ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Maite Murphy, PCR Judge
Deadra L. Jefferson, Trial Judge
Appellate Case No. 2018-000738

JOHNNY TAMAR BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURUSANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Petitioner's Statement of Issue

The trial judge erred in allowing the State to introduce evidence that appellant was listed on the sex offender registry and evidence of a prior bad act because the prejudicial value of this evidence viewed either separately or cumulatively outweighed any probative value.

Respondent's Statement of Issue

I. The trial court did not abuse its broad discretion by allowing the State to present evidence regarding Petitioner's inclusion on the sex offender registry and Petitioner's prior sexual assaults on the same minor victim.

   A. The trial court did not abuse its broad discretion by allowing the State to present evidence regarding Petitioner's inclusion on the sex offender registry as proof of an element of first-degree criminal sexual conduct with a minor because the probative value of that evidence, which was necessary and essential to prove an element of the charged offense, was not substantially outweighed by the evidence's potential for undue prejudice. Furthermore, the trial court took appropriate efforts to minimize the evidence's potential for undue prejudice by limiting the information admitted in regard to the prior conviction and by issuing a limiting instruction to the jury.

   B. The trial court did not abuse its broad discretion by allowing the State to present evidence through the testimony of the minor victim that Petitioner had previously sexually assaulted her several times when she was between six and seven years old until he left the geographic area because this evidence constituted evidence of the existence of a common scheme or plan due to its numerous significant similarities to sexual assault of the minor victim for which Petitioner was on trial, including the same victim, the similar manner in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, and because the probative value of the evidence of the prior abuse was not substantially outweighed by its potential for undue prejudice. However, even assuming the trial court somehow erred in admitting the evidence of the prior abuse, any error was entirely harmless in light of the other overwhelming evidence of Petitioner's guilt presented during trial.

STATEMENT OF THE CASE

During the November 2013 term, the Charleston County Grand Jury indicted Petitioner Johnny Tamar Brown for two counts of first-degree criminal sexual conduct with a minor (2013-GS-10-6759, 2013-GS-10-6760). Thereafter, during the April 2015 term, the Charleston County Grand Jury indicted Petitioner for third-degree criminal sexual conduct with a minor (2015-GS-10-2362). The indictments stemmed from an incident on June 20, 2013, when Petitioner vaginally and anally raped his cousin's thirteen-year-old daughter while her two-year-old sister was nearby.

Petitioner had previously been convicted of first-degree criminal sexual conduct with a minor, and, accordingly, the State informed Petitioner it intended to serve him with notice to seek life without parole pursuant to Section 17-25-45 of the South Carolina Code of Laws. On June 24, 2014, Petitioner appeared before the Honorable Roger M. Young, Sr., circuit court judge, where he rejected the State's plea offer for a recommended sentence of twenty years imprisonment. The court advised Petitioner that it was "very likely" the State would seek life without parole pursuant to Section 17-25-45 based on his prior conviction for first-degree criminal sexual conduct with a minor if he rejected the plea offer and Petitioner advised the court he understood and had discussed this with his attorney. Thereafter, the State served Petitioner with notice of its intent to seek life without parole.

On April 13, 2015, Petitioner appeared in the Charleston County Court of General Sessions and proceeded to a jury trial before the Honorable Deadra Jefferson, circuit court judge. Assistant Public Defender Charles Cochran of the Charleston County Public Defender's office represented Petitioner. Assistant Solicitors Debbie Herring-Lash and Shannon Elliott of the Ninth Circuit Solicitor's Office prosecuted the case. On April 15, 2015, the jury convicted

Petitioner as indicted of all three offenses. Judge Jefferson sentenced Petitioner to life imprisonment for both first-degree criminal sexual conduct with a minor convictions and to fifteen years for the third-degree criminal sexual conduct. Petitioner did not file a notice of appeal.

Petitioner did file a timely application for post-conviction relief on March 29, 2016. On June 23, 2016, the State (Respondent) served its return to the application and requested an evidentiary hearing. Thereafter, on December 3, 2017, Petitioner, through appointed counsel James K. Falk, filed an amended application. An evidentiary hearing into the matter was convened January 31, 2018, at the Charleston County Courthouse before the Honorable Maite Murphy, circuit court judge. At the evidentiary hearing, Petitioner proceeded forward on the following claims:

1. Ineffective assistance of counsel for failing to object to testimony of State's witness Katherine Fabrizio, including
    a. testimony was beyond the scope of permissible non-expert testimony
    b. testimony amounting to bolstering and a violation of the Confrontation Clause
2. Ineffective assistance of counsel for failing to move for a curative instruction following bolstering testimony from Katherine Fabrizio
3. Ineffective assistance of counsel for failing to perfect a direct appeal

Petitioner was present at the hearing and represented by counsel Falk. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of Respondent. Following the evidentiary hearing, Judge Murphy granted Petitioner a belated review of direct appeal issues pursuant to White v. State[1] and denied all remaining grounds in the application.

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[1] 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner filed a notice of appeal. On October 31, 2018, Petitioner filed a Petition for a Writ of Certiorari and a Brief of Appellant Pursuant to White. This Brief of Respondent Pursuant to White and an accompanying Return to Petition for Writ of Certiorari follow.

STATEMENT OF FACTS

On June 20, 2013, Petitioner's cousin lived in Charleston County with her thirteen-year-old daughter (Victim) and two-year-old daughter. (App. 64-65, 122-26). That afternoon, Petitioner's cousin left for work, leaving her two daughters at home as she typically did while she worked. (App. 124-26). While she was gone, Petitioner came over to the house. (App. 70). Petitioner began tickling the girls, starting first with the younger child and eventually tickling Victim. (App. 72-73). Petitioner then pushed Victim's clothing to the side and penetrated her vagina and anus with his penis. (App. 74-78, 86-88). This was not the first time Petitioner had sexually assaulted Victim—Petitioner had anally penetrated her when she was six-years-old. (App. 112-14).

When Petitioner finished assaulting the thirteen-year-old child, he attempted to pay Victim twenty dollars, went into the bathroom, and then left the house. (App. 88). Petitioner later sent his other cousin, Solomon, to the home to try to give Victim some candy, which she refused. (App. 88-89). Once Petitioner left, Victim took a shower and then gave her two-year-old sister a bath. (App. 89). She then began to cry and continued to do so until her mother came home a few hours later. (App. 89-90). When her mother arrived home, Victim disclosed the abuse to her mother, who took her to the hospital for evaluation. (App. 90-94, 129-31).

At the hospital, Victim was evaluated by Katherine Fabrizio (Fabrizio), a nurse practitioner and pediatric sexual assault nurse examiner (PSANE). (App. 158-61). Fabrizio started her examination of Victim between 11:00 p.m. and 12:00 a.m. on the day of the assault. (App. 165). Fabrizio described Victim's demeanor as "very quiet, very tearful, very much in shock." (App. 165). Fabrizio collected swabs from the child's mouth, vagina, and rectum, as well as collected fingernail scrapings. (App. 167). Fabrizio did not observe any trauma to the child's

vaginal or anal area. (App. 178-79). The collected swabs were sent to the laboratory for analysis, where Victim's vaginal swab tested positive for gonorrhea. (App. 182-85, 299-301, 314-16). A urine sample taken from Petitioner also tested positive for gonorrhea. (App. 307-10, 314-16). Additional testing also detected semen on Victim's vaginal swabs, although a DNA profile was not able to be developed from the swab. (App. 284, 290-96).

Victim's mother also took Victim to Lowcountry Children's Center, where she again disclosed her sexual assault to a forensic interviewer. (App. 132, 246-247). Victim also disclosed the sexual assault to the nurse at her school. (App. 316-20).

Petitioner, who was a registered sex offender based on a prior conviction for first-degree criminal sexual conduct with a minor, was required to wear an ankle monitor that tracked his location at all times with GPS data. (App. 225). This GPS data corroborated Victim's disclosure and established Petitioner was at Victim's home during the times she reported Petitioner had sexually assaulted her. (App. 256-61).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see 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."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I. The trial court did not abuse its broad discretion by allowing the State to present evidence regarding Petitioner's inclusion on the sex offender registry and Petitioner's prior sexual assaults on the same minor victim.

Petitioner contends the trial court committed reversible error when it permitted the State to introduce evidence that Petitioner was a registered sex offender and had previously sexually assaulted the same minor victim because the prejudicial value of such evidence allegedly outweighed the probative value when viewed separately or cumulatively. Contrary to Petitioner's contentions, the trial court did not abuse its broad discretion and properly admitted evidence regarding both Petitioner's inclusion on the sex offender registry and Petitioner's prior sexual assaults on the same minor victim. Petitioner's conviction should be affirmed.

A. The trial court did not abuse its broad discretion by allowing the State to present evidence regarding Petitioner's inclusion on the sex offender registry as proof of an element of first-degree criminal sexual conduct with a minor because the probative value of that evidence, which was necessary and essential to prove an element of the charged offense, was not substantially outweighed by the evidence's potential for undue prejudice. Furthermore, the trial court took appropriate efforts to minimize the evidence's potential for undue prejudice by limiting the information admitted in regard to the prior conviction and by issuing a limiting instruction to the jury.

At the outset of Petitioner's trial, the State informed the trial court it intended to offer evidence that Petitioner had been convicted of a crime listed in Section 23-3-430(C) that required him to register as a sex offender as an element of the charged offense—Section 16-3-655(A)(2). (App. 17-18). The State further informed the court that it did not intend to go into the details of the underlying conviction resulting in Petitioner's inclusion on the sex offender registry or even as to what the underlying conviction was for, but rather, merely intended to introduce evidence that Petitioner had been convicted of a crime enumerated in Section 23-3-430(C) requiring

registration as a sex offender which it intended to admit through the person who adminsters the sex offender registry for Charleston County. (App. 18-22). Defense counsel objected, arguing—incorrectly—the evidence of a prior conviction was not an element of the offense. (App. 20). The court reserved ruling, indicating it wanted additional time to review the statute before determining whether the evidence was admissible. (App. 22). Later, during a break in proceedings, the trial court ruled evidence of a prior conviction listed in Section 23-3-430(C) requiring registration as a sex offender was an element of the charged offense and ruled the State could offer evidence to prove this element in accordance with the statute. (App. 80-82).

The State then introduced such evidence through the testimony of Detective Robert Colson with the Charleston County Sheriff's Office, who testified as follows regarding Petitioner's inclusion on the sex offender registry:

> Q. Now what are your duties?
>
> A. Sex offender registry.
>
> Q. Ad as part of that, do you work with registering sex offenders?
>
> A. Yes, I do.
>
> Q. And as of May of 2013, was [Petitioner] on the sex offender registry for a crime listed in 23-3-430(C)?
>
> A. Yes.

(App. 223-225). The State did not introduce—and did not seek to introduce—any evidence as to the specific crime for which Petitioner had been convicted or the underlying details of that offense.

During closing arguments, the trial court gave the following limiting instruction to the jury regarding evidence of his inclusion on the sex offender registry pursuant to a conviction listed in Section 23-3-430(C):

> The State must then prove beyond a reasonable doubt that the defendant has been ordered to be included in the sex offender registry pursuant to South Carolina Code Annotated Section 23-3-430 (d) at the time of the sexual battery.
>
> I instruct you that evidence that the defendant has been ordered to be included in the sex offender registry pursuant to Code Section 23-3-430 (d) was not offered to prove that the defendant has a bad character or to prove that the defendant committed criminal sexual conduct on this occasion. This prior registration may be considered by you only for the purpose of determining whether or not the State satisfied that element of the offense that makes it first degree criminal sexual conduct with a minor
>
> Before you can consider the evidence of the defendant's prior registration, you must first find that the State has proven beyond a reasonable doubt that a sexual battery was committed by the defendant. If you find beyond a reasonable doubt that the sexual battery was committed, then you may consider evidence of the prior registration as evidence of the element which would make the criminal sexual conduct first degree criminal conduct with a minor
>
> If you do not find beyond a reasonable doubt that the defendant has been ordered to be included in the sex offender registry pursuant to South Carolina Code Annotated Section 23-3-430(b), then you cannot return a verdict of first degree criminal sexual conduct with a minor.

(App. 386-88).

On appeal, Petitioner argues the trial court erred by allowing the State to present evidence of Petitioner's inclusion on the sex offender registry based on the prejudicial value of such evidence. Petitioner appears to recognize that the existence of a prior conviction requiring inclusion on the sex offender registry is an element of the offense he was convicted, first-degree criminal sexual conduct with a minor pursuant to Section 16-3-655(A)(2), but nevertheless argues the prejudicial value of the evidence outweighed its probative value. Contrary to Petitioner's contentions, the trial court did not abuse his broad discretion by allowing the State to present evidence that Petitioner was convicted of a crime listed in Section 23-3-430(C) that required him to register as a sex offender because the evidence's probative value, which was extremely high due to the essential nature of proving an element of first-degree criminal sexual

conduct with a minor, was not substantially outweighed by any danger of unfair prejudice, which was greatly reduced by the trial court's instructions to the jurors informing them they could only consider the evidence for a limited purpose. Petitioner's convictions should be affirmed.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ").

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

Trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727 S.E.2d at 757. A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In present case, Petitioner was charged with committing first-degree criminal sexual conduct with a minor in violation of Section 16-3-655(A)(2). Pursuant to that statutory section,

an individual is guilty of first-degree criminal sexual conduct with a minor if he or she "engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)."[2] S.C. Code Ann. § 16-3-655(A)(2). Notably, in delineating the elements of the offense, the legislature chose not only to make the age of the victim and the commission of a sexual battery elements of the offense but, in order to deter recidivist sex offenders, also elected to make the fact the offender had previously committed an offense that required him or her to be placed on the sex offender registry an element of the offense.[3] Id.; see

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[2] Significantly, Section 23-3-430(C) outlines a list of different offenses involving criminal conduct of a sexual nature that require offenders to register as sex offenders in South Carolina upon conviction. See S.C. Code Ann. § 23-3-430(C) (requiring sex offender registration for anyone convicted of twenty-two delineated South Carolina offenses, including first-degree criminal sexual conduct with a minor, or "any other offense specified in" the federal Sex Offender Registration and Notification Act). Likewise, Section 23-3-430(D) provides a trial judge with discretion to place any offender convicted of an offense **not** listed in Section 23-3-430(C) on the South Carolina sex offender registry if good cause is shown. See S.C. Code Ann. § 23-3-430(D) ("Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.").

[3] Significantly, the prior conviction necessary to establish the recidivist offender element must be for a highly specific type of crime—a sex crime resulting in placement on the sex offender registry—that is of the same nature as the crime the State is seeking to prove, which is also a sex crime requiring placement on the sex offender registry. See S.C. Code Ann. § 16-3-655(A)(2) (instructing "[a] person is guilty of criminal sexual conduct with a minor in the first degree" if "the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)"). Therefore, the prior conviction evidence needed for a prosecution under Section 16-3-655(A)(2) is **not** evidence of a conviction for a broad class of offenses that are potentially dissimilar to the charged offense and, instead, is evidence directly related to the charged offense. Compare Benton, 338 S.C. at 154, 526 S.E.2d at 230 (recognizing the legislature's inclusion of an element requiring proof of a prior conviction for burglary or an offense of a similar nature in the first-degree burglary statute reflected the

State v. Benton, 338 S.C. 151, 154, 526 S.E.2d 228, 230 (2000) ("To deter repeat offenders, the General Assembly chose to include two or more prior burglary and/or housebreaking convictions as an element of first degree burglary."); see also Smith v. Doe, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is 'frightening and high.' "); McCune v. Lile, 536 U.S. 24, 33 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."). Thus, in order to prove Petitioner's guilt for the charged offense, the State was required to prove Petitioner committed a sexual battery with a victim under the age of sixteen and was on the sex offender registry by virtue of a conviction for a delineated offense or by virtue of a sentencing judge making a determination there was good cause for him to register as a sex offender.

In order to prove the element of first-degree criminal sexual conduct with a minor that required a showing Petitioner was a recidivist sex offender, the State introduced into evidence testimony from the administrator of the Charleston County Sex Offender Registry, who testified that as of May 2013[4], Petitioner was included on the sex offender registry for a crime listed in Section 23-3-430(C). Through that evidence alone, the State was able to prove to the jurors, who

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legislature's intention to deter repeat offenders); and State v. Hamilton, 327 S.C. 440, 446, 486 S.E.2d 512, 515 (Ct. App. 1998) ("Here, however, a generic prior conviction was not involved."); with Old Chief v. United States, 519 U.S. 172, 186 (1997) (holding—in a sharply-divided opinion—the Federal Rules of Evidence required a district court judge to accept a defendant's offer to concede the fact of a prior conviction and prevent the prosecutor from introducing evidence in regard to the name and nature of that prior conviction in a prosecution for unlawful possession of a firearm by a felon because "[t]he statutory language in which the prior-conviction requirement [was] couched show[ed] no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies").

[4] The trial transcript and indictments clearly indicate the charged offenses occurred in June 2013. However, throughout his brief, Petitioner repeatedly references the acts as having occurred in 2015. This is inaccurate, as Petitioners **trial** was in 2015, not the sexual assault.

were required to find Petitioner guilty beyond a reasonable doubt of each and every element of the indicted offense, Petitioner had previously been convicted of an offense listed in S.C. Code Ann. § 23-3-430(C). See In rè Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) ("[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime."). For that reason, the evidence of Petitioner's prior conviction for an offense enumerated in Section 23-3-430(C) , which had been did not include information about the particular offense or any details of the underlying offense in an effort to minimize its potential for prejudice, had immense probative value in Petitioner's case as it established an element of the offense that necessarily had to be proven, and, since that evidence was essential to prove the charged offense, the probative value of the evidence was not—and could not be—substantially outweighed by a danger of unfair prejudice, which was particularly true in light of the limiting instructions the trial judge presented to the jury in regard to the evidence of the prior conviction before the jurors began their deliberations.[5] See United States v. Gaudin, 515 U.S.

[5] Notably, Petitioner did **not** object to the sufficiency of the trial court's limiting instructions during trial or allege those instructions were unlikely to be followed by the jurors. See State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("[A]s the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review."); see also State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (instructing an appellant cannot complain on appeal about a particular ruling if the appellant acquiesces to that ruling during trial). Therefore, Petitioner is precluded from challenging the sufficiency of the limiting instructions for the first time on appeal. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

506, 510 (1995) ("[The Fifth Amendment and Sixth Amendment to the United States Constitution] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); United States v. Gilliam, 994 F.2d 97, 100 (2nd Cir. 1993) ("Where the prior conviction is essential to proving the crime, it is by definition not prejudicial."); see also Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." (citations omitted)); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."); cf. State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) ("The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented."). As a result, the trial court did not abuse its broad discretion in admitting the evidence that Petitioner had previously been convicted of an offense delineated in Section 23-3-430(C) requiring him to register as a sex offender for the limited purpose of proving an element of the indicted offense. See State v. Cheatham, 349 S.C. 101, 109-110, 561 S.E.2d 618, 623 (Ct. App. 2002) ("It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first degree burglary does not constitute unfair prejudice in this case. Further, the trial judge

specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice."); see also Old Chief v. United States, 519 U.S. 172, 183, n. 7 (1997) ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon."). Petitioner's conviction should be affirmed.

B. The trial court did not abuse its broad discretion by allowing the State to present evidence through the testimony of the minor victim that Petitioner had previously sexually assaulted her several times when she was between six and seven years old until he left the geographic area because this evidence constituted evidence of the existence of a common scheme or plan due to its numerous significant similarities to sexual assault of the minor victim for which Petitioner was on trial, including the same victim, the similar manner in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, and because the probative value of the evidence of the prior abuse was not substantially outweighed by its potential for undue prejudice. However, even assuming the trial court somehow erred in admitting the evidence of the prior abuse, any error was entirely harmless in light of the other overwhelming evidence of Petitioner's guilt presented during trial.

At the beginning of Petitioner's trial, the State also sought to introduce evidence of Petitioner's prior sexual assaults of the same minor victim from approximately five to six years earlier, which the State asserted was part of a continuous course of conduct. Specifically, the State asserted it intended to introduce evidence through the testimony of Victim that Petitioner had anally penetrated her in a similar manner at the homes of her grandmother and great-

grandmother and the abuse stopped when Petitioner was removed from the Charleston County area, only to resume within six weeks of his return to the area through his commission of the charged conduct. (App. 14-15). Defense counsel responded the time period between the prior bad acts and the charged offenses was too remote for it to be admissible as a common scheme or plan pursuant to Rule 404(b), SCRE. (App. 16-17). The trial court declined to rule *in limine*, instructed both parties not to mention the prior bad act during opening statements, and reserved a ruling until she could hear testimony. (App. 17).

During Victim's testimony, the trial court excused the jury from the court room and allowed the State to proffer testimony on the prior bad acts. During this proffer, Victim testified Petitioner had previously sexually assaulted her at the homes of her grandmother and great-grandmother. Specifically, Victim testified Petitioner had climbed on top of her while she was lying on her stomach on a bed and anally penetrated her with his penis. She testified Petitioner had not threatened her after the abuse. She testified she had never disclosed the abuse and eventually Petitioner left the Charleston area for a few years. (App. 94-98). Following the proffer, the State argued the proffer testimony was admissible as common scheme or plan evidence. Defense counsel argued the elicited testimony did fall within the common scheme or plan exception to Rule 404(b), SCRE, because it was too remote in time from the charged offenses, having occurred years prior to the alleged abuse for which Petitioner was on trial. Defense counsel also argued the prejudice would outweigh any probative value. (App. 99). In reply, the State argued remoteness was not dispositive on the case, but rather, the court should look at the similarities and the continuous course of conduct that was only interrupted by Petitioner's physical removal from Victim due to an unrelated incarceration and resumed shortly after he returned to the Charleston area and once again had access to Victim. (App. 100-102,

104-105). Defense counsel then responded the common scheme or plan exception was inapplicable because identity of the perpetrator was not at issue, which he asserted was necessary for the admission of Rule 404(b), SCRE. (App. 105-06).

The trial court ruled the State could introduce evidence of Petitioner's prior sexual assaults of Victim as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, finding that when weighing the similarities and dissimilarities, there was a "compelling example of continued illicit conduct that fits within the common scheme or plan exception." (App. 106-11). The court specifically noted it considered "the age at which the Victim has alleged the abuse occurred, the relationship between Victim and Petitioner, the location where the abuse is alleged to have occurred, the use of coercion or threats, the manner of the occurrence, referring to the type of sexual battery" and then compared them to the proffered testimony and allegations giving rise to the charged crimes. (App. 107-11). Thereafter, the testimony of Victim resumed before the jury and she testified in a manner consistent with her previous proffer. (App. 111-14).

During closing arguments, the trial court gave the following limiting instruction to the jury regarding evidence of prior bad acts:

> I instruct you, ladies and gentlemen, that you have heard evidence that the defendant committed a bad act not the subject of a conviction other than the one for which he's now on trial. This testimony, ladies and gentlemen, if you include it is true, may only be considered by you on the question of common scheme or plan and for no other reason and no other purpose. You may give this evidence the weight, value and effect, if any, which you find it should have on the sole issue of common scheme or plan.
>
> You must not consider evidence of the commission of another bad act not the subject of the conviction as proof of the defendant's guilt of the charge we are trying today. It is like any other evidentiary fact, you are to give it the weight value and effect you decide it should receive.

(App. 380-81).

On appeal, Petitioner contends the trial court committed reversible error in admitting Victim's testimony regarding Petitioner's sexual assaults of her five to six years prior as evidence of the existence of a common scheme or plan. In support of that contention, Petitioner maintains the prior bad act evidence was inadmissible because it was not sufficiently similar to Petitioner's more recent acts involving Victim, was too temporally remote, and was more prejudicial than probative. Specifically, Petitioner contends the prior bad act was a decade prior and involved anal penetration while the charged offense was for solely vaginal penetration.[6] To the contrary, the trial court properly admitted Victim's testimony regarding the prior sexual assaults because her testimony was highly similar to the testimony of her current assaults, including in regard to the similar manner in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, the continuation of the abuse once Petitioner returned to the Charleston area, and constituted proof of the existence of Petitioner's common scheme or plan to sexually assault Victim in family homes when in the physical area of Victim. As a result, the trial court did not abuse its broad discretion in admitting the testimony regarding Petitioner's prior bad acts. However, even assuming the trial court somehow erred in admitting this testimony, any error was entirely harmless in light of the other overwhelming evidence of Petitioner's guilt presented during trial, and the admission of the challenged evidence could not have impacted the verdict. Petitioner's convictions should be affirmed.

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. Wilson,

[6] Both of these contentions are inaccurate and clearly disproved by the record. The abuse did not occur "nearly a decade between the two events" as Petitioner repeatedly asserts, as the charged conduct occurred in 2013 (six or seven years prior), not in 2015 as Petitioner repeatedly and inaccurately cites in his brief. Moreover, both the prior abuse and abuse giving rise to the charges included anal penetration. (App. 80-81).

345 S.C. at 6, 545 S.E.2d 829. "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). Furthermore, in reviewing such a ruling, the trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) the existence of a common scheme or plan; or (5) identity). In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of

evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial court must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, our Supreme Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. 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. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).
>
> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (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. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence **is simply a requirement that the two be factually similar** and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278 (emphasis added).

Finally, after determining the prior bad act evidence is relevant and falls within a permissible exception of Rule 404(b), SCRE, the trial court must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." Wallace, 384 S.C. at 435, 683 S.E.2d at 278. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible." Mathis, 359 S.C. at 463, 597 S.E.2d at 879. "Stated differently, evidence which is 'logically relevant to establish a material element of the offense charged is not to 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)).

In State v. Blanton, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994), Blanton was arrested and charged with first-degree criminal sexual conduct with a minor after Blanton's granddaughter alleged Blanton sexually molested her on several occasions. During trial, two other girls were permitted to testify over Blanton's objection about being sexually abused by Blanton approximately seven or eight years before Blanton sexually abused his granddaughter. Id. Following trial, Blanton appealed his conviction and asserted the prior bad act evidence was not sufficiently similar to the charged offense to constitute evidence of a common scheme or

plan. Id. However, the Court of Appeals disagreed and noted the following similarities existed between the prior bad act evidence and the incident involving Blanton's granddaughter:

> 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 of 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.

Id. at 33, 446 S.E.2d at 439. Based on those similarities, the Court of Appeals found the evidence of the prior bad acts was admissible and affirmed Blanton's conviction. Id.

In State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009), Clasby was arrested and charged with first-degree criminal sexual conduct with a minor and lewd act upon a child after Clasby's biological daughter disclosed that Clasby had been sexually abusing her; the specific charged conduct was alleged to have occurred in June 2004. During trial, the State sought to introduce evidence of prior bad acts involving Clasby with the victim that allegedly occurred prior to the June 2004 incidents for which she had been indicted. Id. The State argued these prior bad acts established "an escalating pattern of abuse that eventually culminated in criminal sexual conduct in the first degree." Id. After hearing the proffered testimony of the victim in camera, the trial court ruled the prior bad act evidence was admissible as the common scheme or plan evidence. Id. Following trial, Clasby appealed and argued the trial court erred in admitting the evidence of prior bad acts involving the same victim because she was not indicted for the prior conduct. Id. The Supreme Court rejected Clasby's argument and noted:

> Each of the incidents established a pattern of escalating abuse which ultimately culminated in Clasby's digital penetration of B.C. The four prior incidents of sexual misconduct by Clasby reveal the same illicit conduct with B.C. during periods of visitation prior to the June 1, 2004 indicted offenses.

Id. at 156, 682 S.E.2d at 896. The Court further found "[b]ecause a close degree of similarity exists between the crimes charged and the bad act evidence, we hold the proffered evidence satisfied the established requirements for the admissibility of evidence under the common scheme or plan exception. Id. at 156-57, 682 S.E.2d at 896.

In State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner—over the course of two years—reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim's testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner—over the course of two months—hugged her and fondled her breasts while she was babysitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. Id. at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness' testimony regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan. Id. at 582, 608 S.E.2d at

467. Following the trial, Hubner appealed his convictions and asserted the prior bad act evidence should not have been admitted. Id. at 575, 608 S.E.2d at 464. On appeal, the Court of Appeals reversed Hubner's convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. Id. at 585, 608 S.E.2d at 469. However, the Supreme Court subsequently reversed this Court's decision and affirmed Hubner's convictions after finding the trial judge properly admitted the evidence of the prior sexual assaults. State v. Hubner, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

Likewise, in State v. Scott, 405 S.C. 489, 492-493, 748 S.E.2d 236, 239-239 (Ct. App. 2013), Scott was arrested and charged with numerous offenses, including one count of second-degree criminal sexual conduct with a minor and three counts of committing a lewd act upon a child, following an investigation into allegations he sexually abused his four biological daughters when they were minors. During trial, the State sought to admit evidence regarding Scott's prior acts of sexual abuse to establish the existence of a common scheme or plan through the testimony of two unrelated witnesses who alleged Scott sexually abused them when they were minors approximately eleven years before Scott first began sexually the oldest of his four daughters, who had not yet been born at the time Scott engaged in the sexual abuse of his earlier victims. Id. at 492-493, 748 S.E.2d at 238-239. In response, defense counsel objected to the admission of that testimony on the grounds it was too remote and its probative value was substantially outweighed by the danger of unfair prejudice. Id. at 499, 748 S.E.2d at 242. However, the trial court permitted Scott's prior victims to testify over objection, and Scott was ultimately convicted of numerous offenses. Id. at 496-497, 748 S.E.2d at 240-241. Subsequently, Scott appealed his convictions, arguing the prior bad act evidence was not sufficiently similar to the charged crimes to establish the existence of a common scheme or plan and was so remote its

probative value was substantially outweighed by the danger of unfair prejudice. Id. at 492, 748 S.E.2d at 238. On appeal, the Court of Appeals affirmed. Id. In affirming, the Court of Appeals first concluded Scott's prior victims' testimony was admissible pursuant to Rule 404(b), SCRE, because the many similarities existing between the charged crimes and the prior bad acts, including in regard to the ages of the victims at the time of the abuse, the locations and situations where the victims were abused, and the nature of the abuse, outweighed any of the dissimilarities, which included the facts Scott was not biologically related to his prior victims and did not abuse his prior victims in all the same ways he abused his daughters. Id. at 503, 748 S.E.2d at 244. Furthermore, the Court of Appeals determined the probative value of the prior bad act evidence was not substantially outweighed by a danger of unfair prejudice despite the fact Scott had abused his prior victims eleven years before he began the abuse of his daughters. Id. at 508-509, 748 S.E.2d at 247.

In Petitioner's case, the trial court did not abuse its broad discretion by admitting evidence of Petitioner's prior sexual assault of Victim because this evidence constituted evidence of the existence of Petitioner's common scheme or plan to sexually assault Victim in family homes when adults were not present when in the same physical location as Victim. Notably, during trial, Victim testified when she was six and seven years old, Petitioner sexually abused her in a manner which even Petitioner concedes is "striking similar" to the charges for which he was on trial. See BOP 7. This abuse, which included anal penetration of Victim while she was on her stomach on a bed at the homes of family members when other adults were not present, did not stop until Petitioner was physically absent from Victim due to his removal from the Charleston area. The prior abuse was in a similar location (a family home) when other adults were not present, the same as the charged offenses. (App. 68-87, 95-97). Both the prior assaults

and the current assault involved anal penetration of Victim while she laid on her stomach on a bed and Victim described a similar "moving back and forth" action from Petitioner. (App. 68-87, 95-97). Neither instance involved threats or physical violence other than the sexual assault.

Thus, both instances involved the same victim. Both involved similar locations (family homes) when other adults were not present. Both involved similar actions (Petitioner's anal penetration of Victim while she laid on her stomach on a bed in a "moving back and forth" motion). Neither involved threats nor physical violence other than the sexual assault. Moreover, the abuse was part of a continuous course of conduct that only stopped when Petitioner was physically removed from the Charleston area (and his physical access to Victim was prohibited) and resumed shortly after Petitioner was back in the same geographic area as Victim with access to her again. Accordingly, the evidence of the prior bad act was strikingly similar to the charged offenses. See Wallace, 384 S.C. at 434, n. 5, 683 S.E.2d at 278 ("Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis."); cf. Blanton, 316 S.C. at 33, 446 S.E.2d at 439 (finding the prior bad acts were sufficiently similar to the charged offense to be admissible where the victims in all of the acts were approximately the same age, each of the victims was subjected to the same type of sexual abuse in the same locations, and Blanton took advantage of his relationship with the victims for sexual gratification in each of the acts). Furthermore, those similarities between the acts outweighed any dissimilarities, which established a clear and logical connection between the earlier acts and more recent crimes. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("In sum, there are similarities in the class of the victim, timing, place, and warning that outweigh any dissimilarity."); cf. Scott, 405 S.C. at 501, 748 S.E.2d at 243 (finding prior bad act evidence to be admissible where some distinctions

existed between the prior bad act testimony and the testimony of Scott's most recent victims but the distinctions did not outweigh the significant similarities). As a result, Victim's testimony regarding the prior bad act evidence was properly admitted towards establishing the existence of Petitioner's common scheme or plan to sexually abuse Victim at family homes when other adults were not present, and the trial court's decision to admit that testimony did not constitute an abuse of discretion. See Wallace, 384 S.C. at 433-434, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). . . . A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility.").

Moreover, the trial court's decision to admit the prior bad act evidence was not rendered erroneous due to the fact the earlier abuse was approximately six to seven years prior to the current abuse for which Petitioner was on trial in light of the fact temporal remoteness of prior bad act evidence does not automatically render that evidence inadmissible during trial. Blanton, 316 S.C. at 33, 446 S.E.2d at 440; see State v. Tutton, 354 S.C. 319, 332, n. 5, 580 S.E.2d 186, 193 (Ct. App. 2003) ("Remoteness in time, however, is not dispositive."). In Petitioner's case, Petitioner began abusing Victim approximately six to seven years before the sexual assaults for which he was on trial. Although the gap between the prior sexual abuse and the current abuse was somewhat lengthy, the delay was explained by the fact Petitioner was physically removed from Victim's geographic area due to an unrelated incarceration and resumed shortly after he returned to the Charleston area, which renewed his access to Victim. Therefore, the lapse in time between the prior abuse and the more recent abuse did **not** result from the abandonment of the common scheme or plan based on the testimony and evidence presented during trial and, instead, resulted from the fact Petitioner could not resume his common scheme or plan until he was once

again in the same geographic location as Victim. See State v. McCombs, 410 S.C. 90, 101, 762 S.E.2d 744, 750 (Ct. App. 2014) ("The circuit court does not necessarily err when it permits testimony about a bad act occurring many years prior to the charged crime. In fact, evidence of prior bad acts that occurred many years before the charged crime is often admissible to prove a common scheme or plan." (citations omitted)); Scott, 405 S.C. at 504-505, 748 S.E.2d at 244-245 ("[E]vidence of bad acts occurring many years before the charged crime is often admissible to demonstrate a common scheme or plan. Thus, the trial court did not err in admitting the bad act evidence, simply because the evidence was purportedly too temporally remote." (citations omitted)). Accordingly, the remoteness of the prior bad act evidence to the current abuse did not render the evidence inadmissible or diminish the probative value of the evidence in light of the numerous similarities to Petitioner's more recent offenses involving Victim. See Tutton, 354 S.C. at 330, 580 S.E.2d at 192 ("It goes without saying that the conduct need not be continuous to fall within the common scheme or plan exception."); see also Hubner, 384 S.C. at 437, 683 S.E.2d at 280 (reversing a decision in which prior bad act evidence concerning incidents that occurred approximately fourteen to fifteen years before the charged offense was found to be inadmissible); State v. Hallman, 298 S.C. 172, 174, 379 S.E.2d 115, 116-117 (1989) (admitting evidence of prior bad acts occurring roughly seven years before the charged offense); Scott, 405 S.C. at 508, 748 S.E.2d at 247 (finding evidence of Scott's prior sexual abuse of earlier victims was admissible pursuant to the common scheme or plan exception despite the fact Scott's most recent victims had not been born at the time Scott sexually abused his earlier victims).

In Petitioner's case, the prior bad act evidence was strikingly similar to the evidence of the charged offenses in regard to the same victim, the manner in which the abuse occurred, the nature of the abuse, the locations where the abuse occurred, and a lack of threats to Victim. See

Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("Here, the similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity."); see also State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008) ("Where there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan."). Therefore, like in Blanton, Hubner, Scott, and numerous other cases, the prior bad act evidence was relevant and admissible as proof of the existence of a common scheme or plan, and its high probative value substantially outweighed its potential for undue prejudice. For those reasons, the trial court did not abuse his broad discretion in admitting the testimony regarding Appellant's prior bad acts. See State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also Martucci, 380 S.C. at 253, 669 S.E.2d at 609 ("If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal."). Petitioner's convictions should be affirmed.

Moreover, even if this Court were to conclude the trial court abused its broad discretion in allowing the State to introduce evidence of Petitioner's prior sexual assaults of Victim, such an error was harmless and had no impact on the jury's verdict in light of the overwhelming evidence of Petitioner's guilt. After an error is discovered, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis.

Next we must determine whether the error was harmless."). 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). 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). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "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).

In the case at bar, notwithstanding the admission of the testimony of Victim regarding Petitioner's highly similar prior acts of sexual abuse, Victim testified during trial about the sexual abuse she suffered at Petitioner's hands without contradiction or rebuttal, which was corroborated by her mother's account of the abuse reported to her by Victim immediately after the assault. See State v. Miller, 266 S.C. 409, 413, 223 S.E.2d 774, 776 (1976) ("The positive, uncontradicted identification of appellants and their codefendant as the perpetrators of the crime charged and their apprehension a short time later in the identified getaway car, with the incriminating evidence found therein, so overwhelmingly establishes their guilt as to render any violation of Bruton 'harmless beyond a reasonable doubt.' "); see also State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) (recognizing an error in the admission of evidence can be rendered harmless when other direct or circumstantial evidence is presented that corroborates the evidence). Additionally, numerous witnesses testified about Victim's consistent disclosures of the sexual abuse after it was finally revealed, including to the PSANE nurse that evaluated Victim, the forensic interviewer who interviewed Victim, and the registered nurse at Victim's

school that Victim to whom Victim disclosed the abuse. Furthermore, GPS tracking data from Petitioner's ankle monitor established Petitioner was at Victim's home during the times she reported her abuse and semen was found on the vaginal swabs collected from Victim. Finally, corroborating Victim's disclosure, Petitioner and Victim—a thirteen-year-old-girl—both tested positive for gonorrhea, a sexually transmitted disease. Critically, based on that evidence of guilt independent of Petitioner's prior sexual abuse of Victim, Petitioner's guilt was overwhelmingly established, and any error in the admission of the prior sexual assaults could not reasonably have had any impact on the verdict. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (finding an error to be harmless beyond a reasonable doubt in light of the overwhelming evidence of the appellant's guilt); Sherard, 303 S.C. at 176, 399 S.E.2d at 597 ("[An appellate court] will not set aside a conviction due to insubstantial errors not affecting the result."). Therefore, the trial court's decision to admit evidence of the prior sexual assaults would not warrant a reversal of Petitioner's convictions even if that decision was an erroneous one. See State v. Kromah, 401 S.C. 340, 362, 737 S.E.2d 490, 501 (2013) (finding an error in the admission of improper testimony to be harmless where that error could not have reasonably affected the outcome of trial in light of the other evidence that was presented). Petitioner's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm Petitioner's convictions and sentences.

Respectfully submitted,

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April 17, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Maite Murphy, PCR Judge
Deadra L. Jefferson, Trial Judge
Appellate Case No. 2018-000738

JOHNNY TAMAR BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

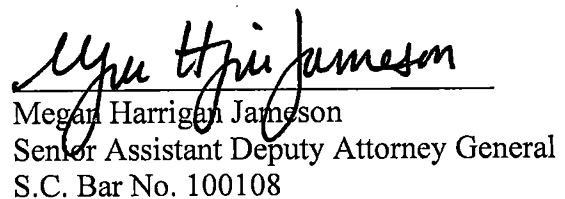
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Brief of Respondent pursuant to White v. State on Petitioner by depositing two copies of the same in interagency mail, addressed to:

Deputy Chief Appellate Defender Wanda H. Carter
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 17th day of April, 2019.



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