ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2018-001041

THE STATE,

Respondent,

vs.

ISAIAH GADSON, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ISAAC McDUFFIE STONE
Fourteenth Judicial Circuit Solicitor

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL..... 1

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW..... 2

STATEMENT OF FACTS..... 3

ISSUE AS IT WAS PRESENTED AT TRIAL.....10

ARGUMENT

I. The trial court did not abuse its discretion in granting the State's 404(b) motion to introduce evidence of Appellant's prior ABHAN of Lori L." 14

CONCLUSION..... 18

DESIGNATION OF MATTER

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

Clark v. Cantrell,
339 S.C. 369, 529 S.E.2d 528 (2000) 2
State v. Baccus,
367 S.C. 41, 625 S.E.2d 216 (2006) 2
State v. Carter,
323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996) 14, 16
State v. Cartwright,
425 S.C. 81, 819 S.E.2d 756 (2018) 2
State v. Cope,
385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009) 15
State v. Douglas,
369 S.C. 424, 632 S.E.2d 845 (2006) 2
State v. Lyle,
125 S.C. 406, 118 S.E. 803 (1923) 3, 14, 15
State v. Myers,
359 S.C. 40, 596 S.E.2d 488 (2004) 3
State v. Pagan,
369 S.C. 201, 631 S.E.2d 262 (2006) 15
State v. Parker,
315 S.C. 230, 433 S.E.2d 831 (1993) 15
State v. Perez,
423 S.C. 491, 816 S.E.2d 550 (2018) 17
State v. Pittman,
373 S.C. 527, 647 S.E.2d 144 (2007) 2
State v. Raffaldt,
318 S.C. 110, 456 S.E.2d 390 (1995) 16
State v. Wallace,
384 S.C. 428, 683 S.E.2d 275 (2009.) 15, 16
State v. Wood,
362 S.C. 520, 608 S.E.2d 435 (Ct.App.2004) 2

Rules

Rule 404(b), SCRE ..... Passim

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Whether the court erred in admitting evidence of a 1983 sexual ABHAN as a subsequent bad act where the 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?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

Did the trial court abuse its discretion in admitting the evidence of Appellant's 1983 rape of Lori L., a crime for which Appellant accepted a negotiated plea for ABHAN, as more probative than prejudicial evidence that tended to show common scheme or plan and identity of Appellant under 404(b), when both crimes involved: (1) young, Caucasian, tall, slender women, (2) in secluded dirt road areas of Burton, South Carolina, (3) during the cover of dark, (4) who did not know Appellant, (5) were committed with the use or threat of a gun, (6) involved the Appellant first performing oral sex on his victims prior to (6) vaginal rape, (7) where both crimes involved Appellant ejaculating during vaginal rape, (8) both crimes saw the Appellant apologize to the victim for his actions, and (9) both crimes saw the Appellant ask the victim if she enjoyed it?

STATEMENT OF THE CASE

Appellant was indicted for criminal sexual conduct (2016-GS-07-1548), murder (2016-GS-07-1549), kidnapping (2016-GS-07-1550), and armed robbery (2016-GS-07-1551). (R. p. 3). Appellant proceeded to trial on these charges on May 21-24, 2018, before the Honorable Brooks P. Goldsmith, and a jury. (R. p. 1). Assistant Solicitors Hunter Swanson and Kimberly Smith represented the State. Assistant Public Defenders Trasi Campbell and Benjamin Tripp represented Appellant at trial. (R. p. 2). On May 24, 2018, the jury found Appellant guilty of all charges. (R. p. 484, lines 1-16). Appellant was sentenced to 50 years imprisonment for murder, and 30 years imprisonment for each of Appellant's CSC, kidnapping, and armed robbery charges, all of which were order to be served concurrently. (R. p. 485-486).

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (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." *State v. Cartwright*, 425 S.C. 81, 89, 819 S.E.2d 756, 760 (2018) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct.App.2004). "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." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007)(citing *Clark v. Cantrell*, 339 S.C.

369, 389, 529 S.E.2d 528, 539 (2000)). An appellate court "reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision." *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE 404(b); see *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (finding such 404(b) evidence admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent).

STATEMENT OF FACTS

The matter at hand is the 1980 cold case murder of David Krulewicz (hereinafter "David") and subsequent rape of his girlfriend, Susan (hereinafter "Victim"). The facts and evidence presented at trial are as follows:

The 1980 murder and rape

Victim testified that on January 5, 1980, she and her boyfriend David had recently left a party and were "parking" together in his gray van in an area known as "Lover's Lane", located in Burton, South Carolina. (R. p. 135; p. 144, line 16 through p. 150, line 19; p. 186, lines 2-6). It's a heavily wooded area where kids could park. (R. p. 151, lines 1-5). At around 11:45pm, without warning or confrontation, Victim heard gunshots, and felt the glass of the passenger window shatter onto her. (R. p. 152, line 14 through p. 154, line 11). The coroner's testimony demonstrated that those gunshots, measured to be .32 caliber rounds, struck David in the head neck, and arm, ultimately causing his death. (R. p. 210, line 20 through p. 211, line 1; p. 208-209).Victim testified that Appellant robbed her of the fifty dollars she had for shopping money

and then demanded that she perform oral sex on him outside the van. She testified that Appellant held the gun to her head as she complied with his demands and she begged him not to kill her. (R. p. 154, line 14 through p. 156, line 15). Appellant next performed oral sex on Victim. (R. p. 156, line 16 through p. 157, line 2). He then proceeded to vaginally rape Victim and concluded by ejaculating inside of Victim's vagina. Appellant then got up and pulled his pants back up; seeing Appellant was getting dressed, Victim did the same. (R. p. 157, lines 3-5). Victim testified that it was pitch black dark outside that night and that she did not get a good look at Appellant's features during the crime. However, her best opportunity to view Appellant came when Appellant used a lighter in front of his face to light his cigarette. (R. p. 152, line 18-20; p. 157, line 25 through p. 158, line 10). Victim testified that she was scared for her life and certain that Appellant would kill her too if she did not speak nicely to him and put him at ease that she would not report his actions to law enforcement. Her efforts to appease Appellant included smoking a Kools cigarette with him afterwards. (R. p. 157, line 10 through p. 157, line 25; p. 162, lines 11-18). After the rape concluded, Appellant apologized to Victim for killing her friend David, explaining that he had to in order to get to her. (R. p. 159, lines 5-10). She testified that Appellant then instructed her to get inside the van and throw him the keys; he instructed her to stay in the van until he left. (R. p. 159, lines 2-4).

Victim tried to check David for a pulse after Appellant left, but could not tell at the time. She then exited the van and checked to make sure Appellant was gone. (R. p. 159, lines 11-23). After confirming that Appellant had left she went to the driver's side door to try and get David out of the seat so that she could drive to safety and report the crime. She was not strong enough to move David from the seat, so she proceeded to run back toward her home which was less than a mile from where the van was parked. (R. p. 159, line 23 through p. 160, line 5). Still afraid that

Appellant might be in the area, Victim had to jump into the roadside ditch when she saw headlights approaching. (R. p. 160, lines 5-11). Once arriving home, Victim ran inside and broke down screaming and crying as to what had happened. (R. p. 160, lines 12-17).

Victim's father grabbed his shotgun and immediately headed to the scene of the crime. (R. p. 161, lines 6-11; p. 129, line 5 through p. 130, line 3). Victim testified that she believes her mother called the police. (R. p. 161, lines 11-13). Though scared, Victim and her mother soon came to the scene. She provided a brief description of Appellant, noting him to be a black male, in his early 20s with a short afro; law enforcement then instructed her to go to the hospital. (R. p. 161, line 13 through p. 162, line 10). Her later statements to police provided additional information that she believed the assailant to be shorter than her, possibly 5'5"-5'7", and 150 pounds. Victim testified that she did her best to judge the height of Appellant during the crime, but her positioning in the car and on the ground made it difficult to do so. (R. p. 199, line 8 through p. 200, line 1).

A sexual assault examination was performed on Victim and all of her clothes were taken as evidence. (R. p. 163, line 19 through p. 164, line 6; p. 220, lines 12-18). Dr. Fontana, who performed the examination, testified he found "abrasions over the posterior portion of the vagina" that would be consistent with forced intercourse. He was also able to take specimens from both the vagina and the opening of the cervix and found "non-motile" sperm in both locations. (R. p. 222, line 3 through p. 223, line 7). In the investigation efforts that followed, a composite drawing was produced. (R. p. 113; p. 168). Victim was also shown numerous photo lineups, and one in-person lineup. (R. p. 167, lines 9-22). Victim never selected any individual as an identification of the individual who raped her. However, she did bring to the officer's attention when someone in the lineup had characteristics similar to her assailant. She did this in

an effort to further assist her descriptions of Appellant. (R. p. 167, line 23 through p. 168, line 14). Detective Gerry Wagner testified that the rape kit and various other forensic efforts were taken, but DNA testing was not available at that time. (R. p. 117-118).

In May of 1980, five months after the crime, Victim received a phone call from a man who did not identify himself. During the course of the phone call the individual asked if she was the girl who had been raped. When Victim responded that she was, the man asked if she enjoyed it. Victim then promptly hung up the phone. (R. p. 165, line 17 through p. 166, line 15). Victim testified that she did not immediately recognize his voice and noted that there was noise in the background of his phone call, but she believes that it was the rapist who had called her. (R. p. 166, line 13 through p. 167, line 1). While unsubstantiated rumors in the town were frequent, law enforcement was not able to develop any strong leads in her case and the crime went unsolved for the next 36 years. (R. pp. 135; 198; 330; 351; 378-379).

Reinvestigation 1999

Victim learned from Detective Bob Bromage in 1999 that her case would be reopened as part of the newly created cold case task force instigated by the Beaufort County Sheriff. (R. p. 170, lines 15-24). Detective Bromage testified that this particular case indicated that semen had been found during the initial SLED analysis so he submitted the clothing materials from Victim's case and sent them to SLED for testing in 1999. (R. p. 317, lines 5-18). Patti Ruff, processed the evidence pursuant to a bodily fluids inspection, specifically a presumptive test for semen. She then performed cuttings of the clothing to provide for DNA testing. (R. p. 238-242). At that time, DNA testing was available, but still limited to the "Restriction Fragment Length Polymorphism" (RFLP) process. (R. p. 253-254). SLED Forensic DNA analyst, David McClure, testified that they performed testing on the clothing that provided a presumptive positive result

for sperm. (R. p. 254). However, the RFLP method of testing required more DNA material than was present and a DNA profile could not be established at that time. (R. p. 251, line 14 through p. 254, line 11).

2002 DNA Testing

SLED analyst McClure testified that DNA technology advanced considerably between 1999 and 2002. Particularly, the testing was able to move beyond using only RFLP and could use "short tandem repeats" (STRs). This method could successfully discover a DNA profile with small fragments of DNA. STRs are more resistant to DNA deterioration which allows for more effective testing. (R. p. 255, lines 3-14). Victim's clothing was sent for retesting in 2002, new cuttings were taken, and new DNA testing was performed. SLED analyst McClure testified that in 2002 he was able to successfully develop a DNA profile from the sperm on Victim's clothing using the STR method. (R. p. 254, line 12 through p. 255, line 22). He then requested a DNA standard from Victim and David in order to eliminate them from the discovered profile. (R. p. 257, lines 3-10).

Although a DNA profile had been successfully discovered from the sperm on Victim's clothing, the DNA database did not have an existing match for the profile in 2002. As a result, the DNA testing did not identify a new suspect for the crime until thirteen years later. (R. p. 330, lines 10-25).

2016 Identification of Appellant

On August 3, 2016, thirteen years after the DNA profile was established from the semen on Victim's clothing, Detective Bromage received a call from SLED informing him that they had a hit in the DNA database that matched Appellant Isaiah Gadson to the crime. (R. p. 330, lines 10-25). To confirm the results, Officer Selena Nelson took buccal swabs of Appellant (R. p.

271) and SLED DNA technical leader, Laura Nash, established a DNA profile from those swabs. (R. p. 276). Agent Nash was then asked to compare Appellant's DNA profile from the profile developed by David McClure in 2002 from Victim's clothing. Agent Nash testified that the two profiles matched, and then provided the statistical match odds for the tests. (R. p. 276, lines 1-15). She testified that for the test on the cutting from Victim's panties, it was a match to Appellant's profile of 1 in 2.1 trillion, meaning the odds of being a match to the DNA profile would be 1 person out of 2.1 trillion people. (R. p. 276, line 16 through p. 277, line 17). For the test on the cutting from Victim's pants, the statistical match was 1 in 3.7 quadrillion. (R. p. 277, lines 18-25).

Detective Bromage explained the process involved with reopening Victim's case in 1999. He testified that upon reviewing the case he noted that semen had been found by SLED in their 1980 analysis, but that DNA had not existed at the time. With that circumstance in mind Detective Bromage resubmitted the clothing for retesting. (R. p. 316, line 17 through p. 317, line 18; p. 318, line 24 through p. 320, line 8). Detective Bromage was questioned about the fact that some of the collected evidence, including the semen samples from Victim's rape kit, were now missing. Detective Bromage testified that he looked into that issue when reopening the case. He learned by email from SLED that in the process of transitioning the file to microfilm some of the evidence had been destroyed. Detective Bromage testified that email also noted the substantial changes to procedures for handling and retention of evidence changed drastically between the 80's and 90's.[1] (R. p. 320, line 15 through p. 322, line 5). SLED DNA analyst John Barron

[1] This issue was taken up by defense counsel's motion and the court found that there was nothing to demonstrate any bad faith or that exculpatory evidence had been destroyed. (R. p. 19; 421-422)

supported this testimony. (R. p. 386, line 25 through p. 388, line 16; p. 395, line 6 through p. 397, line 10; p. 407, line 20 through p. 408, line 7).

The State also offered the testimony of Clifford Brown, Appellant's cousin. (R. p. 284, lines 11-12). Mr. Brown testified that in the 1980's Appellant's family lived on Glaze Drive, in Burton, South Carolina, and Appellant lived right across the street from them. (R. p. 285, line 18 through p. 286, line 3). Detective Bromage's investigation of Appellant after being informed of the DNA match revealed that Appellant in fact lived on Glaze Drive, approximately two miles from where the 1980 murder and rape occurred. (R. p. 334). Mr. Brown added that their family during that time were the owners of the area known as Lover's Lane. (R. p. 288, line 13-23). When questioned on whether he ever accompanied Appellant to that area, Mr. Brown denied ever taking Appellant there in the past. (R. p. 292, lines 4-14). Detective Bromage was called as a rebuttal witness and testified that he interviewed Clifford Brown on August 15, 2016, wherein Mr. Brown informed him that he and Appellant had driven out to the Lover's Lane location one night in the 70s. (R. p. 293, line 16 through p. 294, line 4). During that trip Mr. Brown told Detective Bromage that he had informed Appellant that the area was a frequented spot for couples who wanted to park together. (R. p. 294, lines 4-15).

Mr. Brown further testified that Appellant worked at the Brown's Mobile Home located on Highway 21. (R. p. 286, lines 4-11). He confirmed that Appellant owned a couple of firearms, but not being able to tell the difference, he could only speculate as to whether Appellant had owned a 357, a .38, or a .32 caliber firearm. (R. p. 286, line 25 through p. 287, line 13).

ISSUE AS IT WAS PRESENTED AT TRIAL

This matter was taken up during the pretrial motion of the State to introduce Lori L.'s testimony pursuant to the *Lyle* factors, but specifically as evidence tending to prove common scheme or plan and identity of Appellant under Rule 404(b). (R. p. 9; p. 21-22; p. 67; p. 69-70). Defense counsel contested the motion. In support of the motion the State presented both memorandum in support which relied upon *State v. Wallace*, oral arguments, as well as a full proffer of her expected testimony. (R. p. 19-41).

1983 Rape of Lori L.

Lori's testimony during the proffer was substantively equivalent to the testimony offered at trial in the presence of the jury. (R. p. 296-312). She testified as follows:

Lori testified that in 1983 she was living on Green Pond Park off of Boundary Street in Beaufort, South Carolina. (R. p. 23, lines 19-25). Boundary Street is also a part of Highway 21. (R. p. 38, lines 20-23). She testified that she was 21 years old at the time, and was a Marine stationed at nearby Parris Island. (R. p. 24, lines 16-21; p. 32, lines 7-9). She explained that in the mornings before work she would walk to the corner store on Highway 21 to meet her ride to work. (R. p. 24, line 22 through p. 25, line 10). She testified that she needed to be at the corner store between 5:30am and 5:45am to meet her ride. (R. p. 30, lines 20-22). On the morning of February 24, 1983, she had woken up late and was concerned that she might miss her ride. (R. p. 24, line 24 through p. 25, line 1). She was walking down Boundary Street (Highway 21) when a car stopped and asked if she wanted a ride. She turned this driver down. (R. p. 25, line 2-5). Soon after, Appellant stopped and asked if she wanted a ride. She chose to accept this ride, concerned that she would miss her ride if she did not. (R. p. 25, lines 5-8).

She got into the car with Appellant and told him where she was going. Appellant agreed to take her to the corner store, but as they drew near to the store he deviated from the route to the

store and turned onto Secondary 73 claiming he needed to buy some marijuana from a friend. (R. p 25, lines 8-16). Lori protested insisting she would miss her ride, but Appellant continued to drive on into nearby Burton, South Carolina. (R. p. 25, lines 13-18; p. 311-312). Appellant questioned Lori if she had ever had sex with a black man. She responded that she had not and informed Appellant that she was married and had only had sex with her husband. (R. p. 25, lines 18-24). Lori explained that it was dark out, and that Appellant drove down the secondary road for about a mile and then turned onto a "wired dirt road" until they reached a field with some sort of nearby structure. Lori testified that Appellant went inside, presuming he was buying marijuana. When he returned he locked the doors to the car and started to force himself on her. (R. p. 25, line 25 through p. 26, line 10).

She began to struggle. In response, Appellant threatened that if she did not stop he would blow her brains out. Lori testified that she believed him and stopped fighting back. (R. p. 26, lines 11-13). Lori testified that during that exchange he started to reach underneath his front driver's seat of the car; she believed the threat and concluded that there was probably a weapon there. (R. p. 26, lines 11-17). Appellant removed his pants and told Lori to take her pants off or die. (R. p. 26, lines 18-21). Appellant then began to perform oral sex on Lori and did so for a couple of minutes. When finished he asked her if she enjoyed it. He then got on top of Lori and vaginally raped her until he ejaculated inside her. (R. p. 26, line 24 through p. 27, line 2).

Lori testified that at that point she was too terrified to move and had to ask if she could get dressed. Appellant told her she could. Lori testified that Appellant then apologized to her, claiming he did not know why he did that and offered to pay her $50. She turned the money down noting she was not a prostitute. Appellant then asked if he was going to call the police or tell her husband. Out of fear for her life, Lori told him she would not tell anyone. He then began

to drive back to the secondary 73 toward where she had wanted to go. (R. p. 27, lines 3-13). Lori noted that by this point it was starting to get light outside and she started to pay as much attention to the car as she could. Appellant dropped her off at a welding shop in the area near the corner store. As he drove away, she made sure to view and memorize his license plate. She then ran the rest of the way to the corner store and called the police. (R. p. 27, lines 14-24).

Lori provided the license plate to the police and a description of the Appellant as: "black male in his mid 20s, maybe 25, 26. He was about 150 pounds, kind of short afro, long sideburns, moustache, he had scraggily facial hair. He was probably 5'9", 5'10". . ." (R. p. 28, lines 3-8). She went to the hospital where a rape kit was performed and the police brought her a photo line-up to consider. She identified Appellant from the line-up and he was later arrested. (R. p. 28, line 20 through p. 29, line 13). Lori testified that they were prepared for trial and were in the process of jury selection when Appellant chose to enter a guilty plea. (R. p. 29, line 14-18). Appellant pled *Nolle Contendre* to Assault and Battery of a High and Aggravated Nature. (R. p. 20).

Additional testimony indicated that Appellant admitted to picking her up, but claimed that he had simply come on to her and suggested they have sex. However, he denied having sexual intercourse with her. (R. p. 40-41; p. 345-347). He also admitted to owning a .32 caliber pistol. While it was a similar make and model firearm, Appellant's pistol from 1983 did not match the ballistics for the 1980 murder. (R. p. 39, line 22 through p. 41, line 23).

In support of the 404(b) motion the Solicitor argued that the various facts from the 1983 rape were of such strong similarity to the rape and murder committed in 1980, that under *State v. Wallace*, they constituted evidence tending to show a common plan or scheme as well as evidence of identity and therefore were properly admissible. Specifically, the Solicitor noted that that the physical characteristics of both victims were strikingly similar. Both were young, tall,

slender, white women. (R. p. 21, lines 10-13). Second, the Solicitor demonstrated that in both crimes the victim was a stranger to Appellant, and that they were either isolated or he made sure to make them isolated prior to the rape. (R. p. 21, lines 13-17). Next, the Solicitor established that both crimes were committed during dark hours on dirt roads in the Burton, South Carolina area. (R. p. 21, lines 17-20). The Solicitor argued that in both crimes Appellant used the threat of a firearm to gain his victim's compliance to the rape. (R. p. 21, line 21 through p. 22, line 3). The solicitor continued his arguments for the motion by pointing out two very unusual similarities. First, that Appellant apologized to the victim for his actions (R. p. 22, lines 5-7) and that he ultimately asks both victims whether they enjoyed it. (R. p. 22, lines 7-14). Lastly, the Solicitor identified that in both rapes Appellant began by performing oral sex on each victim and then proceeded to vaginally rape each victim. (R. p. 22, line 16-18). The facts demonstrate that Appellant ejaculated during the vaginal rape of both victims. Additionally, the Solicitor argued that the evidence was more probative than prejudicial. (R. p. 67; p. 70).

Defense counsel argued against the motion, asserting that the differences in the crimes and contrasting the facts of this case from normal 404(b) scenarios such as child molestation cases where the defendant goes to the same place and commits the same crime in the same way. (R. p. 761, line 3 through p. 73, line 3). Defense counsel *attempts* to argue that the Lori L. ABHAN did not involve any aspect of violence, and that Lori's agreement to ride with Appellant was voluntary. (R. p. 72, lines 4-9; p. 73, line 3-7). Defense counsel argued that admitting the testimony in question would be far more prejudicial that probative. (R. p. 76, lines 7-14).

Following the arguments of counsel, Judge Goldsmith ruled that he would grant the State's motion to introduce the evidence. The trial court made specific findings regarding the similarities presented, agreeing that the young age and race of the female victims was in favor of

the State. The trial court likewise found that the secluded dirt roads in the Burton area, the coercion by threat of firearm, the oral sex followed by vaginal penetration, the apologies made after both crimes, and that both victims were asked if they enjoyed the assault all weighed in favor of the State. The court noted that while both victims were strangers to the Appellant, he did not find that fact as favorable support to the State. In conclusion, Judge Goldsmith stated that "All of those, balancing the similarities with the dissimilarities, I find that the similarities far outweigh the dissimilarities. And I realize that it's prejudicial, but I find that the probative value does in fact outweigh its prejudicial effects." (R. p. 81, lines 17-22).

ARGUMENT

I. The trial court did not abuse its discretion in granting the State's 404(b) motion to introduce evidence of Appellant's prior ABHAN of Lori L.

The trial court did not abuse its discretion in admitting the evidence of Appellant's rape/ABHAN of Lori L. on the basis of common scheme or plan and identity, as argued by the State. The evidence presented to the court was vastly sufficient to rule the evidence admissible under *Lyle* and *Wallace*, and in the absence of abuse of discretion there can be no basis for error.

Generally, evidence of a person's character is not admissible for the purpose of proving action in conformity with said character. However, evidence of other crimes, wrongs, or acts can be admissible for the purpose of establishing motive, identity, the existence of common scheme or plan, the absence of mistake or accident, or intent. SCRE 404(b). Such evidence must then be found to be more probative than prejudicial under Rule 403. *State v. Carter*, 323 S.C. 465, 467, 476 S.E.2d 916, 918 (Ct. App. 1996). *State v Lyle* serves as the seminal case for the discussion and application of these exceptions to the inadmissibility of prior bad acts evidence. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). *State v. Wallace* has since provided an outline of how

evidence of prior bad acts specific to sexual assault should be considered and weighed by the court in conducting a Rule 404(b) analysis. Therein, the South Carolina Supreme Court held that:

> 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. *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993). When 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 charged: (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.

State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277–78 (2009.) "To be admissible against a defendant in a criminal proceeding as evidence of identity, 'the bad act must logically relate to the crime with which the defendant has been charged.'" *State v. Cope*, 385 S.C. 274, 284, 684 S.E.2d 177, 182 (Ct. App. 2009), aff'd, 405 S.C. 317, 748 S.E.2d 194 (2013) (quoting *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). "In contrast, to admit evidence about other bad acts against an accused to show the existence of a common scheme or plan, '[a] close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility.'" *Id.* (quoting *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (S.C. 2009)).

The trial court carried out this evaluation with exceptional thoroughness. (R. p. 80). The court's notations of the numerous and striking similarities likewise rendered the evidence more probative than prejudicial, such that the evidence should be admissible under Rule 403. (R. p. 80).

The record demonstrates that the similarities in the method and behaviors of Appellant far exceed the concern for "general similarity" but are instead "a close degree of similarity or a connection between the prior bad acts and the crime." *State v. Carter*, 323 S.C. 465, 467, 476 S.E.2d 916, 918 (Ct. App. 1996) (citing *State v. Raffaldt*, 318 S.C. 110, 113, 456 S.E.2d 390, 392 (1995)). Here the similarities are striking, such that there are at least ten commonalities between the crimes; some of which are of such a unique and "bizarre" nature that the evidence is not merely a demonstration of propensity, but that of method and identity. As the court in *Carter* noted, the evidence of a prior scheme or plan cannot be used to demonstrate that since a defendant was committing a crime on one given day, he must also have been committing the same type of crime another day. *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996).

This case is different. The testimony offered does not simply suggest to the jury that since Appellant was the rapist in 1983, he must therefore have been the rapist in 1980 – it informed the jury precisely how Appellant went about carrying out his rapes, his behavior immediately following the rapes, and his apparent desire for praise of enjoyment from his victim. The jury can know for certain that Appellant displayed those unique approaches and behaviors in the 1983 sexual assault and there distinct presence in the 1980 sexual assault lends itself to evidence of identity.

Appellant attempts to draw disfavor upon the *Wallace* decision by citing the concurring opinion in *State v. Perez*. *Wallace* is the authority for the evaluation of common plan or scheme evidence and the weighing of similarity under Rule 404(b). However, it should be noted that the concurring opinion merely references concern for the desire to establish a common scheme or plan in isolation of any other purpose for the evidence. *State v. Perez*, 423 S.C. 491, 502-03, 816

S.E.2d 550, 556-57 (2018), reh'g denied (Aug. 2, 2018). Even *Lyle* makes known that the evidence demonstrating common scheme or plan can often, as it does in the case at hand, carry over into proof of identity. The substantial degree of similarity, the uniqueness of the behaviors in question, and there utility in establishing identity elevate the case at hand above any concerns expressed in the *Perez* concurrence.

The 404(b) analysis and ruling of admissibility of the 1983 rape/ABHAN of Lori L. was well within the discretion of the trial court. Pursuant to *Wallace, t*he trial court properly evaluated the similarities and dissimilarities of the crimes and found them to be substantially in favor of the State. The trial court likewise conducted a Rule 403 balancing of the probative value and prejudice, and concluded that while such evidence was prejudicial to defendant it was more so probative for the state in demonstrating common scheme and identity of Appellant and therefore admissible at trial. In the absence of any legal error, and with the record fully supporting the accuracy of the court's factual analysis, there can be no abuse of discretion in this matter.

To the extent that any error might exist in the court's exercise of discretion in weighing the evidence and testimony presented, or in the balance of interests of the parties therein, such error would be harmless. It is without question that the headlining evidence of this thirty-six year old case is the conclusive DNA match linking Appellant to the sperm found in Victim's panties and pants to the multi-trillionth or greater probability. This is especially so given the chain of custody of evidence and the fact that despite a DNA profile being discovered in 2002, it took an additional 13 years before Appellant's DNA entered the FBI database so as to provide a

match.[2] The degree of accuracy provided the jury an incontrovertible basis for concluding that Appellant was responsible for the rape of Victim and therefore also the perpetrator of preceding crimes of murder, kidnapping, and armed robbery.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General

ISAAC McDUFFIE STONE
Fourteenth Circuit Solicitor's Office
PO Box 1880
Bluffton, SC 29910

BY: _____
W. Joseph Maye

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

February 24, 2020

[2] Even in 1980 the forensics performed on the pants and panties revealed the presence of semen at the outset of the investigation. Technology 1980 simply did not exist sufficient to draw a basis for identity from that semen. (R. p. 393, line 10 through p. 394, line 4).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2018-001041

THE STATE,

Respondent,

vs.

ISAIAH GADSON, JR.,

Appellant.

CERTIFICATE OF COMPLIANCE

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

This 24rd day of February, 2020.

W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT