimately arranged to go to the movies together on February 1, 2013. (App.11-12). Petitioner picked the victim up around 6:30 pm, but when they arrived at the movie theater, Petitioner "didn't want to go in" and instead tried to force the victim's head onto his penis. (App.12; 166-167). After the victim refused to provide oral sex, Petitioner then drove the victim to K-Mart to look for Valentine's Day gifts. (App.13). Upon arrival, Petitioner decided he did not want to go inside and instead again attempted to make the

¹ The victim subsequently explained that although she initially met Petitioner over the chat line, she saw him in person one time at a friend named Tanzy's house. (App.21-22; 132-133).

victim perform oral sex. (App.13). He then tried to give the victim cash to go buy something from the store but the victim threw the money back at Petitioner. (App.13). The victim subsequently asked Petitioner to take her home. (App.14). Petitioner refused and instead took the victim's phone and drove her out to Turnpike Road to a wooded area. (App.14). Petitioner told the victim that she "been telling him a long time" that she was going to "give him some" and "now is the time." (App.14). He also threatened to "take a gun out" if the victim did not cooperate. (App.20).

At that point Petitioner leaned over and tried to take off the victim's pants. (App.15-16). When he was unable to do so, he exited the car, went around and opened the passenger side door, and dragged the victim out of the car. (App.16-17). The victim told Petitioner she did not want to have sex but Appellant told her she had to do it since it was time. (App.17). In an attempt to dissuade Petitioner, the victim told him she was pregnant and that she had herpes. (App.18). Petitioner said "we'll fix that," put on a condom, and began having vaginal sex with the victim. When Petitioner was finished, he threw the condom in the woods and gave the victim back her clothes. (App.18). Petitioner and the victim, who was crying, got back in the car and Petitioner began apologizing, saying he loved the victim, and asking her not to call the police. (App.18-19). He returned the victim's phone to her when they got on Highway 52. (App.162). Petitioner then dropped the victim off at home. The victim walked the long way around the car so she could memorize Petitioner license plate number. As soon as she walked in the house, she ran to her mother and told her she had been raped. (App.19).

The victim's mother testified she was watching television on the evening in question when the victim, looking disheveled, came in the house and immediately told her she had been raped. (App.194-195). The victim's mother noticed the victim's jeans were not buttoned when

she came inside and testified that these jeans had not been broken when the victim left the house. (App.195). The victim's mother took the victim to the hospital immediately, where a nurse performed a rape kit. (App.196). Although the victim had some difficulty communicating,² the victim told the nurse exactly what happened with a good bit of detail. (App. 241-242; 245-246). The nurse also collected the victim's clothing, including her jeans, and took swabs from the victim. (App.243).

Police officers from Florence and Darlington counties responded to the hospital and interviewed the victim. (App.197-198). The victim provided a statement to police that was consistent with her trial testimony. (App.165-68; 202-209; 213-226; 502-503). Using the license plate number the victim provided, police ultimately figured out Petitioner's name and created a photo lineup. (App.224-225). The victim picked Petitioner out as the man who raped her. (App.225). The evidence collected from the victim on the night of the rape was later submitted to SLED for analysis and Petitioner's DNA was found on the buttonhole of the victim's jeans. (App. 249-260; 277-279).

Prior to trial, the State sought a ruling on whether or not a prior bad act witness would be allowed to testify to establish Petitioner's common scheme or plan. (App 7-8). After presenting the victim's testimony in the pre-trial hearing, the State presented the testimony of a prior victim, who was age sixteen at the time of trial. (App.24). Prior victim testified that she was fifteen in June of 2012, when she met Petitioner through social media, specifically Facebook. (App.24-25). Prior victim stated that she met Petitioner after posting a status on Facebook asking if

² The victim suffered from a "learning disability" and "mental difficulties" which made it more difficult for her to communicate clearly. (App.15; 135-137; 194; 242).

anyone wanted to “chill.”³ (App.25). Petitioner responded and the two began sending messages back and forth. (App.25). At some point thereafter, Petitioner came and picked the victim up from her friend’s house for the purpose of giving her a ride home. (App.25; 34; 175). Petitioner’s brother was also in the car and Petitioner asked if prior victim would mind riding with him to drop his brother off in Hartsville. (App.25). During the ride, Petitioner began “touching on” the prior victim. (App.25-26). When Petitioner’s brother exited the car, the prior victim noticed that her cell phone was dead and asked Petitioner if he had a car charger. Petitioner said his “homeboy” had one and drove to his house to retrieve it. (App.26). However, when he came back out of his “homeboy’s” house, he did not have a phone charger; instead he told the prior victim that it was down the street. He then drove down the street to a trailer with a shed in the back. (App.26). He told the prior victim that she could go in the shed and charge her phone. (App.26-27). The victim felt like going in the shed to charge her phone was “kind of sketchy” so she declined. (App.27).

³ In Brief, Petitioner appears to imply that the prior victim’s use of the word “chill” meant she was looking to have sex. (Brief of Petitioner p. 3, n.2). Petitioner bases this implication on an entry from the “Urban Dictionary” website defining the word in that manner. Significantly, however, as of July 8, 2015, there were over one hundred entries defining the word “chill” on the Urban Dictionary website, with the overwhelming majority defining the term, at least in this context, to mean to “hang out” or to relax. See Chill, Urban Dictionary, <http://www.urbandictionary.com/define.php?term=Chill>. The top six definitions of “chill” in the Urban Dictionary are as follows: “(1) to calm down; (2) cool, tight, wicked, sick, sweet, nice, etc.; (3) **to hang out**; (4) to be easy going; (5) a little bit cold; (6) its ok.” See id. (emphasis added). The entry identified by Petitioner appears to be one of a minority of entries defining the word as having a sexual connotation, and pursuant to that entry, “chill” is defined as follows: “A term often used by males to manipulate a female into hanging out with him when his real intention is to have sex with her. Also a code word for sex. Commonly used when a female gives a male her number and when he calls her, asks her to chill with him without knowing much about her yet which shows his true intentions is to really have sex.” See Chill, Urban Dictionary (July 2, 2006), <http://www.urbandictionary.com/define.php?term=Chill>. This definition is wholly inapplicable under the facts of this case, and notably, defense counsel below never once suggested the prior victim was seeking out sex when she made her Facebook post asking if anyone wanted to “chill.”

At that point, Petitioner asked if the prior victim would “give him some head.” (App.26). She said no and reiterated that she told him before she “didn’t want to do nothing like that.” (App.27). Petitioner complained he “drove all the way to Florence to pick you up and you’re not going to give me no head.” (App.27). Petitioner then started trying to push the prior victim’s head down toward his lap and when he “got rougher” she started pulling away and screaming. (App.27). Petitioner exited the car and came around to the passenger side and started hitting her with his fists. The prior victim was so scared that she agreed to perform oral sex. Petitioner got back into the car and the prior victim provided oral sex. (App.28). Petitioner then started driving and the prior victim thought he was going to take her home; however, instead, Petitioner pulled into a partial driveway surrounded by trees and instructed her to take off her pants. (App.28). It was around 9:00 pm and dark outside. The prior victim saw a cornfield on the other side of the road but no homes nearby. (App.29). The prior victim complied with Petitioner’s demands and took her pants off and exited the car. (App.28-29). She tried to dissuade Petitioner from raping her by telling him she was on her period, but Petitioner “didn’t care” and put on a condom. (App.29). Petitioner raped the prior victim vaginally and then anally, then they got back in the car and Petitioner started being “nice” to her. He told the prior victim he was sorry and he “didn’t mean to.” (App.30). He then dropped her off on a street near her house, and she walked the rest of the way home. (App.30-31). On the way home the prior victim sent a message to one of her friends describing what had just happened to her, and her friend encouraged her to tell her grandmother. (App.31). The prior victim did so and her grandmother took her to the hospital. (App.31). Subsequently, the victim picked Petitioner out of a photo lineup prepared by police as the man who raped her. (App.32).

Petitioner also testified at the pretrial hearing, denying he ever had sexual relations with either victim and offering a contradictory version of events and an alibi. (App.42-64). The trial judge ultimately did not find Petitioner's testimony credible for purposes of the pretrial hearing. (App.91-92).

At the conclusion of the pretrial hearing testimony, the solicitor argued prior victim's testimony was admissible under the common scheme or plan exception to Rule 404(b), SCRE, because there were similarities in the ages of the victims, the relationships between the victims and Petitioner, the locations of the incidents of sexual abuse, the use of coercion and threats, and the manner of occurrence of the incidents of sexual abuse. (App.65-66). Specifically, the solicitor pointed out that both victims were young teenaged girls; that Petitioner met each victim through social media and did not previously know the victims; that Petitioner picked up each victim at nighttime and drove them to a secluded area to rape them; that Petitioner used threats, force, and violence with each victim; and that the manner of occurrence was similar where Petitioner first requested oral sex with the victims inside of his car and then forced them to have sexual intercourse outside of the car. (App.66-69). The solicitor also pointed out that in both instances Petitioner made sure the victims did not have access to their cell phone, and that Petitioner ignored both victims when they claimed to have problems that prevented them from having sex and instead simply put on a condom and continued the assault. (App.67-69).

In response, defense counsel argued the testimony of the prior victim was mere propensity evidence and was inadmissible where the evidence to establish the prior sexual assault was not clear and convincing; where her allegations were "vague, entirely too general" and lacking in a close degree of similarity to fit under the common scheme or plan exception,

and where the prejudicial value of the prior victim's testimony "far outweighs" any probative value it would have in the case. (App.71-83).

After recessing to consider the matter, the trial judge ruled the prior victim's testimony was admissible under the common scheme or plan exception. (App.86-92). The judge first determined the evidence was clearly relevant under Rule 401, SCRE, since it had a tendency to make the occurrence of the underlying charge more or less probable. (App.87-88). The judge then found the evidence fit under the common scheme or plan exception where (1) the ages of the victims were similar and they were both teenage girls at the time of the assaults; (2) the victims both met Petitioner through social media; (3) the incidents of abuse both occurred in and around Petitioner's vehicle and occurred after Petitioner took the victims to an unfamiliar, unpopulated area under the pretext of giving them a ride somewhere; (4) Petitioner used coercion and threats in each incident; and (5) the manner of occurrence was similar where Petitioner began by asking for oral sex, forced oral sex, and then forced sexual intercourse. (App.89-91). The judge ruled that while there were "minor dissimilarities" between the two incidents, in the "overall scheme of things" the incidents were "very similar" and were the type of incidents anticipated in the common scheme or plan exception. (App.91). Finally, the judge weighed the prior bad act evidence under Rule 403, SCRE, and determined that the probative value of the evidence was not substantially outweighed by the danger or unfair prejudice.⁴ (App.92-93). Thus, the judge allowed the State to present the prior victim's testimony before the jury, and Petitioner renewed his objection to this testimony at trial. (App.174).

⁴ The trial judge noted that he did find that the prior bad act had been proven by clear and convincing evidence since he found the prior victim's testimony credible and Petitioner's testimony not credible. (App.91-92).

STANDARD OF REVIEW

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); State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.”). 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).

ARGUMENT

- I. **The trial court properly admitted the testimony of the prior victim as a common scheme or plan and to prove identity of the perpetrator when Petitioner's defense was that he was not with the current victim on the night she was raped.**

The trial court correctly admitted the prior victim's testimony as a common scheme or plan when the similarities established the clear connection between the prior bad act and the facts of the current case, the prior bad act helped to establish the identity of the perpetrator, the existence of the prior bad act refuted Petitioner's contention regarding how his DNA appeared on the victim's jeans, and the testimony's probative value was not substantially outweighed by any unfair prejudice. This Court should rely on its long-standing case law regarding prior bad acts and affirm Petitioner's conviction and sentence. Finally, even if error to admit the testimony, any admission is entirely harmless in light of the fact its admission could not have impacted the verdict of the jury beyond a reasonable doubt.⁵

The Courts of this state have long held prior bad acts admissible when they serve to prove some fact or element related to the crime charged. See e.g., State v. Houston, 17 S.C.L. 300, 301, 1 Bail. 300 (S.C. App. L. & Eq. 1829) (admitting evidence of prior forgeries in a forgery

⁵ In his Brief, Petitioner asks this Court to overrule State v. Wallace, 384 S.C. 428, 638 S.E.2d 275 (2009). However, this is the first time Petitioner has argued Wallace is incorrectly decided. The issue was never raised to a lower court, nor was it even raised in Petitioner's Petition for Writ of Certiorari. Significantly, throughout argument to the trial court and the Court of Appeals, Petitioner relied on Wallace to argue the similarities between the prior bad act and the one for which he was on trial were not sufficient to justify admission. This Court did not grant the Petition for Writ of Certiorari as to Arguments I and II in Petitioner's Brief. As a result, the issue is not properly before this Court for consideration. See McCray v. State, 317 S.C. 557, 559 n.1, 455 S.E.2d 686, 687 n.1 (1995) (issue not raised in petition for a writ of certiorari but presented in brief is not preserved for appeal); see also, Rule 242(d)(2) and (i), SCACR; Sloan v. Dep't of Transp., 365 S.C. 299, 308, 618 S.E.2d 876, 880 (2005) (issue not raised in Petition for Rehearing not properly preserved for review by Supreme Court).

case “to shew that the prisoner has passed other counterfeit notes of a similar character” . . . “for although these may be the foundation of other prosecutions, yet they afford evidence, and sometimes very strong evidence, of the knowledge of the falsity of the paper, on which the indictment is founded.”). “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. 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.” Rule 404(b), SCRE.

“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. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. This Court provided some factors to consider 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 the occurrence, for example, the type of sexual battery. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not 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)).

The Court of Appeals explained the common scheme or plan exception:

Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was established. See 2 Wigmore, § 304 (stating that where separate offenses are sufficiently similar, there is an inference that they are manifestations of a common scheme or plan). Accordingly, the evidence in such cases speaks to the existence of the defendant’s

plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred.

State v. Tutton, 354 S.C. 319, 330-31, 580 S.E.2d 186, 192 (Ct. App. 2003).

This Court's decision in Wallace did not change the admissibility of prior bad act evidence. Instead, it merely clarified this Court's long-standing consideration of prior bad act evidence. Under common law in America, as in England, "there never did exist any rule of evidence . . . excluding proof of other offences of the accused where such proof was relevant to a fact in issue. All that there was to be found was a very narrow rule excluding proof where the relevance was merely to the evil disposition of the accused." Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 990 (1938). South Carolina case law supports this conclusion. *See e.g., State v. Petty*, 16 S.C.L. 59, 62, Harp. 59 (S.C. Const. App. 1823) (finding admissible proof of prior instances when a defendant passed forged notes during trial for passing a forged note and holding: "But let it be admitted that it is a crime, yet if the proof of it has a tendency to support the issue, in the case before the court, it is admissible. It has been determined, as to this very offence, that proof of a man's having passed other forged notes, may be given in evidence."); State v. Winter, 83 S.C. 251, 65 S.E. 243, 245 (1909) (finding evidence of prior similar acts—buying stolen goods—provided proof defendant received stolen goods knowing them to be stolen); *see also, State v. Odel*, 2 Tread. 758, 3 Brev.552 (1816) (finding if prior bad act had been the same as current crime it would have been admissible into evidence, but since significant dissimilarities existed it was inadmissible).

In State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923), this Court articulated five reasons for admitting evidence of other bad acts: "Generally speaking, evidence of other crimes

is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.” State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923) (quoting People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901)). “If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.” State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923).

This Court in Wallace merely explained that the logical relevance in a case considering a common scheme or plan can usually be found in the fact the other bad act and the act for which the defendant is on trial are similar. A review of some of the cases from this Court and the Court of Appeals in which evidence was found inadmissible is apposite to proper application of Rule 404(b) and Lyle, especially when those cases are juxtaposed to cases in which prior bad act evidence was admissible as a common scheme or plan.

In State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983), evidence was presented establishing Stokes committed a lewd act upon his juvenile victim when the child came to his house to purchase a frozen treat. Id. at 192, 304 S.E.2d at 814. Over objection, the trial judge admitted testimony indicating Stokes once asked another child to meet him at the railroad tracks for an undisclosed purpose, which the child speculated Stokes intended to rape her. Id. On appeal, the Supreme Court reversed, finding no connection between the acts, which were in no way similar, and determining the trial judge erred in admitting the evidence. Id. at 193, 304 S.E.2d at 815.

The Court of Appeals decision in Tutton is another example of when the dissimilarities were so great that they precluded a finding of a common scheme or plan. In Tutton, two sisters testified Tutton rubbed their butts and private parts with his hands while they were sleeping near him. Tutton, 354 S.C. at 323, 580 S.E.2d at 188. Over objection, one of the sisters also testified Tutton performed oral sex on her, forced her to perform oral sex on him, and threatened her not to tell several years prior to the charged incidents. Id. at 324, 580 S.E.2d at 189. The Court found:

The balancing of the similarities in cases concerning the admission of common scheme or plan evidence is a difficult task. While inferential leaps are at the heart of such decisions, we are compelled to find that the similarities in this case are insufficient to support the inference that Tutton employed a common scheme or plan to commit the assaults alleged in this case.

Id. at 333, 580 S.E.2d at 194.

In State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997), which came many years before Wallace, this Court reviewed the similarities of two armed robberies. The Court found “the only point of similarity with any merit is the alleged similar clothing worn by the robbers.” Id. at 53, 488 S.E.2d at 326. As a result, this Court found: “We find there is insufficient similarity between the two crime sprees to prove a common scheme or plan under Lyle.” Id.; see also, State v. Berry, 332 S.C. 214, 219, 503 S.E.2d 770, 773 (Ct. App. 1998) (“In this case, there are insufficient similarities between the attack on the victim and the attack on Polite to connect the incidents as part of a common scheme or plan. The incidents occurred fifteen months apart, under different circumstances, at different times, in different places, and in different ways. That both women coincidentally wore glasses and both claimed Berry grabbed their throats does not render the attacks sufficiently connected or similar to justify admission of evidence of the Polite incident under the common scheme or plan exception.”); State v. Davenport, 321 S.C. 134, 138,

467 S.E.2d 258, 260–61 (Ct. App. 1996) (finding “to be admissible under the common scheme exception, the similarity or connection between the prior bad act and the current charge must be close” and concluding the use of a knife and the lack of a connection between the victims and Davenport was insufficient to establish a common scheme or plan).

These cases can be juxtaposed to some of the cases in which the Courts have found the similarities sufficient to establish a common scheme or plan. In State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. This Court found the testimony admissible, noting the following:

. . . All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All the alleged activities took place in Blanton’s house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible.

Blanton, 316 S.C. at 32, 446 S.E.2d at 439.

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman’s home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman’s home. The victim and two other women each testified that the abuse began shortly after they arrived at Hallman’s farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman’s penis. The events in each case took place in the bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her

clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the farm at four years old and was made to rub his penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

In finding the prior bad acts admissible, this Court noted the following:

The prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of the abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the same manner under similar circumstances.

Id., 298 S.C. at 175, 379 S.E.2d at 117.

This Court in State v. McClellan found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in a prosecution for similar acts against the youngest daughter because the “experiences of each daughter parallel that of her sisters . . .” State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Specifically, this Court noted: “[T]he initial attack occurred around age twelve; Appellant entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to “Honor thy Father”].” Id.⁶

In Petitioner’s case, the evidence regarding the prior victim’s sexual assault was admissible under the common scheme or plan exception because there was a close degree of similarity between the assault of the current victim and that of the prior victim, and the relevant and significant similarities between the incidents outweighed any dissimilarities. First, the

⁶ It should be noted all three of these cases occurred prior to this Court’s issuance of Wallace, and all three relied on the significant similarities and the “parallel” of events to find a common scheme or plan.

victims were both young, teenaged girls at the time of the assaults - the victim was eighteen and the prior victim was fifteen. Second, both victims met Petitioner for the first time through social media and they were not part of his usual social circle. When the victims met with Petitioner on the dates of the assaults, it was their first time spending time with Petitioner alone. These facts are significant because they allowed Petitioner to take advantage of young girls who barely knew him and therefore could not as easily identify him to law enforcement. Third, the sexual assaults both began in Petitioner's vehicle, with Petitioner seeking out oral sex from the victims, and when they declined, he forced oral sex. Then it escalated in both instances to forced penetrative sex immediately outside the vehicle in a remote, secluded location where Petitioner could have his way with the victims without being easily observed and where the victims would not feel like they could easily escape from him.

Fourth, Petitioner used force and physical violence with both victims. With the current victim, he used force when attempting to compel her to perform oral sex inside the vehicle, used physical violence to drag her out of the vehicle, and used violence during the sexual intercourse. (App.11-19; 126-130). With the prior victim, Petitioner similarly used force when attempting to compel oral sex inside the vehicle, and also used physical violence before the prior victim decided it would be safer to simply submit to Petitioner's demands both regarding oral sex and penetrative sex. (App.26-31; 177-181). Fifth, the manner of occurrence was highly similar in both instances. Petitioner, under the pretense of providing the victims with a ride somewhere in his car, took advantage of the victims while alone with them, first attempting to compel them to perform oral sex on him inside the car, then forcing them to remove articles of clothing and have sexual intercourse with him immediately outside the car in a secluded location. Before beginning the assaults, Petitioner ensured both victims did not have access to their cell phones.

Petitioner also ignored both victims' proffered reasons why they could not have sex and instead put on a condom. Finally, following the sexual assaults, Petitioner apologized to both victims, tried to act kind toward them, and attempted to minimize his conduct.

Even if the similarities alone are not sufficient for admission of the testimony, the testimony clearly establishes a logical relevance to the underlying crime. The testimony by the prior victim fortifies the identity of Petitioner as the victim's attacker and refutes his explanation for how the DNA ended up on the victim's jeans.

Identity became an issue during Petitioner's opening statement. Counsel stated: "I believe that through the course of this trial you will see that the evidence just is not there to sustain a conviction against Mr. Cotton because Mr. Cotton was not even with [the victim] the night she claimed that this happened. Mr. Cotton can't be guilty of what he's accused." (App.119). This argument was reiterated during closing arguments. (App. 384). During trial, one of the main defenses set forth at trial was an alibi defense. (App.395-396). Additionally, the defense brought out the fact unidentified DNA was found on the victim's pants and sought to insinuate this could be the DNA of the actual rapist. (App.231-232; 265-266; 314-315; 395; 398). The fact Petitioner committed a very similar crime, with a very similar method, against a very similar victim is relevant and highly probative in corroborating the current victim's testimony it was Petitioner and not someone else that raped her.

Additionally, Petitioner attempted to explain the DNA on the victim's pants by indicating it got there through an innocent hug when his arm or hand must have brushed across the button hole of her jeans to leave the DNA. The testimony of the prior victim is highly probative to refute this explanation of how the DNA came to be on the victim's jeans, and lends support to

the victim's statement that Petitioner's DNA was on her jeans from when he ripped off her pants and raped her. (App.11-12; 191).

The probative value of the prior victim's testimony outweighed any unfair prejudice to Petitioner. Under Rule 403, SCRE, evidence that is relevant may still be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means tending to prove or disprove. State v. Gray, 408 S.C. 601, 609-10, 759 S.E.2d 160, 165 (Ct. App. 2014) (citing Black's Law Dictionary 1323 (9th ed. 2009)). "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165.

The probative value of evidence must, of course, be weighed against the danger of unfair prejudice. "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE, is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014) (emphasis in original). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (citation omitted).

"When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citation omitted). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. at 534, 763 S.E.2d at 28 (citation omitted).

“We review a trial court’s decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court’s judgment.” Id. (citation omitted); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Petitioner testified in his defense and presented alibi witnesses, thereby creating a potential credibility contest between the victim and Petitioner’s witnesses. Evidence that supported the victim’s claims by demonstrating Petitioner’s common scheme or plan was particularly probative under these circumstances. See State v. Chavis, 412 S.C. 101, 111-12, 771 S.E.2d 336, 341 (2015) (“While [common scheme or plan evidence] did not directly corroborate Victim’s testimony, it supported her claims by demonstrating Appellant’s common scheme of abusing those close to him.”).

The evidence spoke to Petitioner’s plan, not merely his character, so the prior bad acts carried no danger of “unfair” prejudice. Further, any possibility of unfair prejudice was minimized by the trial court’s thorough limiting instruction, given at the beginning of the prior victim’s testimony, regarding the proper purpose of Lyle evidence:

Ladies and gentlemen, let me give you a charge, if I may, about this testimony, this evidence. You’re hearing evidence that the defendant allegedly committed a previous sexual offense which is not the subject of a conviction other than the one for which he’s on trial here today. This testimony if you conclude it is true, may only be considered by you on the question of whether there exists some common scheme or plan with regard to these alleged acts and for no other reason and no other purpose. You may give this evidence the weight and value, if any, that you find it should have on the sole issue of whether there may be some common scheme or plan existing here. You must not consider as evidence of the commission of another alleged sexual offense as proof of the

defendant's guilt of the charge that we're trying here today; nor as proof of a trait of his character, nor to actions in conformity with that trait of character. With that understanding, you may proceed.

(App.176-177). The trial judge gave a similar admonishment in the final jury charge. (App.427-428). Significantly, it is well-established that jurors are presumed to follow instructions provided by a trial judge. See e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow the law as instructed to them); see also State v. Trotter, 317 S.C. 411, 414, 453 S.E.2d 905, 907 (Ct. App. 1995) ("The trial judge's limiting instruction regarding the nature of Busterna's testimony assured no prejudice would occur."); Judy v. Judy, 384 S.C. 634, 643-44, 682 S.E.2d 836, 841 (Ct. App. 2009) ("Furthermore, to the extent the admission of the prior judgment may have prejudiced Ronnie, we find any prejudice was alleviated when the trial court gave a limiting instruction to the jury as to the proper purpose for which the evidence of the prior judgment was to be used.").

In sum, the trial judge did not abuse his broad discretion in weighing the probative value of the prior bad act evidence against its potential for undue prejudice. See Wallace, 384 S.C. at 435, 683 S.E.2d at 278-79 (the trial judge properly admitted evidence regarding prior incidents of sexual abuse against the victim's sister where the probative value of this evidence substantially outweighed the danger of unfair prejudice); State v. Atieh, 397 S.C. 641, 649, 725 S.E.2d 730, 734 (Ct. App. 2012)("The trial court instructed the jury it could not consider evidence of bad acts for any reason other than intent, common scheme or plan, or absence of mistake. It specifically cautioned the jury against considering the testimony as proof of Atieh's guilt. The trial court took all precautions to reduce any prejudice Employee 4's testimony may have created and Atieh has shown no clear evidence Employee 4's testimony improperly influenced the jury's verdict. Therefore, we find the trial court did not abuse its discretion in

admitting Employee 4's testimony."'). The trial judge's Rule 403 determination in this case should not be reversed. See State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citations omitted).

The testimony in from the current victim and the prior victim establish the logical connection through their vast similarities. Further, the testimony is highly probative of a common scheme or plan that establishes Petitioner's identity as the person who raped the current victim and refutes his claims that his DNA was on the current victim's pants for a purely innocent reason. As a result, the similarities outweighing the dissimilarities and the logical relevance being established, the trial court did not err in admitting the testimony of the prior victim.

Even if its admission was error, any error was entirely harmless in light of the evidence in this case. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011); State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). Appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case. Byers, 392 S.C. at 448, 710 S.E.2d at 60. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C.

376, 389, 728 S.E.2d 468, 475 (2012) (“Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.”).

The victim testified at trial, providing a detailed account of events leading up to the sexual assault, the sexual assault itself, and the events that followed. Notably, she reported the rape to her mother immediately, as soon as she arrived home and was outside of the custody and control of Petitioner. (App.194-195). The nurse who collected evidence from the victim at the hospital recounted the victim’s highly consistent version of events as told to her that night. (App.245-246). The nurse also testified about scratch marks she found on the victim’s buttock and thigh, which were consistent with the victim’s account of sexual assault. (App.246). The victim also provided a consistent version of events to the responding police officers. (App.165-68; 202-209; 213-26; 502-503).

Also significant is the fact the current victim provided police with a license plate immediately after the rape was reported. The license plate came back to an individual, Ms. Gattison, residing at the same location as Petitioner. (App.224-225). This is significant because pursuant to Petitioner’s testimony he and the current victim only met in person one other time, roughly a month before he was accused of raping her. He testified he drove to her aunt’s house and sat in the car while he and the current victim talked. He indicated he hugged her from the car through the driver’s window. He did not indicate he was driving Ms. Gattison’s vehicle at that time and did not indicate the current victim would have been able to obtain the license plate number from their prior interactions either online or one time in person. (App.354-355). Importantly, the only opportunity the current victim had to obtain Ms. Gattison’s license plate

would have been on February 1, when Petitioner alleged he was not present and the current victim insisted she was raped. As a result of the current victim reporting the license plate, officers put together a photo lineup and the current victim picked Petitioner out of the lineup. (App.225).

Most significantly, Petitioner's DNA was found on the buttonhole of the jeans the victim was wearing on the night of the sexual assault. (App.260; 277-279). The probability of a match from someone other than Petitioner was one in 220 million. (App.278). Although Petitioner testified at trial and presented an alibi defense, he denied ever having sex with the victim and failed to logically explain his DNA being on Petitioner's jeans. He claimed that he met the current victim only one time in person and that he gave her a hug while seated in his car. He maintained his arm or hand must have touched the buttonhole of her jeans and transferred his DNA. Supposedly, this interaction took place around a month before the DNA was found on the current victim's jeans. (App.354-356).

In light of the consistency of the current victim's statement, her providing a license plate number matched to a vehicle at Petitioner's residence, and Petitioner's DNA being on her jeans without a logical explanation aside from the rape, any error with respect to admission of the prior bad act evidence was harmless beyond a reasonable doubt. See State v. Parker, 315 S.C. 230, 234-35, 433 S.E.2d 831, 833 (1993) (although it was error to admit evidence of the defendant's prior bad acts under the common scheme or plan exception, such error was harmless beyond a reasonable doubt due to the overwhelming evidence of guilt separate and apart from the evidence of the prior bad acts).

The trial court in this case did not err in relying on Wallace and the long-standing case law in South Carolina respecting common scheme or plan. The testimony of the prior victim

was clearly relevant and probative both to establish the common plan by Petitioner, but also to establish his identity which was at issue and to refute his explanation for how the DNA appeared on the current victim's jeans. There is no reason to reverse this Court's decision in Wallace as it stems from a long line of cases indicating the significance of similarities between events in order to properly establish a common scheme or plan. Even if this Court finds the testimony should not have been admitted, its use was limited by the trial court's instruction and the other evidence in the record rendered any error entirely harmless. As a result, this Court should affirm Petitioner's conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion and Petitioner's conviction and sentence should be affirmed.

Respectfully submitted,

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July 31, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Darlington County
Hon. J. Michael Baxley, Circuit Court Judge
Appellate Case Tracking No. 2017-002402

The State,

Respondent,

v.

Damyon M. Cotton,

Petitioner.

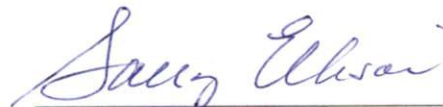
PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Brief of Respondent by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 31st day of July, 2018.



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