STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000748

The State, Respondent,

vs.

Eric VanCleave, Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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III. The trial court properly denied Appellant's motion for a directed verdict.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Appellant became a member of the church run by the victim's father in 2000 or 2001. Appellant developed a close relationship with the victim's family including multiple brothers of the victim. According to the victim, Appellant was always touching him, giving back rubs or hugs. (4/1T.88; R. 122).

In 2001 or 2002, the victim began spending the night occasionally over at Appellant's home. Appellant made certain the victim would sleep in the same bed with him. The victim awoke during the night to Appellant "messing with [the victim's] penis." (4/1T.89; R.123). Appellant's hand was inside the victim's pants moving in a motion trying to cause the victim to ejaculate. The victim indicated Appellant touched him and touched him on the butt. Eventually, Appellant caused the victim to ejaculate and then used the victim's hand on Appellant's penis to cause him to ejaculate. (4/1T.89-90; R.123-124).

The victim indicated he was really scared and did not know what people would think of him. He contemplated trying to get home, but worried about what his parents would think. So instead, he went back to the bed with Appellant and laid on his stomach the remainder of the night to prevent Appellant from "messing" with him. (4/1T.90; R. 124). The victim did not tell anyone about the incident because he was afraid to say anything. (4/1T.91; R. 125).

The abuse occurred frequently at his house, often once a month. Much of the abuse was similar to the first incident with touching and masturbating. However, the abuse progressed and Appellant began performing oral sex on the victim until the victim

masturbated. Appellant also began putting his finger into the victim's anus. Finally, Appellant sodomized the victim during the abuse. (4/1T.91; R.125).

The victim and members of the victim's family went on camping trips with Appellant. They went camping in Barnwell County at Barnwell State Park Campground. On their second trip to Barnwell, the victim, several of the victim's brothers, Appellant, and Mike Sanders all stayed in Appellant's pop-up camper. (4/1T.97; R.131). The camping trip happened in 2005, though the victim could not remember exactly when it occurred. He did indicate he believed he was either 14 or 15 years old. (4/1T.98; R.132).

Appellant made certain the victim was sleeping in the same bed with him in the camper and everyone else was in different beds. The curtain to the bed was closed, blocking any view from the remainder of the camper. During the night, the victim awoke to Appellant performing oral sex on him. Appellant then had the victim use his hand to touch and masturbate Appellant. Then the abuse escalated and Appellant put his finger into the victim's anus and, eventually anally raped the victim. (4/1T.99; R.133). While abusing the victim, Appellant whispered to him asking if he liked it or if he would smile. Appellant also whispered that he was sorry for what he was doing. (4/1T.100; R.134).

Approximately two weeks after the victim turned 16 on May 18, 2006, he went on another camping trip with Appellant to Barnwell State Park. Again, they stayed in Appellant's pop-up camper, with Appellant and the victim sleeping in the same bed. (4/1T.102-103; R. 136-137). Appellant again fondled the victim and performed oral sex on the victim until he ejaculated. Appellant again had the victim touch Appellant's penis. Appellant then anally raped the victim again. (4/1T.103; R. 137).

The abuse was not revealed until 2010 when the victim finally told his parents. He attended a conference in which the speaker discussed forgiveness and how holding onto something could keep someone from getting closer to God. The victim knew Appellant worked for an elementary school and taught Vacation Bible School and so he felt he had to disclose the abuse. (4/1T.111-112; R.145-146).

Michael Richburg, the manager of Barnwell State Park testified regarding the records kept of campers at the park. He testified Appellant made a reservation for Barnwell State Park for arrival on May 27, 2006 and departure on May 29, 2006. (4/1T.140-141; R.173-174). He indicated no records were kept from 2005 or earlier. (4/1T.142; R.175).

Michael Sanders testified he was a friend of the victim's family and Appellant. He testified he went on a couple camping trips with Appellant and the victim to Barnwell State Park. He indicated the first trip they slept in tents, but on the second trip they slept in Appellant's camper. He also verified Appellant and the victim slept in the same bed on the second trip while in the camper. (4/1T.149; R. 182). He indicated the trip with the camper was in the fall of 2005, possibly around Halloween. (4/1T.149; R. 182). He further verified the fact the curtain was pulled closing off Appellant and the victim from the remainder of the camper. (4/1T.150; R.183).

ARGUMENT

I. The trial court properly allowed trial to proceed on new indictments and properly granted Appellant a continuance to allow him time to prepare.

Appellant contends the trial court erred in not dismissing and allowing the State to proceed on indictments obtained shortly before Appellant's case was initially called. The trial court properly concluded the State could obtain new indictments based on information obtained from the victim and granted Appellant's motion for a continuance. While Appellant renewed his motion to dismiss, he did not indicate a need for a further continuance or explain any prejudice resulting from going forward at the term of court his case was called for trial. Finally, to the extent Appellant argues the State violated his right to a speedy trial, the issue is not preserved for review on appeal.

Preservation

At the hearing on February 25, 2013, Appellant mentioned the two motions for speedy trial he filed, but he never argued the case should be dismissed on the basis of a violation of his right to a speedy trial. (2/25T.6; R. 061). Instead, he argued that the case should be dismissed because it was a due process violation for the State to bring new indictments against him three years after he was arrested and just before trial. (2/25T.7; R.062). Additionally, in renewing the motion prior to trial, Appellant argument was to "renew our objection to those four new Indictments being presented three years after my client's arrest and only after presentation of alibi evidence in regards to the prior four Indictments." (4/1T.65; R. 107). Again, counsel never articulated an argument based on a violation of his right to a speedy trial.

The issue of a speedy trial is not preserved for review on appeal because it was not argued as an issue to the trial court, and Appellant cannot raise one ground at trial and another on appeal. State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

On the merits, the trial court properly denied Appellant's motion to dismiss the case whether based on pre-indictment delay or based on an alleged violation of his right to a speedy trial. Further, to the extent counsel maintains the indictments are invalid because they allege a range of dates for the acts to have occurred, time is not of the essence in any of the indicted offenses, and the ranges are, therefore, proper.

Speedy Trial

The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend VI. The United States Supreme Court (USSC) explained: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Beavers v. Haubert, 198 U.S. 77, 87 (1905); see also, Barker v. Wingo, 407 U.S. 514, 522 (1972) (finding "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case"). As the USSC stated:

> In Barker, the Court refused to "quantif[y]" the right "into a specified number of days or months" or to hinge the right on a defendant's explicit request for a speedy trial. Id., at 522–525, 92 S.Ct. 2182. Rejecting such "inflexible

> approaches," Barker established a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." Id., at 529, 530, 92 S.Ct. 2182.

Vermont v. Brillon, 129 S.Ct. 1283, 1290 (2009).

A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." Id. (quoting Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)).

In Barker, the USSC identified several factors to be used in determining whether a defendant has been denied the right to a speedy trial including: (1) the length of delay, (2) the reason the government uses to explain the delay, (3) when and how the defendant asserted his speedy trial right, and (4) the prejudice to the defendant. Barker, 407 U.S. at 530; see also, State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978) (applying Barker factors in South Carolina). "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530.

Even assuming the three-year delay between his arrest and trial, is sufficient to warrant consideration of the remaining factors, the trial court properly denied the motion to dismiss. See Doggett v. U.S., 505 U.S. 647, 652 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."); see also, Waites, 270 S.C. at 108, 240 S.E.2d at 653 (holding a two-year-and-four-month delay in a prosecution for assault and

battery of a high and aggravated nature and for pointing and presenting a firearm implicated the rest of the Barker analysis).

The second factor is the reason for the delay. In Brillon, the USSC explained:

> Barker instructs that "different weights should be assigned to different reasons," id., at 531, 92 S.Ct. 2182, and in applying Barker, we have asked "whether the government or the criminal defendant is more to blame for th[e] delay." Doggett v. United States, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Deliberate delay "to hamper the defense" weighs heavily against the prosecution. Barker, 407 U.S., at 531, 92 S.Ct. 2182. "[M]ore neutral reason[s] such as negligence or overcrowded courts" weigh less heavily "but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Ibid.

Brillon, 129 S.Ct. at 1290. Further, the Court has instructed delays caused by the defendant should be weighed against him. See Barker, 407 U.S. at 529.

In the instant case, the State explained any delay in the trial of Appellant. First, the solicitor explained Appellant changed counsel, and as soon as Appellant's new counsel requested the matter be heard expeditiously, the State placed the trial on the first available term of court. (2/25T.4; 9; R. 059; 064). The solicitor explained other pending charges in Lexington County contributed to the delay in this case. Further, she explained Barnwell County only has four terms of court a year, and as soon as she received the motion for speedy trial from Appellant's counsel she began discussing the terms of court and placed the case on the first available term. (2/25T.9; R. 064). The reasons provided do not indicate any intent to hamper the defense or purposeful delay caused by the State. The reasons are mostly neutral and relate to the lack of court time available. Finally, Appellant changed counsel and the case was scheduled for the first available term of

court after receipt of Appellant's new counsel's motion for a speedy trial. Accordingly, this factor does not weigh in favor of a violation of Appellant's right to a speedy trial.

The third factor for consideration is Petitioner's assertion of the right. Langford, 400 S.C. at 444, 735 S.E.2d at 483. As the Court instructed in Barker:

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. . . . We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531-532.

In the instant case, Appellant first asserted his right by filing a motion in July 2012. (Motion for Speedy Trial dated July 24, 2012; R.045-046). This motion was filed twenty-seven months after his arrest. His second motion was filed almost six months later and right before his case was to be called for trial. (Motion for Speedy Trial dated January 14, 2013; R. 047-049). As discussed above, his case was called in February 2013 at the first available term of court in Barnwell County after his motion was received. Further, as discussed in the preservation section above, it is important to note that Appellant did not raise a motion to dismiss for violating his right to a speedy trial at his trial. As a result, he did not vigorously or aggressively seek to assert his right to a speedy trial and this factor should weigh in the State's favor.

In considering the fourth prong of the test, whether Appellant suffered prejudice, the South Carolina Supreme Court found Barker instructive. Langford, 400 S.C. at 445, 735 S.E.2d at 484. The USSC stated:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Barker, 407 U.S. at 532. During the time prior to trial, Appellant was out on bond so he did not suffer oppressive pretrial incarceration. He asserts as his main allegation of prejudice that two witnesses died prior to the case being called for trial. However, the record fails to disclose when these individuals died, who the witnesses were, and how their testimony would have been helpful to Appellant's case. He merely makes the general assertion: "it would be a violation of due process for my client to have to defend those dates after he's been out for three years, after he's lost two of the witnesses who were potential witnesses on his case." (2/25T.7; R. 062). This general assertion is insufficient to establish the prejudice necessary to demonstrate a violation of Appellant's right to a speedy trial.

In looking at the factors and the case as a whole, taking into account both the interest of Appellant and the State, Appellant has failed to demonstrate he was entitled to a dismissal based on a violation of his right to a speedy trial.

Pre-indictment Delay

Appellant also seems to maintain he is entitled to dismissal based on excessive pre-indictment delay by the State. Appellant has failed to prove the delay caused substantial actual prejudice to his right to a fair trial. Further, the State was justified in

bringing the new indictments after discussions with the victim lead to different and uncertain timeframes being involved.

The South Carolina Supreme Court established a two prong test to determine if a defendant's right to due process has been violated by delay in indictment. See State v. Brazell, 325 S.C. 65, 72-73, 480 S.E.2d 64, 68-69 (1997). "First, the defendant must prove that the delay caused substantial actual prejudice to his right to a fair trial. The second prong requires the court to consider the reason for the State's delay and to balance the justification for the delay against the prejudice to the defendant." State v. Lee, 375 S.C. 394, 397, 653 S.E.2d 259, 260 (2007) (citing Brazell, 325 S.C. at 72-73, 480 S.E.2d at 68-69)(internal citations omitted).

In order to prove substantial prejudice, Appellant must show he was "meaningfully impaired in his ability to defend against the [S]tate's charges to such an extent that the disposition of the criminal proceeding was likely effected [sic]." Lee, 375 S.C. at 398, 653 S.E.2d at 260-261. "To meet his burden of showing substantial prejudice, the defendant must identify the evidence and expected content of the evidence with specificity, as well as show that he made serious efforts to obtain the evidence and that it was not available from other source." Id. at 398, 653 S.E.2d at 261 (emphasis added)(citing Brazell).

In the instant case, Appellant failed to show he was meaningfully impaired in his ability to defend the charges by the delay. He made a vague reference to possible witnesses who were deceased at the time of trial, but failed to identify any evidence they could provide, much less exculpatory evidence. Appellant failed to identify to the trial court or this Court, "with specificity," any evidence he has been prevented from

presenting to the jury which could have been at all beneficial to his case. As a result, he has failed to meet the first necessary prong of the test.

Additionally, even if he met the first prong and could establish substantial actual prejudice, the State was justified in bringing the indictments three years after Appellant's arrest. "[T]he second part of the due process inquiry requires the court to consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant." Id. at 400, 653 S.E.2d at 262. "When balancing the prejudice and the justification, the basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" Id.

The solicitor explained Appellant changed counsel and other charges were pending in Lexington County for Appellant. (2/25T.4; 9; R. 059;064). Further, she explained the new indictments were based on discussions with the victim and determinations that there was ongoing conduct and between Appellant and the victim. (2/25T.3-4; 9; R. 058-059; 064). The State's reason for the delay in bringing the new indictments provides sufficient justification. Accordingly, even if Appellant can demonstrate substantial actual prejudice, the prejudice of the delay, when weighed against the valid reasons of the State in the three-year delay, is not sufficient to warrant vacating Appellant's convictions and sentences.

Indictment Time Frame

Finally, Appellant seems to contend the use of a range as opposed to specific dates in the indictment was a basis for dismissal or quashing the indictments. "The primary purposes of an indictment are to put the defendant on notice of what he is called

upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) (citing State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005)). If the objection to an indictment is timely made, the circuit court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500.

As explained in State v. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 853-854 (Ct. App. 2007), this Court has adopted a two-prong test for determining the sufficiency of an indictment involving a purportedly overbroad time period: "(1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury." Id. The Court provided as examples: State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (holding an indictment alleging commission of second-degree criminal sexual conduct during periods of June 1 through July 20, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995, was sufficient as to time); State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) (finding an indictment charging first-degree criminal sexual conduct with a minor covering a two-year period was sufficient as to time); and State v. Thompson, 305 S.C. 496, 500-01, 409 S.E.2d 420, 423 (Ct. App.

1991) ("The specific date and time is not an element of the offense of first-degree criminal sexual conduct.").

None of the offenses for which Appellant was charged have time as an element which must be specifically pled. See S.C. Code Ann. § 16-3-655(B) (Supp. 2010) (criminal sexual conduct with a minor second degree); S.C. Code Ann. § 16-15-140 (Supp. 2010) (committing a lewd act upon a child); S.C. Code Ann. § 16-3-654 (criminal sexual conduct third degree); State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000) (defining ABHAN as "the unlawful act of violent injury to another accompanied by circumstances of aggravation."). As a result, the roughly one year range provided in the indictments for lewd act and CSC with a minor, and the two day range in the ABHAN and CSC third degree indictments, did not render them invalid as the range occurred prior to the date of the indictments and time was not of the essence in any of the charges.

II. The trial court properly allowed testimony of prior and other bad acts by Appellant because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Appellant maintains the trial court erred in allowing the State to admit the testimony of the victim's two brothers regarding other bad acts by Appellant. Further, he seems to argue the victim's testimony of the continuous nature of the conduct should not have been allowed. The trial court properly considered the evidence and allowed the evidence of the brother's victimization as part of a common scheme or plan based on the similarities to the acts charged. Further, the court properly allowed the victim to testify to the continuous course of illicit conduct between Appellant and himself.

Prior to trial, the State moved *in limine* to admit the testimony of the victim's two brothers as well as the victim's testimony about the continuous abuse by Appellant. The victim testified first regarding the abuse by Appellant. He testified Appellant became a friend of the family. Sometime in 2000-2001, when the victim was either 10 or 11, the Appellant began having the victim over to his house for the night. The victim stated he would wake up to Appellant fondling him and Appellant trying to ejaculate the victim. The victim testified Appellant also used the victim's hand to try and do the same to Appellant. The victim testified similar abuse occurred numerous times at Appellant's house. (4/1T.6-7; R. 078-079).

The victim testified the abuse progressed. He stated Appellant would use his mouth on the victim's penis. The victim testified Appellant would put his finger in the victim's anus and eventually anally raped him. (4/1T.7; R. 079).

The victim testified the abuse would occur in other locations as well. The abuse occurred on camping trips, at the flea market, and on trips to football games. He said the abuse on the trips would occur in the bed of Appellant's pop-up camper. (4/1T.8; R. 080).

On the trips to Barnwell Appellant committed the abuse for which he was charged and forms the basis of this appeal. The victim testified he would be in the bed of the pop-up camper with Appellant. He stated the abuse began similar to the other abuse. The victim would wake up to Appellant fondling, kissing, or rubbing him. He testified Appellant would put the victim's penis in Appellant's mouth and Appellant would ejaculate the victim. Appellant then would anally rape him. (4/1T.9; R. 081).

The victim's older brother testified Appellant became a friend of the family and spent time with the victim's family, including going on a lot of trips. He specifically testified to a camping trip to Maggie Valley. (4/1T.17; R. 089). The victim's older brother testified he fell asleep in the camper with Appellant. He stated he woke up to his pants pulled down and Appellant attempting to ejaculate him. The victim's older brother testified Appellant appeared to be sleeping so he moved his hand off, pulled up his pants and went back to sleep. The abuse occurred when the victim's older brother was about 17. (4/1T.18; R. 090).

The victim's younger brother testified Appellant was a friend of the family. He testified they would go to football games, on trips, and camping with Appellant. (4/1T.21-22; R.093-094). He testified on a trip to Cherokee, North Carolina Appellant when he was about 12 or 13, Appellant made arrangements for him to sleep in the same bed with Appellant in Appellant's camper. He testified he woke up to Appellant grasping his penis and trying to ejaculate him. Appellant was doing this to the boy through the

outside of his clothes. The victim's younger brother testified he looked over and Appellant appeared to be asleep. He assumed it was a mistake. However, the following night the same thing happened so the victim's younger brother got out of the bed and slept the rest of the night on the floor. (4/1T.22-23; R. 094-095).

Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Proof of prior bad acts must be clear and convincing if they are not the subject of a conviction. State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

The brothers' allegations, as well as the testimony of the continuous illicit conduct with the victim, were clear and convincing. While Appellant argues the brother's allegations are not supported by criminal charges, charges or investigations are not required in order for the court to find the testimony clear and convincing. "Clear and convincing evidence is that 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, 24, 664 S.E.2d 480, 483 (2008).

All three testified to their ages during the conduct. They all provided specifics as to location where the conduct occurred. The brothers both described the camper they were in when the sexual conduct occurred. They both testified how Appellant either ended up in the same sleeping area or arranged for the brother to be in the sleeping area with Appellant so that he had access to them. The victim testified how the abuse progressed from touching to anal rape. The details provided, even though specific dates could not be remembered for events occurring roughly 6-7 years or more previously, provided clear and convincing evidence of the acts to allow their admission.[1]

Further, the brothers' testimony is sufficiently similar to the testimony by the victim to be admissible. "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. The South Carolina Supreme 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.

In the instant case, the victims were all in their mid to late teens when the abuse occurred. The victims were brothers and all had a relationship with Appellant because he was a family friend with whom they spent significant time. The abuse of each boy

[1] It is questionable if the issue of whether the siblings provided proof by clear and convincing evidence of the acts is preserved.

occurred on camping trips, in Appellant's camper. While none of the boys testified regarding threats, the victim and one of his brothers testified Appellant "arranged" for them to be sleeping with him when the sexual abuse occurred. Finally, each of the boys testified to Appellant fondling them, grasping their penis, and trying to ejaculate them. The similarities in this case certainly outweigh the slight differences of where the camping trips occurred and exactly when the events occurred.

Further, the victim's testimony regarding prior acts of abuse by Appellant is admissible under the common scheme or plan exception as well. The South Carolina Supreme Court reaffirmed that the common scheme or plan exception can be established through continuous illicit conduct between the defendant and the victim. See State v. Clasby, 385 S.C. 148, 157-158, 682 S.E.2d 892, 897 (2009); see also, State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct. App. 2008) (holding evidence that defendant began touching and committing other sexual misconduct with victim when she was six or seven years old was admissible to show common scheme or plan during trial for the indicted offense of CSC with a minor, second degree on the ground that the "six to seven year pattern of escalating abuse of Victim by [defendant was] the essence of grooming and continuous illicit activity"); State v. Weaverling, 337 S.C. 460, 471, 523 S.E.2d 787, 792 (Ct. App. 1999) (finding victim's testimony regarding pattern of sexual abuse he suffered by the defendant was properly admitted as part of a common scheme or plan exception in trial for CSC with a minor and disseminating harmful material to a minor where the "challenged testimonial evidence of [defendant's] prior bad acts show[ed] the same illicit conduct with the same victim under similar circumstances over a period of several years").

In this case, the victim testified the abuse began when he was young, and included touching and masturbation. The victim testified about the grooming and continuing illicit conduct for several years between Appellant and the victim. He discussed the escalation of abuse from touching, to oral sex, to anal rape. This testimony is clearly admissible as part of a common scheme or plan related to the abuse of the victim.

Finally, the trial court properly determined the probative value outweighed any prejudicial impact of the testimony. The testimony established Appellant's means of getting the children alone, using his camper as the location, and taking advantage of the situation for his benefit. The probative value of the common scheme or plan as strong proof of the underlying charges outweighs any prejudice which may occur.

III. The trial court properly denied Appellant's motion for a directed verdict.

Appellant contends the trial court erred in denying his motion for directed verdict because the evidence created at most a mere suspicion of guilt. The testimony of the victim established the basis for conviction of all four charges and was supported by other testimony in the record. Accordingly, the trial court properly allowed the case to go to the jury.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Appellant faced charges of criminal sexual conduct with a minor second degree, committing a lewd act upon a child, criminal sexual conduct third degree, and ABHAN. Pursuant to section 16-3-655(B) of the South Carolina Code (Supp. 2010):

> A person is guilty of criminal sexual conduct with a minor in the second degree if:
> (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial,

> custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

Section 16-15-140 of the South Carolina Code defines the crime of committing a lewd act upon a child:

> It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

To convict Appellant of criminal sexual conduct in the third degree, the State must show:

> [T]he actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
>
> (a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.

S.C. Code Ann. § 16-3-654 (Supp. 2010).

ABHAN is defined as "the unlawful act of violent injury to another accompanied by circumstances of aggravation." State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000).

The testimony presented in this case as detailed in the statement of facts above, especially the testimony of the victim, creates much more than a mere suspicion and is direct evidence tending to prove Appellant's guilt. The victim's testimony established when he was 15 Appellant touched him on the penis, Appellant made the victim touch Appellant's penis, Appellant performed oral sex on the victim, and anally raped the

victim. His testimony established this occurred while camping in Appellant's camper at Barnwell State Park. The testimony was further supported by Michael Sanders testimony that the camping trip occurred in the fall of 2005 and that he observed the curtain around Appellant and the victim closed during the night. This evidence is sufficient to warrant sending the charges of criminal sexual conduct with a minor in the second degree and committing a lewd act on a child to the jury.

The victim also testified in 2006, shortly after his 16th birthday, he again went on a camping trip. The dates of the camping trip were corroborated by records from Barnwell State Park indicating it occurred the end of May over Memorial Day Weekend. While on this camping trip, the victim testified Appellant again touched his penis, made the victim touch Appellant's penis, performed oral sex on the victim, and then anally raped the victim. This evidence is sufficient to warrant sending the charges of criminal sexual conduct third degree and ABHAN to the jury.

While Appellant may have denied the charges and presented evidence conflicting with the State's evidence, neither this Court nor the trial court performs a weighing of the evidence. The State presented evidence demonstrating Appellant's guilt of the charges brought. Accordingly, the trial court properly denied Appellant's motion for directed verdict and correctly sent all charges to the jury for consideration.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
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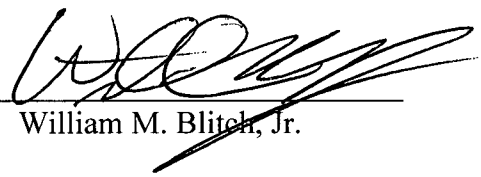
BY: 
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ATTORNEYS FOR RESPONDENT

March 12, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000748

The State, Respondent,

vs.

Eric VanCleave, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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Appeal from Barnwell County
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Eric VanCleave, Appellant.

PROOF OF SERVICE

I, Sally Ellison certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert T. Williams, Sr. Esquire
Benjamin A. Stitely, Esquire
Williams, Hendrix, Steigner & Brink, P.A.
Post Office Box 849
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I further certify that all parties required by Rule to be served have been served.
This 12 day of March, 2014.

Sally Ellison

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March 12, 2014

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RE: State v. Eric VanCleave
Appellate Case Tracking No. 2013-000748

Dear Mr. Williams:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and 9 copies enclosed)
Victim Services