STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

APPELLANT

APPELLATE CASE NO 2017-001796

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, when the dissimilarities between Witness B's testimony and the testimony of Witness A, the prosecuting witness, outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value?

2. Did the trial judge err in admitting the testimony of Witness B., finding that the similarities to Witness A's testimony outweighed the dissimilarities, pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when such a finding is contrary to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and the holding in Wallace should be overturned?

STATEMENT OF THE CASE

In October of 2002, Appellant, Guadalupe Guzman Morales, was arrested for two counts of criminal sexual conduct with a minor second degree and one count of attempted criminal sexual conduct with a minor second degree, arrest warrants #H-067093, 94, 95. In 2016, fourteen years later, the Lancaster County Grand Jury indicted Appellant for criminal sexual conduct with a minor first degree, criminal sexual conduct with a minor second degree and assault with intent to commit criminal sexual conduct with a minor, indictments #2016-GS-29-559, 564, 565. On May 26, 2017, Appellant appeared before the Honorable Brian Gibbons and moved to quash the indictment based on pre-indictment delay as a due process violation. (R. pp. 1- 74). Ned Gregory represented Appellant. Megan Burchstead with the South Carolina Attorney General Office represented the State. The State argued that Appellant had been indicted in 2003, but the indictments were not available because of a fire in the Lancaster Courthouse in 2008. (R. p. 6, line 6 – p. 7, lines 1-25). Judge Gibbons denied the motion to quash the indictment and instead treated the motion as a speedy trial motion.[1] Judge Gibbons did not dismiss the indictment for violation of Appellant's speedy trial rights but scheduled the trial for August 21, 2017. (R. pp. 68-74).

On August 21, 2017, Appellant proceeded to jury trial before the Honorable Roger E. Henderson. Ned Gregory again represented Appellant. Megan Burchstead and Joel Kazak represented the State. The jury returned verdicts of guilty as indicted. Judge Henderson sentenced Appellant to thirty (30) years for criminal sexual conduct first degree, ten (10) years consecutive for assault with intent to commit criminal sexual conduct with a minor and ten (10)

---

[1] Counsel for Appellant stated that he did not want a speedy trial (R. p. 63, lines 7-16). This issue may need to be raised in post-conviction relief.

years concurrent for criminal sexual conduct with a minor second degree. A timely notice of intent to appeal was served on August 25, 2017. 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.

ARGUMENT

1. **The trial judge erred in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, when the dissimilarities between Witness B's testimony and the testimony of Witness A, the prosecuting witness, outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value.**

Between December of 1999 to September of 2001, Witness A, her sister, Witness B, and another younger sister lived with their mother and Appellant. During this time Witness A believed that Appellant was her biological father but was later told he was not. (R. p. 139, lines 6-19). Witness B also believed that Appellant was her father but at the time of trial it was unclear if Appellant is Witness B's biological father. (R. p. 274, line 21 – p. 275, lines 1-25). At the time of trial in 2017, fifteen years after arrest warrants issued, Witness A was twenty-eight years of age. (R. p. 136, lines 10-11). At the time of trial Witness B was twenty- five years of age. (R. p. 267, lines 15-16).

At trial Witness A testified that in 2002, when she was thirteen years of age, she went to live with her uncle and his girlfriend and his two daughters because her mother "kicked her out of the house." (R. p. 137, lines 7-11; p. 159, lines 14-21). Witness A testified that after living with her uncle for about a month, upon questioning by the uncle's girlfriend Michelle, she told Michelle that Appellant had been touching her. (R. p. 151, line 4- p. 152, lines 1-2). As a result of the disclosure by Witness A, the maternal grandmother questioned Witness B and the younger sister. (R. p. 272, lines 15-18). Upon questioning by the maternal grandmother, Witness B told "what happened." (R. p. 272, lines 11-18). At trial Witness B admitted that she later recanted the accusation against Appellant. (R. p. 273, lines 17-19).

On July 26, 2017, prior to trial, the State moved before Judge Henderson for a conditional ruling on the admission of testimony from Witness B, during the trial for charges involving Witness A. (R. pp.76-114). The State argued that the testimony from Witness B should be admitted as the common scheme or plan exception contained in Rule 404(b). (R. p. 81, lines 8-19). Witness B testified that Appellant touched her sexually on three different occasions. (R. p. 91, line 20- p. 92, lines 1-12). Witness A did not testify at the hearing. After Witness B testified, the State argued that Witness B's testimony was admissible pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994); State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998) and State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993). (R. pp. 101 – 105). The State argued that there were strong similarities between Witness B's testimony and the testimony the State expected from Witness A at trial. (R. p. 105, lines 15-25). Counsel for Appellant argued that Rule 404(b) prohibited admission of the testimony from Witness B and cited State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (R. p. 106, lines 5-15). The attorney for the State replied, "I don't believe I actually printed Lyle. We've all heard Lyle so much and to be candid I haven't read it in awhile." (R. p. 106, lines 16-18).

The judge ruled, "Again it is a conditional ruling but at this point in time I find that it would follow the guidelines set forth in Lyle's [sic] and the other cases that have come since then. So, therefore, at least at this point, I would find it to could be admissible as common scheme or plan." (R. p. 113, lines 15-21). It is unclear how the court concluded that the testimony from Witness B was admissible as common scheme or plan without hearing the testimony from Witness A.

After Witness A testified at trial, the State sought a **final** ruling on the admission of testimony from Witness B. (R. p. 211, line 21 – p. 212, 213, lines 1-2). The State argued that the similarities outweighed the dissimilarities. (R. p. 212, lines 17-21). Appellant objected to the testimony from Witness B. (R. p. 213, lines 4-21). The judge ruled, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The judge allowed Witness B's testimony. (R. p. 214, lines 9-12). The trial judge erred. The dissimilarities between Witness B's testimony and Witness A's testimony outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value.

In State v. Lyle, 125 S.C. 406, 118 S.E. 803, 811 (1923), the South Carolina Supreme Court wrote:

> A plan or system common to other crimes was not an essential ingredient of the crime charged. Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves 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. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" (State v. Weldon, 39 S. C. 321, 17 S. E. 688, 24 L. R. A. 126), or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system. See Shaffner v. Com., 72 Pa. 63, 13 Am. Rep. 651, State v. Kenny, supra, and full discussion by Justice Werner in People v. Molineux, supra.

Rule 404(b) provides that, "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." Over time two different approaches emerged in terms of analyzing the admissibility of prior bad acts as a common scheme or plan. See State v. Wallace, 364 S.C. 130, 139, 611 S.E.2d 332, 337, n. #2 (Ct. App. 2005), rev'd, 384 S.C. 428, 683 S.E.2d 275 (2009). The first approach adhered to the traditional requirement of a connection between the charged crime and the prior bad act, as discussed in Lyle. The second approach focused on the close degree of similarity between the charged crime and the prior bad act. In Wallace, the South Carolina Supreme Court wrote, "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)." 384 S.C. at 433, 683 S.E.2d at 277–78. The Court then went on to write:

> 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. See State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433–34, 683 S.E.2d at 278. The Wallace decision appears to have veered away from the traditional connection analysis in Lyle and carved out an exception for sexual abuse cases, as will be discussed further in issue two. Pursuant to a Wallace analysis, the trial judge abused his discretion in allowing the testimony of Witness B because the similarities did not outweigh the dissimilarities.

Testimony of Witness B.

During the pre-trial hearing on July 26, 2017, Witness B testified that beginning when she was three years old until the third grade Appellant touched her in a sexual way three times. (R. p. 88, lines 1-10). She testified that the incidents took place inside the home. (R. p. 92, lines 13-25). Witness B testified that the touching stopped when she was in the third grade. (R. p. 89, lines 19-23). According to Witness B, the last time it happened she was unable to sleep and Appellant told her to come in the room with him and watch television. (R. p. 86, lines 11-18). Witness B testified that while they were laying down on the bed he pulled her pants and underwear down and she felt his penis touch her butt. (R. p. 86, line 23 – p. 87, lines 1-14). Witness B testified that her sisters were asleep in another room. (R. p. 88, lines 21-24). According to Witness B, her mother was working when the incident took place. (R. p. 89, lines 3-10).

Witness B testified that the other two times she was sitting on Appellant's lap and he would put his hands down her pants but there was no digital penetration. (R. p. 87, lines 15-25). She testified that when these other two incidents occurred her sisters were home but in a different room. She testified that her mother was not home. (R. p. 88, line 25 -p. 89, lines 1-18). Later, when Witness B was in the fifth grade, her grandmother questioned her, after Witness A alleged abuse, and Witness B disclosed the incidents to her grandmother. (R. p. 91, lines 1-15).

Testimony of Witness A.

At trial Witness A testified that when she was four Appellant rubbed his groin area against her groin area on the outside of her clothing. (R. p. 143, line 23 – p. 144, lines 1-14). Witness A testified that when she was in first grade digital penetration took place on a daily basis. (R. p. 145, lines 12-19). She said the digital penetration took place mainly at home but also in the car and at the river. (R. p. 145, lines 20-23). Witness A testified that her mom was usually not home when the touching took place and if she was home she was in the shower. (R. p. 146, lines 2-5). Sometimes her sisters would be at home and other times they would not be at home. (R. p. 146, lines 6-9).

Witness A testified that Appellant had intercourse with her on her eleventh birthday in the bedroom Appellant shared with Witness A's mother. (R. p. 140, line 17 – p. 141, 142, lines 1-18). According to Witness A, the whole family was going to Carowinds for her birthday and Appellant threatened not to take them to Carowinds unless she got in bed with him. (R. p. 141, line 2 – p. 142, lines 1-2). Witness A testified that at the time her sisters were getting ready in the room they shared and her mother was in the shower. (R. p. 142, lines 11-14). According to witness A, Appellant continued to have sex with her after her eleventh birthday. (R. p. 142, lines 17-19).

Witness A testified that Appellant had sex with her in her room in the summer after she turned eleven. (R. p. 148, line 15 – p. 149, lines 1-3). Witness A testified that, at the time, she was in trouble, confined to her room and her mom had taken her sisters to Walmart. (R. p. 148, lines 15-21). Witness A also testified that one time when she was at home from school because she was sick Appellant asked her to lie on the couch with him and he put his hands down her

pants. (R. p. 149, lines 9-25). According to Witness A, Appellant told her that if she told her mother, her mother would kill her. (R. p. 150, lines 16-19).

Dissimilarities outweigh similarities.

The allegations made by Witness B were substantially different from the allegations made by Witness A. The three instances of sexual touching alleged by Witness B never progressed to digital penetration and always took place in the home. Witness A alleged digital penetration on an almost daily basis that progressed to instances of sexual intercourse. The incidents took place mainly in the home but also in the car and at the river. Viewing the factors listed in Wallace, while both witnesses allege the abuse began when they were young, three or four years old, Witness B testified that the abuse ended when she was in the third grade. Witness A testified that the abuse continued after her eleventh birthday. Appellant was a father figure to both, but the type of alleged abuse was different. The locations were different. While the State argued that Appellant used coercion in the form of his role as a father figure, (R. p. 103, lines 8-15), only witness A testified about a threat. Witness B testified that her mother was not home during the three alleged instances but Witness A testified that her mother was in the shower during at least one of the alleged incidents.

The present case is distinguished from Wallace. In Wallace both the prosecuting witness and the Lyle witness were stepdaughters of Wallace, the abuse began around the same time with the fondling of breasts, the abuse of both occurred in the family home when the mother was not home and Wallace admonished both not to tell as nobody would believe them. The degree of similarity present in Wallace is not present in this case.

The present case is also distinguished from State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989). In Hallman the extent of the abuse of the prosecuting witness was greater than that

of the Lyle witnesses, as in the present case, but the type of abuse in Hallman was similar for all, starting with rubbing outside of the clothes, digital penetration and forcing the witnesses to rub his penis. In the present case the type of abuse alleged by Witness B was limited to sexual touching with no digital penetration and no intercourse as alleged by Witness A.

The present case is also distinguished from State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). In McClellan three daughters testified that beginning on their twelfth birthday their father would come into their bedroom at night, wake one of them and take her to his bedroom where he would explain the Biblical verse that children are to "Honor thy Father" and he would explain that he was teaching them how to be with their husbands. No such similarity exists in the present case.

The case is also distinguished from State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994), where the South Carolina Court of Appeals wrote, "All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were sufficiently similar to the charged offense to be admissible." Unlike in Blanton, the type of and location of the abuse alleged in the present case is different.

The present case is distinguished from State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App. 1998), where the Court of Appeals wrote:

> Here, Adams used his relationship as stepfather to control the girls; the girls were approximately the same age; the attacks began in the back-yard hammock; both girls were molested in Adams's truck; both girls were forced to place their hands on Adams's genitals while in his truck; Adams picked locks to both girls' bedrooms to watch them change clothes; Adams entered the bathroom while both girls were showering and pulled the shower curtain aside while they were bathing;

> Adams offered to show both girls a pornographic videotape; Adams repeatedly asked both girls when they could have sex; and, to control both girls from disclosing his abuse, Adams threatened both girls with the same line: "If you tell, you'll go down with me."

Again, the similarities present in Adams are not present in this case.

In State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993), the South Carolina Court of Appeals wrote:

> We hold that the testimony of the oldest step-daughter, Nayenda, is clearly admissible under Lyle. Both Jenne and Nayenda experienced similar acts of abuse from the defendant which occurred in the same places and during the same time frame. We hold that the probative value of Nayenda's testimony substantially outweighs any danger of unfair prejudice. Thus, her testimony falls within the Lyle common scheme exception.
>
> The testimony of the youngest step-daughter, Tenita, is a much closer question. Tenita was not subjected to the alleged abusive conduct to the extent of her sisters. The crimes committed on Jenne and Tenita are not "so related to each other that proof of one tends to establish the other." State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980), citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). There must be a connection between the crime charged and the prior bad act or the accused should be given the benefit of the doubt. State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). Accordingly, we hold that Tenita's testimony should be excluded to prevent undue prejudice.

The testimony of Witness B in the present case is analogous to the testimony of the youngest step-daughter in Henry and should have been excluded. Witness B was not subjected to the alleged abusive conduct to the extent of her sister, just as the younger sister in Henry, and the alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. While Henry was decided prior to Wallace, and used a connection analysis rather than a similarities analysis, under either analysis the testimony should be excluded as the similarities do not outweigh the dissimilarities and there was no connection between the alleged incidents. Witness B's testimony was inadmissible propensity evidence and the admission of the testimony was not harmless.

Even if the prior bad act evidence is clear and convincing[2] and falls within a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). Rule 403, SCRE provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574 (1997) the Court defined unfair prejudice writing:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

In the present case, the testimony from Witness B did not meet the similarities test of Wallace and should have been excluded. Alternatively, the testimony should have been excluded because the probative value is substantially outweighed by the danger of unfair prejudice.

2. **The trial judge erred in admitting the testimony of Witness B., finding that the similarities to Witness A's testimony outweighed the dissimilarities, pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when such a finding is contrary to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and the holding in Wallace should be overturned.**

---

[2] An argument was not made at trial that Witness B's testimony did not meet the clear and convincing standard for required for uncharged conduct although Witness B at one point recanted the allegations.

The judge allowed the testimony from Witness B stating, "Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales." (R. p. 213, line 22 – p. 214, lines 1-5). The similarities analysis used by the trial judge in the present case derives from the Wallace case. 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 testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b), SCRE.

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 435–36, 683 S.E.2d at 279.

Recently, in a concurring opinion in State v. Perez, 423 S.C. 491, 816 S.E.2d 550, 556–57 (2018), the Court wrote:

> Accordingly, 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.

As noted by the Wallace dissent, 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 non-sexual abuse cases. For example, in State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997), a murder, armed robbery case, the South Carolina Supreme Court found that prior robberies were inadmissible and wrote:

> 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 as noted above. See also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (Homicide by child abuse case - "Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.). Additionally, the Wallace similarities analysis for the admission of prior bad act evidence in

sexual abuse cases is impossible to reconcile with sexual abuse cases decided prior to Wallace that used the traditional Lyle connection analysis. See State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. App. 1993).

In State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718–19 (1998), the South Carolina Supreme Court wrote:

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).[7] Both rules are grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

The admission of prior bad act evidence based on similarities alone allows the admission of inadmissible propensity evidence. The Wallace opinion should be overruled and the traditional connection test of Lyle and Rule 404(b) applied in all cases, including cases involving sexual abuse allegations. In State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327–28 (2000), the South Carolina Supreme Court wrote, "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). '[I]f the court does not clearly perceive the connection between the 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.' Lyle, 125 S.C. at 417, 118 S.E. at 807."

Applying the traditional connection test of Lyle and Rule 404(b) to the testimony of Witness B in the present case, the record fails to establish a logical relevance between the

allegations made by Witness B and the crimes for which Appellant stood trial. As discussed in issue one, the alleged crimes committed on both witnesses are not so related to each other that proof of one tends to establish the other. State v. Wilson, 274 S.C. 635, 637, 266 S.E.2d 426, 427 (1980) citing State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923). The testimony of Witness B constituted inadmissible propensity evidence. The testimony of Witness B should have been excluded. The error in admitting the propensity evidence was not harmless. As the South Carolina Supreme Court noted in State v. Wilson, 274 S.C. 635, 637–38, 266 S.E.2d 426, 427 (1980), "The Lyle court emphasized that evidence of other crimes must be strictly scrutinized before its admission, since 'the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.' Lyle at 125 S.C. 412, 118 S.E. at 807. If there is any doubt as to the connection between the acts, the accused is to be given the benefit of the doubt and the evidence should not be admitted." The trial judge abused his discretion in admitting Witness B's testimony as evidence of a common scheme or plan.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of January, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

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."

January 23, 2019

Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GUADALUPE GUZMAN MORALES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of January, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of January, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.