

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Abbeville County

S.C. SUPREME COURT

Honorable R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

PETITIONER.

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APPENDIX  
\_\_\_\_\_

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Shane Alexander Washington, Appellant.

Appellate Case No. 2016-000907

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Appeal From Abbeville County  
R. Lawton McIntosh, Circuit Court Judge

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Unpublished Opinion No. 2020-UP-003  
Submitted November 1, 2019 – Filed January 8, 2020

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**AFFIRMED**

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Appellant.

Attorney General Alan McCrory Wilson and Senior  
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**PER CURIAM:** Shane Washington appeals his conviction of first-degree criminal sexual conduct with a minor, for which he was sentenced to thirty years' imprisonment. Washington argues the circuit court erred in 1) admitting evidence.

of subsequent acts of unindicted sexual misconduct; and 2) refusing to enter a directed verdict when the State failed to present evidence of sexual battery on the date alleged in the indictment. We affirm.

### FACTS

On September 3, 2010, Minor told her father that Washington had been sexually assaulting her since the beginning of July, most recently on September 2, 2010. Minor's father reported the abuse to the police on the same day and, on September 9, 2011, Washington was indicted for first-degree criminal sexual conduct with a minor. On April 6, 2015, Washington's case proceeded to trial, but Washington could not be located. Consequently, Washington was tried *in absentia*.

During the trial, the State presented Minor's October 14, 2010 forensic interview. In the video, Minor described the first instance of abuse. After this description, Washington moved to exclude the remainder of the video from evidence, arguing the remaining instances of abuse described in the video constituted subsequent, unindicted crimes. Washington argued that because he was indicted for conduct on July 1, 2010, the first instance of abuse described in the video was the crime for which he was indicted. Thus, Washington argued, the subsequent crimes were irrelevant to the indicted offense and overly prejudicial.

The circuit court determined that the remainder of the forensic interview was admissible, reasoning the bad acts evidence was part of the *res gestae* and demonstrated motive, intent, and lack of mistake. Before the remainder of the video was published, the circuit court instructed the jury that, to the extent any evidence was presented other than the alleged acts on or around July 1, 2010, it should not consider Washington's guilt or innocence in committing these acts, but should only consider the acts for the purpose of determining motive, intent, absence of mistake, or to present a setting of the case and its environment.

During the remainder of the video, Minor described four instances of abuse. First, Minor described the last instance of abuse, indicating that Washington had put his "private" in her butt. Additionally, Minor described another instance of abuse, asserting that Washington had placed his "private" in her butt, and two additional instances in which Washington made Minor perform fellatio.

After the video concluded, Minor testified that Washington began abusing her around July 2010, when she was seven years old, by touching "both spots on the outside," that he put his "private" in her butt multiple times, and that such abuse occurred in her mother's bathroom and in the "tattoo room." Minor also indicated

that Washington put his "private" in her butt at least once in July, around the time of the first assault, further indicating that it occurred "in the summertime" when she was not in school.

After Minor's testimony, Washington moved for a directed verdict, arguing there was no evidence of sexual battery occurring on or about July 1, 2010. Washington again argued that because the indictment read "on or about July 1, 2010," it could only be referring to the first instance of abuse. The State argued the date in the indictment was not a material element of the crime and that the indictment was a charging instrument that merely needed to put Washington on notice. Ultimately, the circuit court denied the directed verdict.

After deliberating, the jury found Washington guilty of first-degree criminal sexual conduct with a minor, specifically finding "the defendant committed the acts upon Minor, fellatio, any intrusion however slight into any part of her genital or anal openings or any object being inserted into her genital or anal openings." After the jury returned its verdict, the sentence was sealed. On April 20, 2016, the Honorable Donald B. Hocker<sup>1</sup> unsealed Washington's sentence, which was thirty years' imprisonment. This appeal followed.

### ISSUES ON APPEAL

1. Did the circuit court err in admitting subsequent acts of unindicted sexual misconduct?
2. Did the circuit court err in failing to enter a directed verdict on the ground that the State did not present evidence of sexual battery on the date alleged in the indictment?

### STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Therefore, "[an appellate court is] bound by the [circuit] court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829.

#### Admissibility of subsequent bad acts

"This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* "The

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<sup>1</sup> Washington's trial was before the Honorable R. Lawton McIntosh.

admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). Accordingly, "[an appellate court] does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the [circuit court]'s ruling is supported by any evidence." *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829. As such, "[i]f there is any evidence to support the admission of [] bad act evidence, the [circuit court]'s ruling will not be disturbed on appeal." *Id.*

### Unfair Prejudice

"A [circuit court]'s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." *State v. Sweat*, 362 S.C. 117, 129, 606 S.E.2d 508, 514 (Ct. App. 2004). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a [circuit] court is reviewed by an appellate tribunal." *Id.* (quoting *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)).

### Directed Verdict

"When a motion for a directed verdict of acquittal is made in a criminal case, the [circuit] court is concerned with the existence or non-existence of evidence, not its weight." *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). "On appeal from the denial of a motion for directed verdict, [an appellate c]ourt must view the evidence in a light most favorable to the State." *Id.* An appellate court must find that a case was properly submitted to the jury when "the State presents any evidence [that] reasonably tends to prove the defendant[]'s guilt, or from which the defendant[]'s guilt can be fairly and logically deduced . . ." *Id.*; *State v. Morgan*, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, th[e appellate c]ourt must find the case was properly submitted to the jury. ").

## LAW/ANALYSIS

### I. Subsequent bad acts

Washington argues the circuit court erred in admitting the remainder of the forensic interview because it constituted evidence of subsequent bad acts. The State

argues the circuit court properly admitted the evidence as an exception to Rule 404(b), SCRE, or as part of the *res gestae* of the case. We agree with the State.

"Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged." *Sweat*, 362 S.C. at 123, 606 S.E.2d at 511; *see also State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) ("[E]vidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged."). However, such evidence is admissible

when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime.

*Sweat*, 362 S.C. at 123, 606 S.E.2d at 511; *see also* Rule 404(b), SCRE ("[Evidence of other bad acts] may . . . be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). Additionally, evidence of other bad acts may be admitted under the *res gestae* theory, which "recognizes [such] evidence . . . may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999).

Before the circuit court may admit bad acts evidence, it must make several determinations: 1) the proffered evidence must be relevant; 2) when a defendant has not been convicted of the bad acts, the evidence of such acts must be clear and convincing; 3) the bad act evidence must fit within a Rule 404(b) exception or form part of the *res gestae*; and 4) the probative value of such evidence must not be substantially outweighed by the danger of unfair prejudice. *State v. Clasby*, 385 S.C. 148, 154–56, 682 S.E.2d 892, 895–96 (2009); *King*, 334 S.C. at 512–13, 514 S.E.2d at 582–83.

While we do not agree that all four incidents described by Minor in the remainder of the video constitute evidence of subsequent bad acts, at a minimum,

the last incident described likely constitutes evidence of a subsequent bad act.<sup>2</sup> Accordingly, we will analyze whether the circuit court erred in admitting the entire forensic interview. On appeal, Washington does not dispute that the other bad acts were proven by clear and convincing evidence. Therefore, we will review the circuit court's determinations regarding relevance, common scheme, *res gestae*, and unfair prejudice.

#### a. Relevance

Washington argues the bad acts evidence is not relevant because the acts occurred after the date of the crime alleged in the indictment. The State argues the acts were relevant because they were intimately connected to the abuse and provided context regarding the time period in which the abuse occurred. The State also argues there is significant probative value in evidence demonstrating continuous illicit intercourse between Washington and Minor. We agree with the State.

"As a threshold matter, the trial judge must initially determine whether the proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence [that] assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *Sweat*, 362 S.C. at 126, 606 S.E.2d at 513. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." *Id.* at 126-27, 606 S.E.2d at 513.

Our courts have previously found that bad acts evidence can be relevant in establishing charged criminal sexual conduct. *See Clasby*, 385 S.C. at 158-59, 682 S.E.2d at 898 (finding because "there was no physical evidence to corroborate [Minor]'s testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, . . . her testimony of Clasby's sustained illicit conduct was *extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child*" (emphasis added)). Additionally, under the *res gestae* theory, "evidence of other bad acts may be *an integral part of the crime* with which the defendant is charged[] or *may be needed to aid the fact finder* in understanding the context in which the crime occurred." *King*, 334 S.C. at 512, 514

<sup>2</sup> When Minor reported her abuse on September 3, 2010, she claimed that Washington had last abused her the day before.

S.E.2d at 582 (emphases added). Thus, the circuit court properly found the bad acts evidence was relevant.

### **b. Bad acts exceptions**

Washington argues the circuit court erred in admitting the bad acts evidence because it constituted propensity evidence precluded by Rule 404(b), SCRE. The State argues the circuit court properly admitted the evidence because it satisfies the "common scheme or plan" exception to Rule 404(b) and forms part of the *res gestae*. We agree with the State.

"If the [circuit court] finds the evidence to be relevant, the [court] must then determine whether the bad act evidence fits within an exception of Rule 404(b)[,]" or whether it forms part of the *res gestae*. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895; *King*, 334 S.C. at 512–13, 514 S.E.2d at 582–83. Pursuant to Rule 404(b), SCRE, "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." However, such evidence may "be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." *Clasby*, 385 S.C. at 155, 682 S.E.2d at 895 (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)); *see also* *Sweat*, 362 S.C. at 127, 606 S.E.2d at 513 ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." (quoting *King*, 334 S.C. at 512, 514 S.E.2d at 582)). "If 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." *Sweat*, 362 S.C. at 127, 606 S.E.2d at 513.

#### Common scheme or plan

"The common scheme or plan exception is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties." *State v. Weaverling*, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999) (quoting *State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)). "Where there is a close degree of similarity between the crime charged and the prior bad act, [our courts] have held prior bad acts are admissible to demonstrate a common scheme or plan." *Clasby*, 385 S.C. at 155, 682 S.E.2d at 896 (quoting *Gaines*, 380 S.C. at 30, 667 S.E.2d at 731). "When determining whether evidence is admissible as common scheme or plan, the [circuit]

court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *Id.* (quoting *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277–78 (2009)). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." *Id.* (quoting *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278). Moreover, when a "defendant's [b]ad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan." *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008).

Here, the similarities between all of the incidents described by Minor in the interview strongly outweigh the dissimilarities. The following details are consistent among all of the alleged assaults: 1) Minor was the victim, *see id.* ("When a criminal defendant's [b]ad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan."); 2) all of the alleged assaults constituted sexual battery;<sup>3</sup> 3) the assaults occurred in Minor's home; 4) the assaults occurred while Minor's mother was asleep or out of the house; 5) most of the assaults occurred at night; and 6) Washington made Minor wear a blindfold or cover her eyes each time. There are two main dissimilarities between the assaults: 1) the location within the house—the tattoo room, her mother's room, and her brother's room—where the abuse occurred; and 2) the type of sexual battery that occurred. Accordingly, we find the similarities between the incidents alleged by

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<sup>3</sup> Washington argues the first assault did not constitute sexual battery because Minor did not describe any penetration, but indicated the incident merely involved touching on the outside of Minor's "private" and butt. However, Minor also indicated Washington 1) "rubbed on her," touching her "private" and butt on the outside with skin touching skin; 2) blindfolded her; and 3) pulled his pants down and told her to bend over. Minor further indicated she did not know what Washington did to her, but felt something "wet" on her butt when he was finished. Based on this evidence, the circuit court found Minor provided a sufficient description to demonstrate that a sexual battery had occurred. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("[An appellate court is] bound by the [circuit] court's factual findings unless they are clearly erroneous."). We agree that Minor sufficiently described a sexual battery when describing the first incident. *See S.C. Code Ann. § 16-3-651(h)* (2015) ("'Sexual battery' means . . . anal intercourse, or any intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body . . ."); *see, e.g., State v. Mathis*, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986) ("The six-year-old prosecutrix testified that Mathis touched her with his penis. She could not remember if he put it inside her body. However, when asked if it hurt, she replied that it had. This is evidence of some 'intrusion, however slight' . . .").

Minor strongly outweigh the dissimilarities such that the circuit court did not abuse its discretion in admitting the evidence as an exception to Rule 404(b), SCRE. See *Clasby*, 385 S.C. at 155, 682 S.E.2d at 896 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." (quoting *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278)); see also *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("If there is any evidence to support the admission of [bad act evidence, the [circuit court]'s ruling will not be disturbed on appeal.").

*Res gestae*

"Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." *Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003); see also *King*, 334 S.C. at 512, 514 S.E.2d at 582 ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged[] or may be needed to aid the fact finder in understanding the context in which the crime occurred."). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*." *State v. McGee*, 408 S.C. 278, 288, 758 S.E.2d 730, 735 (Ct. App. 2014) (quoting *State v. Preslar*, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)). "Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime." *King*, 334 S.C. at 513, 514 S.E.2d at 583. Accordingly, "evidence of [bad acts is inadmissible as part of the *res gestae*] 'whe[n] the record does not support any relationship between the crime and' the bad acts." *Id.* (quoting *State v. Hough*, 325 S.C. 88, 92, 480 S.E.2d 77, 79 (1997)).

The circuit court properly admitted the bad acts evidence under the *res gestae* theory because the unindicted conduct was so intimately tied to the charged offense that it was necessary for a full presentation of the case. First, the acts were all relatively close in time as they occurred over the course of two months. See *King*, 334 S.C. at 513, 514 S.E.2d at 583 ("Under this theory, it is important that the temporal proximity of the [bad act be closely related to the charged crime."). Second, we believe the bad acts evidence provided context to the crime as part of Washington's sustained illicit conduct. See *id.* at 512, 514 S.E.2d at 582 ("The *res gestae* theory recognizes evidence of other bad acts may be . . . needed to aid the fact finder in understanding the context in which the crime occurred."). Thus, the evidence was helpful to the jury by demonstrating the alleged sexual battery was not a one-time event that may have been misinterpreted or misremembered. Third, we believe the evidence was necessary to complete the "story of the crime on trial." See

*Sweat*, 362 S.C. at 133, 606 S.E.2d at 517 (finding bad acts evidence properly admitted under the *res gestae* theory "to 'complete the story of the crime on trial.'"). The bad acts evidence provided a time range for the alleged sexual misconduct, the sustained nature of the abuse, and the consistent methods by which Washington perpetrated the abuse. Accordingly, the circuit court properly admitted the bad acts evidence under the *res gestae* theory. See *McGee*, 408 S.C. at 288, 758 S.E.2d at 735 ("When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*." (quoting *Preslar*, 364 S.C. at 474, 613 S.E.2d at 385)); see also *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("If there is any evidence to support the admission of [ ] bad act evidence, the [circuit court]'s ruling will not be disturbed on appeal.").

### c. Unfair prejudice

Washington argues the circuit court erred in admitting the bad acts evidence because the danger of unfair prejudice substantially outweighed the evidence's probative value. The State argues the probative value of the bad acts evidence outweighs any danger of unfair prejudice. We agree with the State.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. As such, even if bad acts evidence falls within an exception to Rule 404(b) or forms part of the *res gestae*, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Clasby*, 385 S.C. at 155–56, 682 S.E.2d at 896; *King*, 334 S.C. at 512, 514 S.E.2d at 582. However, "[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice [that] must be scrutinized under Rule 403." *McGee*, 408 S.C. at 289, 758 S.E.2d at 736 (alterations in original) (quoting *State v. Collins*, 398 S.C. 197, 207, 727 S.E.2d 751, 757 (Ct. App. 2012), *rev'd on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014)). Thus, "[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence [that] tends to suggest [a] decision on an improper basis." *Id.* at 288–89, 758 S.E.2d at 736 (quoting *State v. Dennis*, 402 S.C. 627, 636, 742, S.E.2d 21, 26 (Ct. App. 2013)). "The determination of prejudice must be based on the entire record[,] and the result will generally turn on the facts of each case." *Wilson*, 345 S.C. at 7, 545 S.E.2d at 830.

Here, the probative value of the bad acts evidence substantially outweighs the risk of unfair prejudice. First, the risk of unfair prejudice was low because the bad acts evidence, like the evidence of the crime itself, hinged on Minor's credibility. Thus, if the jury found Minor to be credible, it would likely believe her testimony that Washington was guilty of the crime charged and have no reason to consider the

bad acts evidence. *See State v. Aiken*, 322 S.C. 177, 181, 470 S.E.2d 404, 406–07 (Ct. App. 1996) ("[T]he chance that the admission of this evidence unfairly prejudiced [appellant] was small because if the jury found [witness] to be credible, it would likely believe his testimony that [appellant] was guilty of the crime he was charged with and have no reason to consider the testimony concerning the other [crimes]."). Second, the probative value of the bad acts evidence was extremely high because there was no physical evidence of assault. *See Clasby*, 385 S.C. at 158–59, 682 S.E.2d at 897–98 ("[W]e hold *the probative value of this evidence substantially outweighed the danger of unfair prejudice* to [appellant]. Given there was no physical evidence to corroborate [victim's] testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of [appellant's] sustained illicit conduct was *extremely probative* to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child." (emphases added)). Thus, the circuit court properly found that the probative value of the bad acts evidence outweighed the danger of unfair prejudice.<sup>4</sup> *See Sweat*, 362 S.C. at 129, 606 S.E.2d at 514 ("A [circuit court]'s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.").

Because the bad acts evidence was relevant and fit a bad acts exception and its probative value outweighed the danger of unfair prejudice, the circuit court did not abuse its discretion in admitting the evidence. *See Goodwin*, 384 S.C. at 601, 683 S.E.2d at 507 ("The admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion." (quoting *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265)).

## II. Directed verdict

"When a motion for a directed verdict of acquittal is made in a criminal case, the [circuit] court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. As such, "[t]he [defendant]

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<sup>4</sup> Washington argues the prejudicial effect of the bad acts evidence is enhanced by the State's allegedly improper closing argument in which it argued, "If you find as a jury that he stuck his penis in her bottom, he stuck his penis in her mouth like she testified, if you find that she told the truth, then you find the Defendant guilty." This issue has not been preserved for appellate review as Washington did not object to the closing argument at trial. *See Ligon v. Norris*, 371 S.C. 625, 633 n.1. 640 S.E.2d 467, 471 n.1 (Ct. App. 2006) ("When a party fails to make a timely objection to an improper closing argument, the issue is not preserved for appellate review.").

is entitled to a directed verdict when the evidence merely raises a suspicion of guilt[.]" or "when the State fails to present evidence on a material element of the offense charged." *Id.* Conversely, "[a]ny evidence, direct or circumstantial, tending to prove the guilt of the accused creates a jury issue." *Mathis*, 287 S.C. at 593, 340 S.E.2d at 541. Thus, "if the State presents any evidence [that] reasonably tends to prove the defendant[']s guilt, or from which the defendant[']s guilt can be fairly and logically deduced, the case must go to the jury." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395.

"A person is guilty of criminal sexual conduct with a minor in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655(A)(1) (2015). "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h). In regard to the element of intrusion, "[f]ull penetration is not necessary." *State v. Johnson*, 334 S.C. 78, 85, 512 S.E.2d 795, 798 (1999). Moreover, "[a] conviction for a sexual battery may be sustained on the uncorroborated testimony of the victim." *Id.* at 84-85, 512 S.E.2d at 798.

"Strict common law practice requires an indictment to allege the day of the month and year when the offense was committed." *State v. Thompson*, 305 S.C. 496, 500, 409 S.E.2d 420, 423 (Ct. App. 1991). "This rule still applies in any case where the date is a material element of the offense." *Id.* "A material variance between charge and proof entitles the defendant to a directed verdict." *State v. Watts*, 321 S.C. 158, 168, 467 S.E.2d 272, 278 (Ct. App. 1996). "However, a variance is not material 'where the matter alleged is not an element of the offense.'" *Id.* (quoting *State v. Hiott*, 276 S.C. 72, 81, 276 S.E.2d 163, 167 (1981)). "The specific date and time is not an element of the offense of first degree criminal sexual conduct." *Thompson*, 305 S.C. at 501, 409 S.E.2d at 423. Accordingly, an indictment for first-degree criminal sexual conduct with a minor "must sufficiently apprise the defendant of what he or she should be prepared to meet[.]" but the "indictment need not specifically charge the precise time the offense allegedly occurred." *State v. Wingo*, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991); 75 C.J.S. Rape § 61, Westlaw (database updated December 2019) ("Any variance between the date on which an indictment alleges that a rape offense occurs and the date proved at the trial does not entitle the accused to an acquittal since the date and time are not elements of the charged offense, and the accused has sufficient knowledge of the charge against him to adequately prepare a defense."). Rather, "the indictment must

show the offense was committed prior to the finding of the indictment." *Wingo*, 304 S.C. at 175, 403 S.E.2d at 323; 65 Am. Jur. 2d *Rape* § 36, Westlaw, (database updated November 2019) ("Thus, rape can be proved to have been committed at any time before the date of the information and within the period of the statute of limitations . . .").

Based on our state's law, the date of the alleged sexual battery is not a material element of first-degree criminal sexual conduct with a minor. See *Thompson*, 305 S.C. at 501, 409 S.E.2d at 423 ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."). Therefore, because the indictment was sufficient to put Washington on notice of the crime for which he was accused, the State was required to prove only that the sexual battery occurred before the date of the indictment. See *Wingo*, 304 S.C. at 175, 403 S.E.2d at 323 ("[T]he indictment must show the offense was committed prior to the finding of the indictment."). While there is significant evidence in the record upon which the jury could have determined Washington committed sexual battery, we focus on Minor's testimony for the sake of brevity. Minor testified Washington put his "private" in her butt sometime in July around the time of the first incident. This testimony alone constitutes evidence of sexual battery upon which the jury could have found Washington guilty of first-degree criminal sexual conduct with a minor. See S.C. Code Ann. § 16-3-651(h) ("Sexual battery means . . . anal intercourse, or any intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body . . ."); see also *Mathis*, 287 S.C. at 593, 340 S.E.2d at 541 ("Any evidence, direct or circumstantial, tending to prove the guilt of the accused creates a jury issue."); *Johnson*, 334 S.C. at 84-85, 512 S.E.2d at 798 ("A conviction for a sexual battery may be sustained on the uncorroborated testimony of the victim."). Thus, the circuit court properly denied Washington's motion for a directed verdict.

## CONCLUSION

For the foregoing reasons, Washington's conviction is

**AFFIRMED.**<sup>5</sup>

**SHORT, THOMAS, and GEATHERS, JJ., concur.**

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<sup>5</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

APPELLANT.

APPELLATE CASE NO. 2016-000907

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Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

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Opinion No. 2020-UP-003

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PETITION FOR REHEARING

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

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

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

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

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

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

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

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

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

*Prior Bad Act Evidence*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The dissent in Wallace wrote:

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

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

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

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

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

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

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

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

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

#### *Directed Verdict*

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

"When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984)). The accused is entitled to a directed verdict when the state fails to present evidence on a material element of the offense charged. Id. (citing State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case

was properly submitted to the jury.” State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (citing State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) and State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)).

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

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

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

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

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

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

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

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

Respectfully Submitted,



LARA M. CAUDY  
Appellate Defender

This 23rd day of January, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

SHANE ALEXANDER WASHINGTON,

APPELLANT.

CERTIFICATE OF SERVICE

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

*Lara M. Caudy*

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

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

*R. Lawton McIntosh* (L.S)  
Notary Public for South Carolina

My Commission Expires: October 22, 2024.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Shane Alexander Washington, Appellant.

Appellate Case No. 2016-000907

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

*Paul E. Thomas*

J.

*J. D. Tamm*

J.

*Paul G. Short, Jr.*

A.J.

Columbia, South Carolina

cc:

- Alan McCrory Wilson, Esquire
- Lara Mary Caudy, Esquire
- David A. Spencer, Esquire
- David Matthew Stumbo, Esquire
- The Honorable R. Lawton McIntosh

**FILED**

*February 20, 2020*