

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ISAIAH GADSON, JR.

APPELLANT

APPELLATE CASE NO 2018-001041

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting evidence of a 1983 sexual ABHAN as a subsequent bad act where that crime involved an alleged sexual assault on a twenty-one year old woman Marine, who was “catching a ride” to work, since it was not admissible to prove a common scheme or plan or to prove identity in a 1980 rape of a fifteen year old girl immediately after the murder of her boyfriend on “lover’s lane” case, since this evidence was not admissible under Rule 404 (b), SCRE, and its probative value was substantially outweighed by its undue prejudice?

STATEMENT OF THE CASE

Appellant was indicted at the October 2017 term of the Beaufort County Grand Jury for the offenses of murder, criminal sexual conduct in the first degree, kidnapping, and armed robbery. R. 517. His case was called to trial on May 21, 2018, before the Honorable Brooks P. Goldsmith. Hunter Swanson and Kimberly Smith were the assistant solicitors. Trasi Campbell and Benjamin Tripp represented appellant. R. 1 – 2.

On May 24, 2018, the jury found appellant guilty on all four counts. R. 484, ll. 7-16. Judge Goldsmith sentenced appellant to fifty years' imprisonment for murder, thirty years' imprisonment for criminal sexual conduct in the first degree, thirty years' imprisonment for kidnapping, and thirty years' imprisonment for armed robbery. R. 485, l. 19 – 486, l. 8.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Whitner, 399 S.C. at 557, 732 S.E.2d at 866. In order to admit evidence of bad acts not resulting in conviction, the trial court must, “[a]s a threshold matter, ... determine whether the proffered evidence is relevant.” Clasby, 385 S.C. at 154, 682 S.E.2d at 895; see State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). “If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)” to show, *inter alia*, the existence of a common scheme or plan. Clasby, 385 S.C. at 154, 682 S.E.2d at 895.

If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...”).

ARGUMENT

The court erred in admitting evidence of a 1983 ABHAN as a subsequent bad where that crime involved an alleged sexual assault on a twenty-one year old woman Marine, who was “catching a ride” to work, since it was not admissible to prove a common scheme or plan or to prove identity in a 1980 rape of a fifteen year old girl immediately after the murder of her boyfriend on “lover’s lane” case, since this evidence was not admissible under Rule 404 (b), SCRE, and its probative value was substantially outweighed by its unduly prejudicial effect.

Relevant facts

This was a “cold case” from January 5, 1980. It was the murder of twenty-one-year-old David Krulewicz and the rape of his fifteen-year-old girlfriend, Susan, as they sat parked in David’s van on “Lover’s Lane” in rural Beaufort County. R. 517 – 520.

The state filed a motion and memorandum in support of the introduction of appellant’s Alford¹ plea to ABHAN for a February 24, 1983, subsequent incident involving Lori Ann K. Lori Ann K. was a twenty-one-year-old married Marine stationed at Parris Island in Beaufort at the time of the 1983 incident. R. 509; Supp. R. 1-3. The indictment for the 1983 ABHAN stated appellant committed “an assault and battery upon one Lori Ann K. constituting an unlawful act of violent injury to the person of the said Lori Ann K. accompanied by circumstances of aggravation, to-wit: a difference in the sexes, indecent liberties or familiarities with a female.” R. 509; Supp. R. 1-3.

The state alleged the 1983 incident was admissible to show a “common scheme or plan under Rule 404(b), SCRE, and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). R. 512 –

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

513. The solicitor would maintain at the time of trial that the 1983 incident involving Lori K. was also admissible to prove identity under Rule 404(b), SCRE.

The solicitor argued that in the 1980 incident and in the 1983 incident: "Both were young women. Physically they were tall, slender, young women. Their race was white. The relationship between the victim and the perpetrator, they were strangers. They were either isolated or he made sure that they became isolated. The location where the assault occurred. Both assaults were on dark, dirt roads in the northern Beaufort County in the Burton area. The use of coercion or threats. He used the threat of a gun in both cases." R. 21, ll. 10-22.

The 1980 incident involved fifteen-year-old Susan and her boyfriend. Her boyfriend was shot in the head and killed while they sat in his van on "Lover's Lane" in rural Beaufort County at just before midnight. Susan said appellant had her perform oral sex on him and then raped her right after her boyfriend was shot. R. 21, l. 21 – 23, l. 10.

The solicitor said while Lori in the 1983 "hitching a ride" incident did not see a gun, the solicitor alleged appellant threatened to "blow her brains out if she does not succumb to the rape and take her clothes off." The state alleged appellant raped Lori in 1983 although he pled guilty to only ABHAN. The solicitor alleged appellant apologized to both women after raping them and also asked if they "enjoyed it." R. 21, l. 21 – 23, l. 10.

Proffer of 1983 evidence

The state then proffered the evidence of Lori Ann K. about the admissibility of the 1983 crime. Lori K. was a twenty-one-year-old married Marine on February 24, 1983. She was stationed at Parris Island. She remembered that morning that she was walking to a country store to "catch a ride" to work. She always met her ride to work at this corner store on Highway 280. R. 23, l. 17 – 25, l. 12.

Lori K. denied she was not hitchhiking that morning. However, she offered that one man stopped and asked “if I wanted a ride and I turned him down. And then Mr. Gadson stopped and asked if I wanted a ride. And at that point I accepted because, like I said, I was running late and afraid that I would miss my ride. I got in the car and told him where I was going. I was on my way to the corner store on 280 is where I met my ride. And he said he would take me there, but he didn’t.” R. 25, ll. 3-12.

She said appellant turned on a secondary road, which she thought was Highway 73. He told her he was going to “buy some marijuana from a friend. And I explained that I was going to be late and possibly miss my ride, but it didn’t matter he kept driving. He asked me if I smoked and I told him, No. And then at that point he started questioning me as to whether or not I had ever had sex with a black man and I told him, No, that I was married, I had only had sex with my husband and we had been married for five years.” R. 25, ll. 13-24.

Lori K. said appellant continued driving down a dirt road for about a mile and then he went past a trailer, stopped the car, and went inside “a structure of some sort. I assumed that he was going inside to purchase the marijuana. When he got back in the car he locked the doors and started to force himself on me. And at that point I began to struggle. He told me if I didn’t stop he was going to blow my brains out. And I believed him, so I stopped fighting him.” Appellant told her to take her clothes off and he performed oral sex on her, and then he raped her. R. 26, l. 9 – 27, l. 2.

Lori K. said she asked appellant if she could get dressed and he told her yes. “He then told me he was sorry, he didn’t know why he did that and he offered to pay me. I think it was \$50. I told him that I didn’t want his money, that I wasn’t a prostitute.” She promised not to call the police or tell her husband. “He began driving back secondary 73 towards where I wanted to

go. . . . [H]e dropped me off on the secondary road at a welding shop or somewhere near that area. . . . So I got his license plate and ran to the corner market on 280.” R. 27, ll. 14-24.

Lori K. gave a description of the rapist as a “black male in his mid 20s, maybe 25, 26. He was about 150 pounds, kind of short afro, long sideburns, moustache, he had scraggly facial hair. He was probably 5’9”, 5’10”. He was wearing a gold ring on his right hand.” R. 28, ll. 9-15.

She identified appellant’s photograph from a photo lineup and said she was prepared to go to trial when appellant pled guilty to ABHAN. R. 29, ll. 4-18.

On cross-examination, Lori K. denied she was hitchhiking that morning and said she was walking facing traffic when both cars stopped and offered her a ride. R. 31, ll. 2-18. She acknowledged she did not ever see a gun during the incident. R. 32, ll. 13-23. She agreed that appellant had stopped his car and gone inside some building -- where she thought he was going to purchase marijuana -- before he returned and she was raped. She said the thought of getting out of the car and running or hiding crossed her mind when appellant was gone, but “there wasn’t time.” R. 33, ll. 2-23.

The state also called Captain Bob Bromage during the *in camera* hearing on the admissibility of this 1983 incident. Bromage testified that after “Sheriff Tanner’s 1998 election campaign he had promised that we would start looking into the cold cases . . .” R. 35, ll. 19-24. One of these involved “the 1980 case involving the sexual assault against Susan W. at the time, and then the murder of David Krulewicz.” R. 36, ll. 7-10.

Bromage recalled that on August 3, 2016, he was notified of “a match in the national DNA system called CODIS.” The match was appellant. Bromage began a background investigation on appellant. R. 36, ll. 11-20.

Bromage testified that in 1983, appellant was living, as was most of his family, in Burton, South Carolina on Glens Drive. Appellant told the police he was working at Browns Manufacturing Mobile Homes, "which was off of Highway 21 in Beaufort." R. 38, ll. 4-21. Appellant explained, "[I] saw a lady on the side of the road walking, I stopped and asked her if she wanted a ride. She said, yeah. And I asked her where she was going and she said -- and the detective interrupted. Somewhere behind Pizza Hut -- Joy Land or Pizza Hut, somewhere in that area." R. 39, ll. 7-12. Appellant described Lori K. as "white, slender, you know, I didn't pay no attention to the way that she looked." R. 39, ll. 13-17.

Appellant also told the police in 1983 that he did not carry a weapon on his person. He admitted he had an old .32 caliber revolver. R. 39, l. 22 – 40, l. 14.

As to having sex with Lori K., appellant told the police, "I asked her if she wanted to make some money you know. I put my hand [on] . . . leg, between her legs." Appellant never admitted to having the victim take her clothes off, or to having sex with her. R. 40, l. 20 – 41, l. 4.

Bromage continued that police believed a .32 caliber gun may have been involved in the January 5, 1980 murder of David Krulewicz. R. 41, ll. 10-23. However, the actual murder weapon from the 1980 murder was never recovered. R. 41, ll. 20-23.

Over a defense objection that any science claiming the pubic hair of a "African-American man" could be deemed a match or consistent with that found on a white rape victim was junk science, Bromage testified the "[p]ubic hair that was consistent with Isaiah Gadson's [was found] from the combing of her rape kit." Bromage also said semen was found on the victim's clothing and on appellant's front seat. R. 42, l. 10 – 46, l. 23.

Bromage testified the similarities between the 1980 murder and rape and the 1983 incident were that “in both cases, the subject was identified as an African-American male. Both cases occurred in the Burton area. Within a couple of years of each other. The African-American male performed oral sex on both Susan W. in 1980 and Lori K. in 1983. The subject did not wear a condom, ejaculated in both victims. And was apologetic afterwards, offers them an apology. And the fact that they found in his glove compartment back in '83 was a .32 caliber revolver that we expected to be used in the 1980 case. But it was eliminated in the analysis by SLED, but in any case it is a similar type gun.” R. 47, ll. 2-18.

Bromage also said both females were assaulted on a dirt road in a rural area. The 1980 incident was around midnight and the 1983 incident was at 5:30 or 6 a.m. Appellant asked Lori K. after the sexual assault whether she liked it, and Susan W. indicated she later got a phone call in May of 1980, “and she was asked if she liked it.” R. 48, ll. 10-19. Bromage added that both victims promised not to tell the police about the rape. R. 48, l. 23 – 49, l. 7.

On cross-examination, Bromage said the first time he looked at Lori K.'s case from 1983 was in 2016. R. 50, ll. 4-7. Bromage admitted that the SLED report stated that the gun taken from appellant in 1983 did not match, and it was specifically excluded, from being the weapon used in the 1980 murder of David Krulewicz. R. 51, l. 11 – 53, l. 10. Appellant was not a suspect in the David Krulewicz murder until 2016 apparently. R. 52, l. 15 – 53, l. 25.

Bromage admitted in the 1983 incident, appellant was listed as 5'11", 150 pounds. He was almost six feet tall, and he was thirty-one years old in 1983. R. 54, ll. 1-23. The defense noted that the suspect in the 1980 murder was much smaller. The defense had Bromage admit that the suspect in the murder and rape in 1980 was described as 5'5" to 5'7". R. 59, ll. 16-20.

Bromage testified that appellant was ultimately arrested for the 1980 murder of David Krulewicz and the rape of Susan W. because of a DNA match discovered in 2016. R. 56, l. 15 – 57, l. 9.

Arguments of counsel

The solicitor argued that she thought given the similarities in the case that the evidence was admissible pursuant to Rule 404(b), SCRE. The solicitor also argued the evidence was “more probative than prejudicial.” R. 67, ll. 2-15.

Defense counsel Campbell said she could not agree that the allegations in the state’s memorandum were accurate. As to the 1980 murder-rape, Campbell said, “This is what Susan W. reported occurred on or about January 5th, 1980. This what she reported to law enforcement, yes.” R. 69, ll. 6-9.

Defense counsel Campbell argued the burden was on the state to prove that the 1983 subsequent incident was admissible as a common scheme or plan and Campbell noted the state was now arguing it was admissible for identity. R. 69, l. 18 – 70, l. 6. Assistant solicitor Swanson maintained she was analyzing the incidents as both a common scheme or plan and for identity. “Identity really goes a little bit more toward my more probative than prejudicial analysis.” R. 70, ll. 8-25.

Defense counsel Campbell said if the court was using the State v. Wallace factors as “guidance,” the victim in the 1980 case was only fifteen years old. The victim in the 1983 case was twenty-one years old. “To be quite honest, the way I see these cases is that they are traditionally not really like an identity kind of situation. . . . So, there’s really no relationship [to] coordinate between the parties in this case.”

Campbell also noted that Lori K. got into appellant's car in 1983 voluntarily. She was a "21-year-old woman who is walking down the highway, as she has testified to get to her ride to work, agrees to get into the car with Mr. Gadson." Conversely, "Susan and David [in 1980] were parked at Lover's Lane . . ." Lover's Lane was frequented by many people and [Lori K.] said in 1983 she was taken to a desolated area. The gun was pointed at Susan W. in 1980, whereas in 1983, appellant pled guilty to ABHAN, there was no evidence of sexual trauma on [Lori K.], and it was only [her] claim that the sex in 1983, if any, was not consensual. R. 73, l. 3 – 74, l. 13.

Defense counsel told the judge that admitting the 1983 incident would be using it for "propensity evidence" and as to the probative value versus prejudicial effect analysis, "the prejudicial effect of this to Mr. Gadson is irreparable." R. 76, ll. 7-14. Campbell also noted that the murderer and rapist in the 1983 case was much smaller than the 5'10" to six-foot attacker described by [Lori K.] in 1983. R. 75, l. 11 – 76, l. 6.

The court rules

The judge ruled that he was granting the state's motion to admit the 1983 subsequent incident pursuant to Rule 404(b), SCRE. The judge noted that the female victim in one case was fifteen and the female victim in the 1983 incident was twenty-one. They were both white females and strangers to the assailant. The judge said that oral sex was performed before vaginal penetration and that apologies were made to both victims. The judge ruled that the probative value of the evidence did outweigh its prejudicial effect and that it was admissible. R. 80, l. 22 – 81, l. 22.

Missing evidence

Prior to trial, the defense filed a motion to dismiss appellant's case alleging the investigation in this case had been abandoned and evidence destroyed in bad faith. R. 492 – 496. The motion alleged that the victim's father, Johnny Weed, had been a suspect in the murder of his daughter's boyfriend and that when Johnny Weed died in 1983, the matter was seen as concluded. R. 487 – 497.

Defense counsel Tripp argued that half of the evidence in this case was missing or destroyed in bad faith and that appellant could not get a fair trial. Defense counsel noted, for example, that the crime scene photographs were missing. He said this was a complicated case involving a number of motives, including the difference in age “between Ms. W. and Mr. Krulewicz, the involvement of her dad at the scene at the time the police arrived. Her possession of a very large sum of money at that time for a 15-year-old, and all of the inconsistencies in her accounts to the police. You can't have a reliable understanding of what happened that night.” R. 7, l. 11 – 8, l. 8.

The solicitor argued that the burden was on the defense to show bad faith in the evidence not being available and she maintained that the evidence would not have exculpated appellant. The solicitor said that Johnny Weed, the father of the fifteen-year-old girl, ran to the crime scene with a shotgun “because he had just heard that someone shot his daughter's boyfriend.” The solicitor argued that Johnny Weed was “a little out of his mind when he learned that his 15-year-old daughter had been raped. . . . There's absolutely no evidence that anything was destroyed in bad faith.”

The solicitor ridiculed the defense motion to dismiss because evidence was missing. It was the “ramblings of a conspiracy theorist. I mean, I think if you ask Mr. Tripp who shot JFK, I have no idea what he would say, or if we landed on the moon. . . .” R. 9, ll. 7-23.

Defense counsel Campbell countered that “the only evidence that was retained by SLED in 1980 was that rape kit.” However, the other evidence was lost or destroyed, including the victim’s clothing and other items that may have had DNA evidence on them. Defense counsel also noted that unfortunately, “after 36 years DNA can degenerate. And that is likely what happened. We didn’t get any touch DNA off of those items.” “[H]ere we have a victim’s testimony, although she cannot identify the victim [defendant].” The solicitor said appellant “[c]ertainly matched the description at the time and his identity is through the DNA hit, through his semen . . . so I don’t think that dismissal is appropriate . . .”² R. 13, ll. 7-20.

The judge ruled that the failure of the state to investigate did not prove bad faith on the part of law enforcement and he found no evidence that any of the missing evidence would have exculpated appellant, he denied the motion to dismiss. R. 18, l. 25 – 19, l. 11.

Trial evidence

Sonny Bessinger was twenty-five years old in 1980. He was living at 41 Old Salem Road in Beaufort County. It was an all dirt road back then where only a few neighbors lived “and the rest was farmland.” R. 97, l. 19 – 98, l. 22.

Sonny confirmed that some people rode their motorcycles back in this area and went camping and there was a “Lover’s Lane” back there. “It was all kinds of things went on back there, drinking, partying.” Sonny did not know Susan W., although he knew of her family.

² Although the transcript has part of this argument as being from Defense Counsel Campbell, the part of it attributed to the state above in this quotation was obviously from Solicitor Swanson.

Sonny was ten years older than Susan, since she was only fifteen at the time of the murder and rape. R. 99, ll. 8-22.

Sonny remembered on January 5, 1980, around midnight, he was heading home from a bar “because at that time everything closed at 12:00. They had the blue law in effect, everything closed and everyone heads home.” R. 100, l. 3 – 101, l. 23. “I saw a van parked in the woods, and just a little ways up it looked like a car. To me it looked like it was backed up in there. I went home and never thought anything about it.” However, the next morning “the DNR guy stopped by and was asking questions if we heard anything or seen anything. And that is why I mentioned I had seen a van and a car parked up in the woods.” R. 102, ll. 7-17. Other than this, Sonny knew nothing about the murder and rape which involved the van and apparently the car that he saw around midnight the night before.

Gerry Wagner worked for the Beaufort County Sheriff’s Department in 1980. He remembered supervising the investigation of the murder of David Krulewicz and the rape of Susan W. R. 112, ll. 4-21. The murderer and rapist was described as a black male, 5’7” to 5’9”, approximately 170 pounds. R. 119, ll. 1-9.

Wagner did not recall appellant ever being a suspect in the murder and rape at the time. R. 120, ll. 12-17. However, Wagner did recall a man named “Manning Tredway or Tredway Manning” being a suspect since Susan W. picked him out of a line-up in 1981. However, Tredway was 6 feet 1 inches tall, and the height of the assailant was said to be “5 feet 5 inches tall to 5 feet 7 inches tall.” Therefore, Tredway was ruled out as a suspect. R. 122, l. 15 – 124, l. 3.

When asked if Wagner was aware of any evidence being destroyed or hidden in this case, he proclaimed, “No, ma’am, not on my watch.” Wagner added his opinion that there was no

conspiracy to frame anyone or cover up for someone else in this case. R. 121, ll. 2-9. Wagner did admit on cross-examination that the victim's father, Johnny Weed, was arrested and charged with disorderly conduct on the night of the murder because he was armed with a shotgun at the scene of the crime. R. 129, l. 2 – 130, l. 9.

Wagner admitted there were a lot of rumors about this case but that he never considered Johnny Weed a suspect. R. 135, l. 2 – 136, l. 14. Wagner also said investigators never believed a shotgun was involved in the murder. R. 140, l. 20 – 141, l. 18.

Susan W. was grown and married at the time of appellant's trial thirty-eight years later. She testified she was going to Beaufort Academy and that she was a cheerleader in 1980. R. 142, l. 12 – 143, l. 10. Susan was only fifteen years old at the time she was dating David Krulewicz. R. 142, l. 12 – 143, l. 1. Susan's parents owned a moving van company and her boyfriend was working at "Rutlands Heating and Air, I believe," at the time. R. 144, ll. 7-15.

On January 5, 1980, her boyfriend picked her up at about 7:15. They went to the bowling alley and played some foosball machines and then went to a party. Her boyfriend, David, got sick from drinking too much or otherwise being ill. R. 144, l. 7 – 146, l. 7.

Susan remembered that they then went in David's van to a Burger King to get something to eat. However, David got sick again and Susan said she was upset with David "because he had been puking two or three times recently . . . even that week and he wouldn't go to the doctor being stubborn or whatnot and I was kind of upset about it." R. 148, ll. 5-18.

Susan had a 12 o'clock midnight curfew but the Lover's Lane was very near her house. David pulled into that area and "he turned the van off and we were just sitting up in the front seat with the dome light on. We probably -- he smoked a cigarette I'm sure and then he -- we went to the back of the van to sit down because he was still feeling nauseous, and we were sitting back

there for a little while. And I noticed a car going by in the back windows because in the van he had back windows, had some kind of picture or something over them so I could look out and see out, no one could see in.” R. 151, l. 17 – 152, l. 3.

It was pitch dark, so Susan noticed the headlights behind the van. It was about 11:45 and Susan said she knew she had to be home by midnight, but they were only a couple of minutes from the house. Susan was sitting in the passenger seat and David was in the driver’s seat when she heard glass shattering from the passenger side window and David, her boyfriend, “was hunched over . . . I didn’t hear him say anything.” Susan began screaming and begging for the shooter “not to shoot me.” R. 153, l. 4 – 154, l. 18.

Susan heard a man say: “Okay, open the door,” and Susan opened the sliding door and she “kept asking him to please not shoot me.” R. 155, ll. 6-14. Susan gave the man \$50 that she had with her then “he asked me to get out of the van and then take my pants off and get on my knees and then he asked me to perform oral sex on him, which I did.” R. 155, l. 20 – 156, l. 7. Susan remembered the man then laid his jacket on the ground and raped her. R. 156, l. 3 – 157, l. 17.

Susan described how she was extremely nice to the man out of fear. She smoked a cigarette with him, and they walked back to the van. She denied to him that David was her boyfriend. Susan said: “No, he’s not my boyfriend, don’t worry about it. And he said, Well, I only had to kill him to get to you.” The man told her to stay in the van until he left, and Susan remembered after she thought the murder-rapist was gone, that she ran back to her house and told her father and mother what had happened. R. 157, l. 18 – 161, l. 21.

Susan gave a description of the attacker as a “black male, you know, short afro, and that was about it.” She said he was in his mid-20s and smoking Kool cigarettes. R. 161, l. 22 – 163, l. 16.

Susan related that in May of 1980, about four months later, she answered the telephone and she claimed she recognized the voice of the murderer-rapist. She said after asking her other questions, the man asked her if she had “enjoyed it.” Susan heard other people talking on the other end of the phone also. R. 165, l. 17 – 167, l. 1.

Susan viewed several lineups but never identified her attacker or her boyfriend’s murderer. Susan recalled that David’s brother and sister at one point had a “suspected shooter in mind” and Susan told them, “Great, let’s tell the police. So we told the police and that is the last I heard of it.” R. 193, ll. 13-17.

Susan also admitted that in 1999, she asked the police to “ask my mother if dad could have done this.” Susan said she had heard these rumors about her father and she now considered them “ridiculous.” R. 197, l. 19 – 198, l. 10.

Dr. John Fontana testified that he saw Susan at the Beaufort Memorial Hospital emergency room in the early morning hours of January 6, 1980. R. 220, ll. 12-25. Susan described an African-American male in his twenties who was “a few inches shorter than she was. Didn’t appear to be a Marine.” “I think I noted that she was amazingly in control of her emotions, although she was extremely distraught. She was a child.” R. 221, ll. 11-25.

David McClure was a retired SLED DNA expert. McClure remembered testing evidence in this case in 1999, nineteen years after the crime. “I received a cutting from a pair of pink panties, a cutting from a pair of blue pants, and a cutting from a yellow shirt.” R. 249, l. 20 – 252, l. 22. “In 1999 we were using what is called RFLP . . . It uses a large fragment of DNA

to do the analysis.” R. 253, l. 24 – 254, l. 3. McClure said these items were sent back and forth between Beaufort County to SLED in 2002. R. 254, ll. 12-14; r. 260, l. 22 – 261, l.7.

McClure also offered that in 2003, Susan’s DNA profile was compared to that of her victim boyfriend’s profile. “The DNA developed from the semen on items 1.1 and 2.1 did not match the profile from item 3.1, which was the standard submitted for David Krulewicz.” R. 257, l. 11 – 258, l. 13. McClure said he was not aware that the pink panties had been subject to some analysis by SLED in 1980. R. 258, l. 23 – 259, l. 15.

Under continuing challenges to the DNA evidence, the State offered the DNA expert opinion of SLED agent Laura Hash that the DNA profile from the victim’s panties and pants matched the DNA “profile of Isaiah Gadson, Jr.” Hash said the DNA match was one in 2.1 trillion. R. 276, l. 4 – 278, l. 9.

Lori K. had a different last name by the time of appellant’s trial in 2018. She testified before the jury about the February 4, 1983, incident. She repeated her in-camera testimony in large part. Lori said that she was in the Marine Corps at the time, she was twenty-one, just before her twenty-second birthday, and that she was married. On February 4, 1983, she was walking to meet her ride to work between 5:30 and 5:45 in the morning. She again stated, “I was not hitchhiking. And the first ride I turned down. And -- but as I said, I was running late so when Mr. Gadson stopped I knew that I wasn’t going to meet my ride if I didn’t accept a ride, so I -- he offered me a ride and I took it. And I told him where I was going and he said that he would take me there.” R. 296, l. 14 – 299, l. 19. She elaborated:

“So, I got in the car. And when he got to where the corner store was, he turned to secondary, down secondary 73. He asked me -- I asked him where he was taking me, that the corner store was right there and he could just let me out. And he said that he was going to buy some marijuana from a friend. And he asked me if I smoked, and I told him no. He asked me if I had ever had sex

with a black man and I told him no and I explained that I was married.

And, again, I was telling him that I'm going to be late, just let me out and he refused. He went about a mile down the road, it seemed like a mile, it was dark. And he turned left on a dirt road, on a wide dirt road and went past a white trailer and then made a right-hand turn down another dirt road towards an open field and parked the car.

At that point, he got out of the car. It's been a long time. But I seem to remember there was a structure that he went in, but only for a moment. I had just --"

R. 299, l. 19 – 300, l. 15.

Lori said she did not think she had time to escape. "It entered my mind for just a moment, I should run, but he came back. And he got in the car and he locked the doors. And he started putting his weight against me and I began to struggle. And he threatened me. He said to stop struggling or he was going to blow my brains out." R. 300, ll. 16-22. She claimed appellant told her to take her clothes off "or die. And at that point he removed his trousers. And I took my pants off. And that is when he performed oral sex on me. After that he -- that only lasted like two to three minutes and he asked me if it felt good and if I liked it, did I enjoy it. And then he climbed on top of me and he raped me." She maintained that she thought appellant had a gun somewhere. R. 300, l. 16 – 302, l. 3.

Appellant offered her \$50 and she told him she was not a prostitute "and I didn't want his money." "He starts driving back towards the direction that I wanted to go, back towards 280 and [he] dropped me off on 73, secondary 73, near a welding shop." R. 302, ll. 2-22.

She got appellant's license tag number. She described him at the hospital as "a black male in his mid 20s, 25, 26 years old, approximately 5'9", 5'10", 150 pounds, short afro, moustache, sideburns, just as far as facial hair." R. 303, ll. 13-17.

Bob Bromage admitted he had been disciplined in the past for not properly his division. R. 315, l. 21 – 316, l. 6. In this case, Bromage testified that Susan's "pants, shirt, underwear, and a bra" were taken by Dr. Fontana at the hospital after the rape. Bromage admitted that items went missing after that. R. 319, l. 11 – 320, l. 22. Bromage noted this was "before DNA and everything else." R. 321, ll. 2-8.

Bromage offered, "Obviously, since that time evidence handling procedure has dramatically changed as you are aware, pre-DNA, late '80s." R. 321, l. 13 – 322, l. 5. The crime scene photographs were also missing but Bromage maintained none of the evidence was deliberately destroyed. R. 322, ll. 19-21.

As to the 1983 incident involving appellant and Lori K., Bromage remembered appellant telling the police that he "Saw a lady on the side of the road walking. I stopped to ask her if she wanted a ride. She said yeah. I asked her where she was going and she said . . . Joy Land or Pizza Hut, somewhere in the area." R. 345, ll. 10-19. Bromage said appellant told him Lori K. was "white, slender, you know, I didn't pay no attention to the way she looked." R. 345, l. 23 – 346, l. 2.

Appellant also told Bromage he kept a gun in his car but he did not carry it on his person. Appellant asked "her [Lori K.] if she wanted to make some love, you know. I put my hand on her, you know." R. 346, ll. 3-21. Appellant denied that he had sex with her or that forced her to have sex with him. R. 346, l. 25 – 347, l. 16. Bromage identified the indictment for criminal sexual conduct in the first degree indictment where appellant pled guilty to ABHAN from that 1983 incident. R. 348, ll. 3-10.

On cross-examination, Bromage admitted he was aware of a report wherein law enforcement had been advised by a "witness that there was a rumor that Johnny Weed killed her

son and also stated that someone overheard Weed saying that he was going to kill Krulewicz [her boyfriend] because he was a worthless being and public scum.” R. 350, l. 10 – 351, l. 14.

Bromage said he learned this after the case was reopened in 1999. R. 350, l. 10 – 351, l. 14.

Bromage finally acknowledged that appellant’s .32 caliber gun taken from his car in 1983 was not the murder weapon in the 1980 murder-rape case, and that the murder weapon was never recovered. R. 380, l. 10 – 381, l. 17.

Finally, SLED DNA analyst John Barron testified that nine vaginal swabs were taken from Susan in 1980 and that those swabs had been lost or destroyed. Barron could only say, “I didn’t throw it away,” when asked about the missing swabs. R. 407, l. 20 – 408, l. 13.

Discussion

South Carolina law precludes the admission of evidence of a defendant’s prior crimes or “other bad acts” to establish guilt of the crime charged, except for the limited purposes allowed under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. Rule 404(b), SCRE, provides the only purposes for which *prior* crimes, wrongs, or acts may be offered is to show: (1) motive, (2) identity, (3) existence of a common scheme or plan, (4) the absence of mistake or accident, or (5) intent.

Prior to trial, and in the state’s memorandum, the solicitor argued that the facts of the 1983 ABHAN crime were admissible to show a common scheme or plan in the 1980 murder-rape case. As stated, at trial, the solicitor also argued the 1983 case was admissible as to the “intent” exception.

The judge here erroneously ruled the 1983 crime involving the twenty-one-year-old female Marine was admissible under Rule 404(b), SCRE and under Rule 403, SCRE. Specifically, the judge ruled with the solicitor and against defense counsel that the probative

value of the evidence of the 1983 ABHAN crime was not outweighed by its danger of unfair prejudice to the defendant. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999).

The state also couched its motion and argument to admit evidence of the 1983 crime in the “similarities” test of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). In State v. Perez, 423 S.C. 491, 501, 816 S.E.2d 550, 556 (2018), Justice Hearn and Chief Justice Beatty concurred, but wrote separately that the court should overturn State v. Wallace because it had so expanded the admissibility of prior sex acts in sexual offense cases “that the exception has swallowed the rule.”

While appellant submits the judge in this case erroneously admitted the evidence of the 1983 crime under Rule 404(b), SCRE, and pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), this case does exhibit how the exception has swallowed the rule.

The victims in the 1980 murder–rape case for which appellant was on trial was a fifteen-year-old girl parked on Lover’s Lane with her twenty-one-year-old boyfriend. The boyfriend was shot several times, once in the head, and killed. The fifteen-year-old girl begged for her life and she let the assailant into the van. She gave him \$50.00. The assailant then removed the young girl from the van, had her perform oral sex on him, and then he raped her on top of his jacket on the ground.

In the 1983 crime, the twenty-one-year-old woman Marine was walking to a country store on Highway 280 to meet her ride to work when she was offered a ride by two different men. She refused the first ride, but she accepted a ride from the man she later identified as appellant. The testimony of the twenty-one-year-old married Marine was that instead of taking her to the country store, appellant drove to a trailer or other structure where he apparently was going to purchase marijuana. He asked the Marine woman if she smoked marijuana and whether

she had ever had sex with a black man. Appellant left the Marine alone in the car while he went inside the structure seemingly to purchase marijuana. He returned to the car, began leaning on the Marine, had oral sex and raped her, apparently with both sex acts happening inside of the car. Appellant then dropped the Marine woman off somewhere in the vicinity of the country store on Highway 280.

The proffer and arguments in on this issue where extensive. Appellant understands the solicitor argued that the perpetrator in the 1980 and in the 1983 crime apologized for his actions, allegedly asked the victim if she “enjoyed it” and offered money. However, even these seeming similarities had dissimilarities.

In the 1980 crime for which appellant was on trial, the fifteen-year-old girl *gave* appellant \$50 seemingly in the hopes that appellant would not shoot her. In the 1983 crime, it was alleged that appellant *offered* the Marine woman \$50 which she refused, stating she was not a prostitute.

In the 1980 crime allegedly the perpetrator apologized *for murdering the boyfriend*, stating that was the only way he could have had sex with the fifteen-year-old girl. In the 1983 crime, appellant was said to have apologized *for forcing himself* on the Marine, and *he offered her* \$50 as if she was a prostitute, which she was not.

Finally, the victim in the 1980 crime, the fifteen-year-old girl, maintained a man, who she thought had the same voice as the perpetrator, telephoned her months later and included in that telephone call a question whether “enjoyed it.” In the 1983 crime, the perpetrator asked the Marine immediately after the forced sex whether she “enjoyed it.”

In showing a common scheme or plan, the evidence of the other crime does not apply where the plan common to the other crime is not an essential ingredient of the crime charged. “In this connection there must be “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 charge.” State v. Lyle, 118 S.E. at 811.

It is worth noting that the 1983 crime admitted pursuant to Rule 404(b), SCRE, in this case was not a prior bad act but a subsequent crime. Regardless, there was no viable connection between the extraneous 1983 ABHAN crime to which appellant pled, and the 1980 murder-rape for which appellant was on trial since evidence of one crime did not logically tend to prove the crime charged under State v. Lyle or Rule 404 (b), SCRE.

Appellant fully understands that the state intended to prove more of the 1983 crime than appellant admitted to by pleading guilty to ABHAN. Appellant admitted to “indecent liberties” with the 21-year-old marine, while she testified that he raped her after seemingly giving her a ride to the country store.

Again, appellant understands the state’s reliance on the similarities test of State v. Wallace, which was rapidly falling into disfavor at the time of this briefing. A common scheme or plan is classically and correctly applied in cases such as State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), where the robbers are smoking crack cocaine, robbed to get more money for crack cocaine, and robbed again to continue their crack addiction. Similarly, in State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986), theft of the getaway car and other crimes was admissible because the car theft was an integral part of the common scheme or plan.

“If the court does not clearly perceive the connection between extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.” State v. Carter, 323 S.C. 465, 469, 476 S.E.2d 916, 919 (Ct. App. 1996).

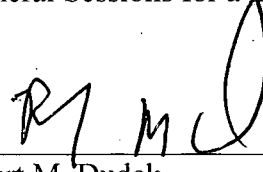
Further, as to “identity,” under Rule 404(b), SCRE, and State v. Lyle, appellant submits the crime to meet the exception should be a signature crime just as it was in Lyle. The 1983 rape of the twenty-one-year-old female Marine who was “catching a ride” when she was raped was hardly the signature crime to make it admissible in the 1980 murder of the twenty-one-year-old boyfriend and the rape of his fifteen-year-old girlfriend while they parked on Lover’s Lane trial. This did not prove a common scheme or plan or identity under Rule 404(b), SCRE or under the applicable case law above. As defense counsel correctly argued, the 1983 evidence would be interpreted by the jury as propensity evidence that appellant was a rapist, and therefore probably guilty of this crime. That was impermissible.

For these same reasons, the judge erred in finding that the probative value of the 1983 rape of the twenty-one-year-old female Marine was not substantially outweighed by its undue prejudice to appellant. As defense counsel correctly argued, the prejudice to appellant was “irreparable” in this case.

Appellant understands the state’s defensiveness on having lost a volume of the evidence from this 1980 murder–rape case over the years. However, the state was not entitled to impermissibly bolster that weakness in its case by having evidence of the 1983 ABHAN crime admitted during this murder–rape case. The error was very prejudicial, it irreparably harmed appellant, and it was not harmless. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'R M Dudek', is written above a horizontal line.

Robert M. Dudek
Chief Appellate Defender

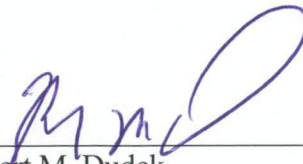
ATTORNEY FOR APPELLANT

This 24th day of February, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 24, 2020.



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