THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Perry M. Buckner, Circuit Court Judge

Case No. 2011-GS-32-2356
Case No. 2011-GS-32-2357
Appellate Case No. 2012-212998

State of South Carolina,

Respondent

v.

Glenn Edwin Vanover,

Appellant

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIIES

Cases:

Rules of Court:

STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in admitting testimony concerning alleged prior acts of the defendant toward the mother of the alleged victim?

STATEMENT OF THE CASE

Appellant, Glenn Edwin Vanover, was indicted in Lexington County on two counts of criminal sexual conduct with a minor in the first degree. R. pp. 3-6. He was tried by a jury on August 28-29, 2012, Judge Perry M. Buckner presiding. R. pp. 8-9. The jury found him guilty of both counts. R. pp. 7, 105-06. Judge Buckner sentenced him to concurrent terms of 26 years. R. pp. 1-2, 107-08.

ARGUMENT

THE COURT ERRED IN ADMITTING TESTIMONY CONCERNING ALLEGED PRIOR ACTS OF THE DEFENDANT TOWARD THE MOTHER OF THE ALLEGED VICTIM.

This case stemmed from allegations made in 2011 by appellant's daughter, when she was 14 years of age and in the ninth grade. R. p. 31. She claimed that her father sexually assaulted her on multiple occasions when she was between the ages of eight and ten. R. pp. 16-22. The evidence established that she had made such a claim before, when she was in the seventh grade. R. p. 24. The defense contended that these allegations were trumped up because the daughter had not been doing well in school, had been getting into trouble, and was being disciplined at home. R. pp. 72-74, 94-97. The daughter admitted that, both in seventh grade when she first made the allegations and in ninth grade when she made them a second time, she was not doing well in school. R. pp. 37, 44-45. Although she denied the extent of the ninth-grade misconduct that her parents

testified about, she admitted having gotten into trouble and having skipped school that year. R. p. 44.

There were no eyewitnesses and no forensic evidence to corroborate the daughter's allegations. The entire case came down to whether the jury believed the daughter or her father.

The daughter claimed the first incident occurred in her father's room when she, her father, and her older brother were home. R. p. 16. She alleged her father touched her and told her not to tell anyone. R. p. 17. On the second occasion, she alleged he touched and penetrated her "private" with his "private." R. pp. 18-19. Although her brother was home, she did not call out for help. R. p. 20. She claimed her father told her not to tell or she would be in trouble, and she said she did not tell because she was afraid. R. p. 20. She claimed the other incidents also occurred in her father's room, in much the same way, and involved additional types of sexual contact. R. pp. 21-22. She said her older brother was also in the home on most of those occasions. R. p. 56.

The daughter initially testified the incidents occurred three times a month. R. p. 39. When trial counsel pointed out that would be 72 times over a two-year period, she backed off that testimony and stated it did not occur that many times. R. p. 40. In a prior statement, she had claimed the incidents occurred six or seven times. R. p. 55. She claimed her mother walked in during one of the incidents and simply turned and walked back out of the room, without doing anything about it. R. pp. 40-41.

The daughter's first allegation of sexual misconduct by her father came when she was in the seventh grade, on the day of her brother's 16th birthday. R. p. 68. He had been given a car for his birthday. R. p. 68. The daughter wanted to ride off with him and

his friends. R. p. 68. When her father would not let her, she told her mother she needed to talk to her, they went inside together, and, showing no emotion, she told her mother her father had been molesting her. R. pp. 68-69, 80. After this allegation, the daughter went to stay with her best friend. R. pp. 23-24. She claimed she stayed at the friend's home for two months, but during that time she did not tell her friend's family what she alleged had occurred. R. pp. 25-26, 50.

Her parents testified she stayed at the friend's home only three days. R. pp. 69, 93. They picked her up and took her to her grandmother's home, where the daughter recanted the allegations. R. pp. 70-71, 85, 93-94. Although the daughter then returned home to live, she denied ever recanting the allegations she had made. R. p. 28. Ultimately, in ninth grade, when she was again not doing well in school, was getting into trouble, and was being strictly disciplined at home, she made the allegations again. R. pp. 72-74, 94-97.

At one point in her testimony, the daughter stated she held this information in so long because "I seen the way he treated my mom and how he hit her." R. p. 25, lines 4-5. The defense objected, but the court allowed this testimony. R. p. 25, lines 6-11. The admission of this evidence was reversible error.

Evidence may not be admitted unless it is relevant. Rules 401, 402, SCRE. Evidence of a defendant's character or trait of character is not admissible to prove action in conformity therewith. Rule 404(a), SCRE. Specifically, evidence of a defendant's prior crimes or other bad acts is not admissible to prove his character in order to show action in conformity therewith. *State v. Black*, 400 S.C. 10, 17, 732 S.E.2d 880, 884 (2012); Rule 404(b). Rather, evidence of other bad acts is admissible only for the limited

purposes allowed under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), and then only if other requirements are also met.

Prior acts evidence "'may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged.'" *State v. Fonseca*, 383 S.C. 640, 647, 681 S.E.2d 1, 4 (Ct. App. 2009), *aff'd and adopted by Supreme Court as its own opinion*, 393 S.C. 229, 711 S.E.2d 906 (2011), *quoting Lyle*, 125 S.C. at 415, 118 S.E. at 807. Such evidence is not admissible to show a propensity of the defendant to engage in criminal conduct. *See State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000); *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999).

"'A necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is.'" *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (citation omitted). Prior acts evidence may not be admitted "to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence." *State v. Tuffour*, 364 S.C. 497, 504, 613 S.E.2d 814, 818 (Ct. App. 2005), *vacated on other grounds*, 371 S.C. 511, 641 S.E.2d 24 (2007).

The only purposes for which evidence of prior crimes, wrongs, or other acts may be introduced is to establish motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; *State v. Wallace*, 384 S.C. 428, 432, 683 S.E.2d 275, 277 (2009); *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); *Lyle*, 125 S.C. at 416, 118 S.E. at 807. To be admissible, the prior act must logically relate to the crime with which the defendant is charged. *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483.

For evidence to be admitted under the common scheme or plan exception, the acts must bear some factual similarity to constitute a connection between them. *See Wallace*, 384 S.C. at 432 n.3, 683 S.E.2d at 277 n.3. Under this exception, the evidence must pertain to "'a common scheme or plan involving other crimes so closely related to the one charged that proof of one tends to prove the other.'" *See Tuffour*, 364 S.C. at 503, 613 S.E.2d at 817, *quoting State v. Barroso*, 328 S.C. 268, 271, 493 S.E.2d 854, 855 (1997) (emphasis omitted).

In addition, where the prior act is not the subject of a conviction, the evidence must be clear and convincing in order to be admissible. *Wallace*, 384 S.C. at 432 n.2, 683 S.E.2d at 277 n.2; *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483. However, even if the evidence is clear and convincing and qualifies for admission under an exception recognized by *Lyle* and Rule 404(b), the evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403; SCRE; *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278-79; *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483.

In this case, the testimony of the daughter that she had seen her father mistreat and hit her mother was inadmissible evidence of alleged prior bad acts. This evidence was not relevant to the issue before the court – whether the defendant had committed the acts alleged by the daughter. Nor did it fit within any of the limited exceptions allowing admission of such evidence. The defendant's identity was not in dispute, therefore the evidence was not admissible for the purpose of establishing identity. *See State v. Benjamin*, 345 S.C. 470, 479 n.7, 549 S.E.2d 258, 263 n.7 (2001); *State v. Langley*, 334 S.C. 643, 648 n.3, 515 S.E.2d 98, 100 n.3 (1999). His motive and intent were not

material issues at trial, and prior acts evidence generally is not admitted to establish motive or intent in sexual offenses. *See Nelson*, 331 S.C. at 10-11, 501 S.E.2d at 721; *Fonseca*, 383 S.C. at 4-5, 681 S.E.2d at 648. There was no claim of mistake or accident that this testimony would refute. *Cf. State v. Smith*, 391 S.C. 353, 359-64, 705 S.E.2d 491, 494-97 (Ct. App. 2011) (evidence of prior abuse resulting in broken femur was admissible to refute claim that child's drug overdose was result of mistake or accident). The alleged prior act of hitting the mother was not part of a common scheme or plan with, and bore no similarity to, the alleged sexual assault of the daughter. *Cf. State v. Taylor*, 399 S.C. 51, 59-61, 731 S.E.2d 596, 600-02 (Ct. App. 2012) (allowing evidence of defendant's rape of same victim nine months earlier, which occurred in identical manner and under almost identical circumstances as charged offense, as evidence of common scheme or plan). The alleged mistreatment and hitting of the mother was not so closely related to the charges for which the defendant was on trial that it tended to prove those charges. Because this evidence was not within any of the exceptions of Rule 404(b), it was inadmissible.

This evidence was also inadmissible under Rule 403 because its probative value was far exceeded by the danger of unfair prejudice to the defendant. The state may contend that this testimony had probative value because it explained why the daughter delayed disclosure of the alleged sexual misconduct. Any such value is minimal, because elsewhere in her testimony the daughter explained her nondisclosure, testifying she was afraid. R. p. 20. She stated her father told her not to tell and told her if she did tell she would be in trouble. R. p. 20. Later, she reiterated that she did not tell because she was scared. R. p. 56. She said she was afraid of her father. R. p. 57. In light of these

passages of testimony establishing why she did not reveal the allegations earlier, there was no need for the improper prior acts testimony concerning her father's having allegedly hit her mother. This evidence was of little additional probative value.

However, the testimony was extremely prejudicial. The case turned entirely on the credibility of the witnesses. There was no independent evidence to corroborate the daughter's allegations. The injection of improper testimony that the father had previously hit the mother likely influenced the jury in its determination that the father was guilty. A strong probability exists that jurors relied on this testimony as propensity evidence and found the father guilty on this improper basis. *Cf. State v. Spears*, 403 S.C. 247, 258, 742 S.E.2d 878, 884 (Ct. App. 2013). The testimony likely led to a determination of guilt because of a perception that the defendant was a bad person – someone who would hit his wife – rather than upon a finding that the state had met its burden of proving he committed the charged offenses.

Finally, this testimony, a generic reference to "the way" the defendant treated the witness's mother and "how" he hit her, was not clear and convincing evidence to establish the alleged prior misconduct, as is required for admission of evidence of prior wrongs or acts that are not the subject of a criminal conviction. *See Wallace*, 384 S.C. at 432 n.2, 683 S.E.2d at 277 n.2; *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483. The testimony was inadmissible under the controlling evidentiary standard.

The error in allowing this improper character and propensity evidence was not harmless.

> Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. An insubstantial error not affecting the result of the trial is harmless where guilt has been *conclusively* proven by competent evidence *such that no other rational conclusion could be reached*.

Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 (citations and quotation marks omitted) (emphasis added). In this case, guilt had not been conclusively proven. Other rational conclusions than guilt could have been reached based on the evidence before the jury.

The state's evidence was not overwhelming. The only evidence against the defendant was the testimony of the daughter. That testimony contained inconsistencies, including the significant discrepancy between her trial testimony that the incidents occurred three times a month for two years (72 times) and a prior statement that they occurred six or seven times. R. pp. 39-40, 55-56.

The defendant denied the allegations. Both he and his wife testified about a compelling reason the daughter had for fabricating the charges. The daughter was having serious trouble in school and failing all her courses. R. pp. 72, 94. She had been skipping school, missing 25 to 30 days. R. p. 95. She had been sneaking out of the house and going away for weekends with friends without her parents knowing where she was. R. p. 94. Because of these problems, the parents had imposed harsh discipline, restrictions which the father described as "boot camp" and the mother called "lockdown." R. pp. 73, 96. They had taken away her cell phone, television, iPod, and computer. R. pp. 73, 96. When she came in from school, she had to go to her room and came out only to eat. R. pp. 73, 96. The daughter was trying to get off restriction by having teachers call her parents when she made good grades. R. p. 73. Her father, however, refused to lift her restrictions until she received a report card. R. p. 74. She made these allegations against her father after she had been under this disciplinary regimen for approximately two weeks. R. pp. 73, 97.

When the daughter had made a similar allegation some years earlier, she had been allowed to go stay at a friend's house. R. pp. 25, 69, 92. Based on the evidence of her school and behavior issues and the parents' disciplinary measures, the jury reasonably could have concluded the daughter fabricated the charges against her father to have the restrictions lifted or to retaliate for his refusal to lift the restrictions. Based on the evidence of what occurred when she previously made the same allegations, the jury reasonably could have concluded she fabricated the charges to again get out of the house and thereby get out from under her father's strict discipline. These rational conclusions could have resulted in a jury finding that the defendant was not guilty. Under these circumstances, there is a substantial likelihood that the admission of the improper evidence of the defendant's bad character and propensity for wrongdoing altered the outcome of this trial and caused the jury to return the guilty verdicts. The erroneous admission of this testimony was unduly prejudicial and not harmless, and should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case to the lower court for a new trial.

Respectfully submitted,

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CERTIFICATE

Counsel hereby certifies that this final brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the appellant's final brief and final reply brief comply with the Order of the Supreme Court of South Carolina entitled *Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, filed August 13, 2007.

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PROOF OF SERVICE

I certify that I have served the record on appeal, the final brief of appellant, and the final reply brief of appellant, by mail, to respondent's attorney, Assistant Attorney General Julie Kate Keeney, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, on August 23, 2013.

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