

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

APPELLANT.

APPELLATE CASE NO. 2016-000907

ORIGINAL

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2020-UP-003

PETITION FOR REHEARING

On January 8, 2020, this Court affirmed Appellant's conviction for first degree criminal sexual conduct (CSC) with a minor. State v. Washington, 2020-UP-003 (S.C. Ct. App. filed January 8, 2020). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in arriving at its conclusions.

On appeal, Appellant argued the trial judge erred (1) by admitting evidence of subsequent acts of unindicted sexual misconduct when such evidence was not part of the *res gestae*, was not admissible pursuant to Rule 404(b), SCRE, and was unfairly prejudicial to Appellant; and (2) by

refusing to direct a verdict when the state failed to present any evidence that Appellant engaged in a sexual battery on or about July 1, 2010, the date alleged in the indictment.

This Court held evidence of the subsequent acts of unindicted sexual misconduct was relevant because the acts were intimately connected to the abuse and provided context regarding the time period in which the abuse occurred. The Court also held there was significant probative value in the evidence demonstrating continuous illicit intercourse between Appellant and Minor.

This Court further held the evidence was admissible pursuant to the common scheme or plan exception found in Rule 404(b), SCRE. Quoting State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), this Court stated, “When determining whether evidence is admissible as common scheme or plan, the [circuit] 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).” 384 S.C. at 433, 683 S.E.2d at 277-278 (alteration in original). The Court then proceeded to analyze the similarities between the subsequent unindicted acts and the conduct for which Appellant was being tried. This Court ultimately held the similarities between all of the acts described by Minor “strongly outweigh” the dissimilarities. The similarities included: (1) Minor was the victim; (2) all of the alleged acts constituted a sexual battery; (3) the assaults occurred in Minor’s home; (4) the assaults occurred when Minor’s mother was asleep or out of the house; (5) most of the assaults occurred at night; and (6) Appellant made Minor wear a blindfold or cover her eyes each time. The Court maintained the only dissimilarities were (1) the location of the assaults within the house; and (2) the type of sexual battery that occurred. The Court concluded that because the similarities “strongly outweigh” the dissimilarities, the trial judge did not abuse his discretion by admitting the evidence.

This Court further held the trial judge properly admitted the bad act evidence under the *res gestae* theory because the unindicted conduct was so intimately tied to the charged offense that it was necessary for a full presentation of the case. The Court emphasized the acts were all close in time as they occurred over the course of two months and “provided context to the crime as part of [Appellant’s] sustained illicit conduct.” Consequently, the Court concluded the evidence was helpful to the jury by demonstrating the alleged sexual battery was not a one time event that may have been misinterpreted or misremembered.

As far as unfair prejudice, this Court held the probative value of the bad act evidence substantially outweighed the risk of unfair prejudice. The Court determined the risk of unfair prejudice was low because the bad act evidence hinged on Minor’s credibility while the probative value was high because there was no physical evidence of the assault.

The Court further held Appellant’s argument that the prejudicial effect of the bad act evidence was enhanced by the state’s improper closing argument where the solicitor urged the jury to consider the uncharged conduct as substantive evidence of the indicted offense was not preserved for appellate review because Appellant did not object to the state’s closing argument at trial.

Lastly, this Court held the trial judge properly denied Appellant’s motion for a direct verdict. The Court concluded that because the date of the alleged sexual battery is not a material element of first degree CSC with a minor, the state was only required to prove that the sexual battery occurred before the date of the indictment. Since Minor testified Appellant put his “private” in her butt sometime in July, this Court held there was sufficient evidence of sexual battery upon which the jury could have found Appellant guilty of first degree CSC with a minor.

Prior Bad Act Evidence

The trial judge properly recognized the alleged sexual misconduct described by Minor during her forensic interview and later during her testimony before the jury that occurred after the first episode of abuse was not evidence of the charge for which Appellant was indicted and constituted “unindicted crimes” since Appellant was only indicted for conduct that occurred “on or about the 1st of July, 2010.” R. 101, ll. 4-6; See R. 213.

However, the judge erred by admitting this evidence of unindicted sexual misconduct since this evidence was not part of the *res gestae* and was not admissible pursuant to Rule 404(b), SCRE. Moreover, the evidence was unfairly prejudicial to Appellant since the subsequent acts were not similar to the conduct for which Appellant was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury.

“South Carolina law precludes evidence of a defendant’s prior crimes or other bad acts to prove the defendant’s guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator.” State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). “As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE.” State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Clasby, 385 S.C. at 154, 682 S.E.2d at 895). “If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b).” Id. “If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) (internal quotation marks omitted). “Even if prior bad act evidence

is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896).

The *res gestae* theory, on the other hand, “recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.” King, 334 S.C. at 512, 514 S.E.2d at 582 (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014)). Our Supreme Court explained the theory of *res gestae* in State v. Adams:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...’ [and is thus] part of the *res gestae* of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “[t]here is no reason to fragmentize the event under inquiry” by suppressing parts of the “*res gestae*.”

Adams, 322 S.C. at 122, 470 S.E.2d at 370-371 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)) (alterations in original). “Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime.” King, 334 S.C. at 513, 514 S.E.2d at 583 (citing State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)).

Citing State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), and State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), the trial judge found the subsequent acts of alleged sexual abuse in this case were admissible as part of the *res gestae*. R. 103, ll. 6-10. This was error.

In Sweat, this Court affirmed the admission of evidence of a prior bad act of domestic abuse as part of the *res gestae*. Sweat was charged with first degree burglary, assault and battery with intent to kill, and three counts of assault of a high and aggravated nature after he invaded a home occupied by his estranged wife, her boyfriend, and several others on December 11, 2001. Sweat, 362 S.C. at 121-122, 606 S.E.2d at 510-511. The state introduced testimony from Sweat's estranged wife of an incident of domestic violence that took place two months earlier in October 2001. Sweat's wife reported the prior incident and Sweat spent forty-five days in jail. While he was in jail, Sweat's wife ended their relationship and became romantically involved with another man.

This Court held the prior episode of domestic abuse was admissible under Rule 404(b) as evidence of motive and intent. Id. at 124, 606 S.E.2d at 512. The Court found from the October incident that the jury could have inferred both (1) motive—that Sweat was driven by anger over his estranged wife causing him to go to jail and terminating their relationship; and (2) intent—that Sweat maliciously sought to inflict harm upon his estranged wife and her boyfriend. Id. at 126, 606 S.E.2d at 513. This Court held the evidence was relevant because it tended to make the state's version of the case more probable and was logically related to why Sweat went to the house that night and to his intentions once there. Id. at 127, 606 S.E.2d at 514.

Additionally, this Court held the evidence was admissible as part of the *res gestae* and was properly admitted to “complete the story of the crime on trial.” Id. at 133, 606 S.E.2d at 517. The Court concluded that the October incident, and the events that followed, including Sweat's estranged wife moving out and ending their relationship, provided the jury with “an appropriate context in which to place the December 11 attack.” Id.

Sweat is easily distinguishable from this case. Here, the alleged unindicted acts occurred *subsequent* to the conduct for which Appellant was indicted as opposed to before and were not relevant in any way to show motive or intent or any other exception contained in Rule 404(b). Moreover, the subsequent acts did not explain or give context to the prior indicted misconduct like the prior act of domestic violence did in Sweat. The subsequent acts only went to propensity—to show Appellant was capable of committing the indicted act of sexual abuse because he later committed additional acts of misconduct against Minor.

In King, our Supreme Court held it was reversible error to admit evidence of prior thefts allegedly committed by King as evidence of motive or as part of the *res gestae*. King was accused of murdering his father-in-law, Billy Turbeville. Turbeville received two checks each month totaling \$2200. After paying his monthly bills totaling \$400, Turbeville kept the remaining cash inside his wallet in the front pocket of his pants. No wallet or cash was found on Mr. Turbeville when his body was discovered. King, 334 S.C. at 508, 514 S.E.2d at 580. The trial court allowed King's ex-wife to testify that King regularly pawned household items, stole cash from her purse, forged checks on her bank account, stole cash from her bank account by using her ATM card, and stopped paying his share of the bills in the months that preceded the murder. Id. at 511, 514 S.E.2d at 582.

After considering both Rule 404(b) and the *res gestae* theory, the Court held the remote thefts were not admissible under any theory, and that the evidence merely showed King's bad character and his propensity to commit crimes. Id. at 513, 514 S.E.2d at 583. The Court further held the admission of the evidence was not harmless because the prior thefts suggested King had a drug problem, which was highly prejudicial, and all the evidence against King was circumstantial. Id. at 514, 514 S.C. at 583.

The unindicted acts of sexual misconduct in this case similarly show Appellant's propensity to commit sexual battery and were not admissible under any of the exceptions of Rule 404(b) or under the *res gestae* theory. The sexual abuse that allegedly occurred "on or about" July 1, 2010 was a completely separate event from the later uncharged crimes, which involved escalating allegations of misconduct. Unlike in State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009), where our Supreme Court held testimony about four *prior* incidents of uncharged misconduct was admissible under Rule 404(b) as evidence of a common scheme or plan, the conduct here occurred *subsequent* to the indicted act and was not similar to the facts of the indicted charge.

The admission of this subsequent uncharged conduct was unfairly prejudicial to Appellant because the acts involved escalating allegations of sexual misconduct that were dissimilar to the indicted act. See Rule 403, SCRE. Moreover, the evidence was indisputably used by the state to prove Appellant committed the crime for which he was indicted. Despite the limiting instruction given by the judge before the admission of the evidence, the assistant solicitor urged the jury to consider the uncharged conduct as substantive evidence of the indicted offense during his closing argument:

Now, the argument will be made, because I'm not dumb and I've done this for a long time, what evidence did they [the state] have that it happened on July 1st. She [Minor] said it had been going on for a couple of months and that ***the first incident was touching, and then later it was sticking something inside her.*** Folks, that's the reason the indictment says what it says. On or about July 1st. On or about, he engaged in sexual battery on Minor. ***If you find as a jury that he stuck his penis in her bottom, he stuck his penis in her mouth like she testified, if you find that she told the truth, then you find the Defendant guilty.***

R. 172, l. 15 – 173, l. 1 (emphasis added).

This argument could only have confused and misled the jury as to the purpose the trial judge admitted the evidence of the unindicted subsequent acts and how the jury was permitted to consider the evidence. See R. 104, I. 16 – 105, I. 5. The solicitor’s argument is further evidence of how the admission of the uncharged misconduct prejudiced Appellant and is proof that the jury likely improperly considered the subsequent acts as evidence of Appellant’s guilt or innocence.

In its opinion affirming Appellant’s conviction, this Court erroneously held Appellant’s contention that the state’s closing argument was proof of unfair prejudice was unpreserved for appellate review since Appellant did not object to the improper closing argument at trial. Notably, Appellant did not challenge the state’s improper closing argument as a separate ground for reversal of Appellant’s conviction on appeal since no objection to the argument was raised below. However, as appellate courts often do, Appellant asserted the state’s closing argument was proof that the erroneous admission of the prior bad act evidence unfairly prejudiced Appellant. This argument is certainly preserved for this Court’s review.

Finally, Appellant respectfully submits that while this Court lacks the authority to overturn the Supreme Court precedent of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), this Court should hold that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). The similarities analysis used by this Court in affirming Appellant’s conviction derives from Wallace. The Wallace similarities analysis for sexual abuse cases, however, is contrary to Lyle and Rule 404, SCRE, a rule of exclusion that only provides for limited exceptions as provided in Rule 404(b).

The dissent in Wallace wrote:

I respectfully dissent. In my opinion, our cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a “common scheme or plan” under Rule 404(b), SCRE, have, in effect, created an exception to the rule’s exclusion of propensity evidence. *Compare, e.g., Vogel v. State*, 315 Md. 458, 554 A.2d 1231 (Ct. App. 1989). We have repeatedly held in non-sexual offense cases that, “the mere presence of similarity only serves to enhance the potential for prejudice,” *State v. Tuffour*, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007) *internal citations omitted*, yet under the majority’s view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions, I believe that thorough scrutiny is warranted.

Wallace, 384 S.C. at 435-436, 683 S.E.2d at 279.

As noted by the dissent in Wallace, the similarities analysis for the admission of prior bad act evidence in sexual abuse cases is impossible to reconcile with the traditional Lyle connection analysis used in nonsexual abuse cases. For example, in State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997), a murder and armed robbery case, our Supreme Court held evidence of prior robberies were inadmissible. The Court asserted:

In the case of the common scheme or plan exception under Lyle, a close degree of similarity or connection between the prior bad act and the crime is necessary. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). *See also* State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983). A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary. Id.

While the Court in Timmons discussed similarities, the Court relied on the traditional connection analysis of Lyle.

Recently, in a concurring opinion in State v. Perez, 423 S.C. 491, 503-504, 816 S.E.2d 550, 557 (2018), Justice Hearn wrote:

I would overrule Wallace and restore the common scheme or plan exception in sexual misconduct cases to its original purpose as articulated in Lyle whereby proof of a common plan or system requires “the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged.” Just as mere similarities between the prior bad act and the crime charged would be insufficient in the case of all other crimes, it should likewise be insufficient when sexual misconduct is involved.

The admission of prior bad act evidence based on similarities alone allows the admission of inadmissible propensity evidence. Wallace should be overruled and the traditional connection test of Lyle and Rule 404(b) applied in all cases, including cases involving sexual abuse allegations like this one.

Respectfully, this Court should grant rehearing, hold the trial judge abused his discretion by admitting evidence of the subsequent uncharged conduct, reverse Appellant’s conviction, and remand for a new trial.

Directed Verdict

The trial judge abused his discretion by refusing to direct a verdict when the state failed to present any direct evidence or substantial circumstantial evidence that Appellant engaged in a sexual battery with Minor “on or about the 1st of July, 2010,” the date alleged in the indictment. See R. 213.

“When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984)). The accused is entitled to a directed verdict when the state fails to present evidence on a material element of the offense charged. Id. (citing State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)). “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.” State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001 (citing State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000 and State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)).

Appellant was indicted for criminal sexual conduct with a minor in the first degree pursuant to S.C. Code Ann. § 16-3-655(A), which states in relevant part: “A person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age.” A sexual battery is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h).

“Sexual battery” is a material element of the offense of first degree CSC with a minor. The state failed to present any evidence that Appellant engaged in sexual battery with Minor on or about July 1, 2010, the date specified in the indictment. When Minor first disclosed on September 3, 2010, she claimed Appellant had been sexually abusing her since the beginning of July, approximately two months prior. During her forensic interview, and later during her testimony before the jury, Minor alleged that the first time Appellant assaulted her was in the “tattoo room” when Appellant touched the “outside” of her “private” and “butt.” See R. 113, l. 23 – 116, l. 25; R. 127, ll. 13-22; R. 131, l. 3 – 132, l. 6; R. 135, ll. 5-21; Court’s Exhibit No. 1 (DVD of Forensic Interview). This conduct does not constitute sexual battery. Consequently, Appellant was entitled to a directed verdict.

In holding the trial judge properly denied Appellant’s motion for a directed verdict, this Court either overlooked or wholly ignored our Supreme Court’s opinion in State v. Brown, 360

S.C. 581, 602 S.E.2d 392 (2004). In Brown, the Supreme Court held Brown was entitled to a directed verdict on three counts of first degree criminal sexual conduct when the state failed to present any evidence Brown committed the acts through the use of aggravated force, which was a material element of the offense, on the dates specified in the indictment. Id. at 590, 602 S.E.2d at 397. Brown physically and sexually abused his daughters, who were adults at the time of trial, repeatedly over a period of years. He was convicted of numerous counts of first degree CSC with a minor, second degree CSC with a minor, lewd act upon a minor, incest, and the three counts of first degree CSC which were the subject of the appeal. The Supreme Court held that while there was evidence in the record in the form of testimony from each daughter that Brown physically beat them at various times for disobedience, refusing to have sex with him, or revealing or attempting to reveal the sexual abuse, there was no evidence Brown used any aggravated force while sexually assaulting his daughters on the dates specified in the indictment. Id. at 590, 602 S.C. at 397. Accordingly, the Court held Brown was entitled to a directed verdict on the three counts of first degree CSC. Id.


In this case, while there was evidence Appellant engaged in a sexual battery with Minor on subsequent occasions, there was no evidence he engaged in a sexual battery “on or about the 1st of July, 2010” as alleged in the indictment. Because there was no evidence Appellant engaged in sexual battery on the date specified in the indictment, the trial judge erred by refusing to grant a directed verdict.

Respectfully, this Court should grant rehearing and direct a verdict of acquittal in Appellant’s favor. See Brown, 360 S.C. at 590, 602 S.E.2d at 397 (“It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the

offense charged against the defendant. When the State fails to present sufficient proof of all the elements, a conviction must be reversed and a judgment for the defendant must be rendered.”).

Based on the foregoing, Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming Appellant’s conviction for first degree CSC with a minor.

Respectfully Submitted,



LARA M. CAUDY
Appellate Defender

This 23rd day of January, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

RESPONDENT,

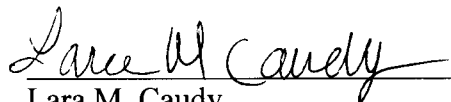
V.

SHANE ALEXANDER WASHINGTON,

APPELLANT.

CERTIFICATE OF SERVICE

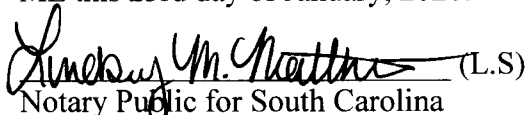
The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shane Alexander Washington, #367946, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of January, 2020.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of January, 2020.

 (L.S)
Notary Public for South Carolina

My Commission Expires: October 22, 2024.