

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2020-UP-003 (S.C. Ct. App. Filed January 8, 2020)

2011-GS-01-00389

THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 20, 2020.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err in holding the trial judge did not abuse his discretion by admitting evidence of subsequent acts of unindicted sexual misconduct by Petitioner when such evidence was not part of the *res gestae*, was not admissible pursuant to Rule 404(b), SCRE or State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and was unfairly prejudicial to Petitioner pursuant to Rule 403, SCRE, since the subsequent acts were not similar to the conduct for which Petitioner was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury?

2.

Did the Court of Appeals err in holding the trial judge properly denied Petitioner's motion for a directed verdict when the state failed to present any evidence that Petitioner engaged in sexual battery, which is a material element of first degree criminal sexual conduct with a minor, on or about July 1, 2010, the date alleged in the indictment?

STATEMENT OF THE CASE

Minor, who was twelve years old at the time of trial, claimed that Petitioner, who was her stepfather, sexually abused her when she was seven years old. R. 127, l. 13 – 129, l. 2. Minor first disclosed to her biological father on September 3, 2010. She said the abuse had been “going on every once in while” for a couple of months and that the last occurrence was the day before, which was September 2, 2010. R. 123, l. 9 – 124, l. 4. Minor’s father immediately called the police and reported the allegations. R. 129, ll. 19-22. During an investigation, Minor attended a forensic interview at Beyond Abuse and was physically examined by a pediatrician for signs of sexual abuse. R. 87, ll. 1-10; R. 69, l. 22 – 70, l. 2. There were no physical findings and Minor’s exam was considered “normal.” R. 71, ll. 12-14; R. 72, l. 7 – 73, l. 10.

During this time period, Minor was living with her mother, her five siblings, and Petitioner in a four bedroom mobile home. Her mother, Petitioner, and her two youngest siblings slept in the master bedroom. Minor shared a bedroom with her two sisters, and her brother had his own room. The fourth bedroom was used by Petitioner, who was a tattoo artist, for his business. The family called this bedroom “the tattoo room.” R. 34, l. 21 – 43, l. 20.

Minor claimed during her forensic interview that the first time Petitioner touched her was in the “tattoo room.” She alleged that on this occasion Petitioner touched her “private” and “butt” with his hand on the “outside.” R. 116, ll. 12-25; R. 130, ll. 3-21; R. 131, l. 3 – 132, l. 6; R. 133, ll. 16-23; See Court’s Exhibit No. 1 (DVD of Forensic Interview). In the weeks or months that followed, Minor claimed Petitioner touched her again. She described one time where Petitioner allegedly forced her to engage in oral sex in her brother’s bedroom and another time where Petitioner allegedly anally penetrated her in her mother’s bathroom. R. 135, ll. 5-21; See Court’s Exhibit No. 1 (DVD of Forensic Interview). Minor claimed the latter was the last

time Petitioner had touched her, meaning the abuse would have taken place on September 2, 2010, the day before she disclosed to her father. R. 115, l. 15 – 116, l. 11; See Court's Exhibit No. 1 (DVD of Forensic Interview).

Minor's description of these alleged encounters occurred during her forensic interview on October 14, 2010. R. 87, ll. 1-10; See Court's Exhibit No. 1 (DVD of Forensic Interview). Contrastingly, her testimony before the jury, which occurred nearly five years later, was very vague.

Minor told the jury that Petitioner touched her "private" and "rear end" under her clothing with his hand and his "private." R. 126, l. 2 – 127, l. 2. She claimed the *first time* Petitioner touched her was "around summertime in July" and that on this occasion Petitioner touched "both of [her] spots" *on the "outside."* R. 127, ll. 13-22 (emphasis added). She alleged that on subsequent occasions Petitioner "put his private inside [her] rear end" and that this occurred "around July in the summertime" in the "tattoo room" and her mother's bathroom. R. 127, l. 23 – 129, l. 2.

An Abbeville County Grand Jury indicted Petitioner on September 30, 2011 for first degree criminal sexual conduct (CSC) with a minor. R. 213. For whatever reason, the state chose to indict Petitioner only for the first occasion of alleged sexual misconduct. The indictment alleged, "That Shane Alexander Washington [Petitioner], did in Abbeville County, state aforesaid, **on or about the 1st of July, 2010** being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one Minor, date of birth: [Redacted], 2002, in violation of Section 16-3-655(A)(1) of the South Carolina Code of Laws, 1976, as amended. R. 213 (emphasis added).

Petitioner's case was called to trial on April 6, 2015 before the Honorable R. Lawton McIntosh, and a jury. R. 1. Petitioner was tried in his absence after he did not appear for trial. Assistant Solicitors Lance Sheek and Yates Brown represented the state, and Janna Nelson represented Petitioner. R. 1.

On April 8, 2015, the jury found Petitioner guilty. R. 201, l. 15 – 202, l. 3. As required by statute, the judge had the jury indicate as part of its verdict which of the acts that constitute a sexual battery it found Petitioner had committed. See S.C. Code Ann. § 16-3-655(D)(1). The jury found Petitioner committed “fellatio” and “any intrusion however slight into any part of her genital or anal openings or any object being inserted into her genital or anal openings.” R. 201, ll. 19-24. The sealed sentence was opened on April 20, 2016 by the Honorable Donald B. Hocker. R. 203. Petitioner was sentenced to thirty years' imprisonment. R. 206, l. 25 – 207, l. 2.

A timely notice of intent to appeal was served on April 29, 2016. Undersigned counsel perfected the direct appeal and, on January 8, 2020, the South Carolina Court of Appeals filed an unpublished opinion affirming Petitioner's conviction and sentence. State v. Washington, Op. No. 2020-UP-003 (S.C. Ct. App. filed January 8, 2020); App. 1-13. Petitioner filed a petition for rehearing on January 23, 2020. App. 14-28. The Court of Appeals denied the petition for rehearing by order dated February 20, 2020. App. 29.

This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred in holding the trial judge did not abuse his discretion by admitting evidence of subsequent acts of unindicted sexual misconduct by Petitioner when such evidence was not part of the *res gestae*, was not admissible pursuant to Rule 404(b), SCRE or *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), and was unfairly prejudicial to Petitioner pursuant to Rule 403, SCRE, since the subsequent acts were not similar to the conduct for which Petitioner was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury.

How the Issue was Presented Below

Before Minor's testimony, the state presented the recording of her forensic interview through Charlotte Ehney, the director of Beyond Abuse, who interviewed Minor on October 14, 2010. R. 86, l. 17 – 87, l. 10. As the forensic interview was being played for the jury, defense counsel informed the judge that she had a matter of law and the judge excused the jury from the courtroom. R. 92, ll. 11-18.

Counsel argued that the remainder of the video should be excluded because Minor goes on to describe subsequent uncharged allegations of sexual abuse. Counsel explained that when Minor first reported the allegations on September 3, 2010, she claimed the abuse had been happening for a couple of months and that the last time it happened was the day before, which was September 2, 2010. Accordingly, the warrant alleged a timeframe of July 1, 2010 until September 2, 2010. Defense counsel continued:

However, the indictment, **the Grand Jury elected to indict Mr. Washington [Petitioner] for activity strictly on July 1st. On or about July 1st of 2010.** So I have to presume that that would be when things started happening because it's the first date listed in the warrant. I didn't have any idea what Minor was going to

say happened on July 1st. **But she, in the rest of the course of this interview, talks about two other incidents . . . she has now talked about everything related to the first incident. She's asked by the interviewer tell me - - tell me what happened the first time. And we've been through that. And I would submit to you, Judge, that that's what he [Petitioner] is indicted for because July 1st is supposedly when this started if you take the incident report and warrant to be - - to have their dates correct. He's indicted for July 1st. She has described the first event. The rest of the interview goes on to ask, were there any other times that it happened. Tell me about the last time that it happened. And throughout the rest of the time Minor describes the last time that something happened which she said was what sounds like anal penetration in her mother's bathroom . . . If that's the last time something happened that must have been - - if you take what she reported is true, that would have been the day before the report was made, September 2nd, which is not what he's indicted for. She describes some other incident of fellatio in her brother's bedroom.**

So, Your Honor, that's my position is that **everything else on this video is irrelevant and overly prejudicial under Rules 401 and 403 and do[es] not relate to the offense that Mr. Washington is charged with in this case.**

R. 92, l. 20 – 26, l. 20 (emphasis added).

In response, the assistant solicitor argued that “statutorily time is not of the essence” and suggested that “on or about the 1st day of July, 2010” encompassed all of “the summertime months.” R. 94, ll. 22-25. Defense counsel disagreed and asserted that “on or about means on July 1st or very close to it.” She emphasized that “when [the state] want[s] to indict for a timeframe [it] can.” R. 96, ll. 6-24. However, for whatever reason, the state chose to indict Petitioner only for alleged conduct that occurred on or about July 1, 2010. See R. 213.

The solicitor also argued that the alleged subsequent acts should be admissible under the *res gestae* theory, which allows the state “to present the evidence that completes the entire story, instead of presenting a very disjointed story.” R. 95, ll. 7-20. He later contended that the alleged subsequent acts are a part of the *res gestae* because the acts put the abuse “into context.” He asserted, “[W]hat I have found from doing these cases . . . is that if you present the picture to a jury that you've got these kids living there. It happens on one day and it's never happened any

other time, it leaves the jury wondering what *precipitated* that one event where it's showing the pattern of conduct puts it in the context that they can understand. It certainly makes it more logical. And it certainly would go to prove that this child is not misinterpreting something that happened. It wasn't a bathing or helping change clothes and a touch that the child misinterpreted. But this was a pattern of conduct." R. 99, ll. 7-19 (emphasis added).

As to *res gestae*, defense counsel asserted that her understanding of the theory is – "I have to explain to you that somebody stole this car because this is the same car he used an hour later in this armed robbery or this bank robbery. That's not what we've got here. We've got three incidents that are . . . very different." R. 99, l. 21 – 100, l. 4. Counsel also cited to State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009). She explained that in Clasby the Supreme Court affirmed the admission of evidence of "similar acts" of "continued elicit intercourse" that happened "prior to the indicted offense" as "kind of a grooming theory." Before being cut off by the judge, counsel distinguished this case from Clasby by asserting that the uncharged acts admitted in Clasby were *prior* to the indicted act and were used to show what led up to the indicted crime where here the uncharged acts were *subsequent* to the conduct for which Petitioner was indicted. R. 102, l. 17 – 103, l. 5.

The judge ultimately found that the alleged subsequent acts were "unindicted crimes." R. 101, ll. 4-6. However, 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 judge found the subsequent acts were admissible as part of the *res gestae*. R. 103, ll. 6-10. He concluded that the unindicted conduct goes "to show motive and intent, not [a] mistake - - it would also go to show a full presentation of the evidence of the context and environment in which this setting took place." R. 101, ll. 7-17.

At the end of the judge's ruling, defense counsel raised Rule 404(b), SCRE. Counsel argued that the unindicted subsequent acts were propensity evidence under Rule 404(b), SCRE, State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and not part of the *res gestae*. She emphasized that "on the tape she [Minor] has already explained the complete act for which Mr. Washington [Petitioner] is indicted and it is unfairly prejudicial to allow any other act that he is not on notice for, Your Honor." R. 103, l. 23 – 104, l. 11. Despite this additional argument, the judge did not alter his ruling and made it clear he had made his determination. R. 104, ll. 3-13.

Subject to Petitioner's objection, the judge gave the following limiting instruction to the jury before the remainder of the forensic interview was published:

Ladies and gentlemen, there may be reflected on the video evidence of other acts allegedly committed by the Defendant on the witness. The indictment in this matter only charges the Defendant with conduct that occurred on or around July 1st, 2010. To the extent that any evidence is presented other than the alleged acts on or around July 1st, 2010 you shall not consider the Defendant's innocence or guilt in committing these acts because he had not been indicted for these acts. This evidence, if any, may be considered by you for the sole purpose of considering the Defendant's motive, intent, absence of mistake, and/or to present a setting of the case and its environment. Ladies and gentlemen, it's up to you to evaluate the weight of the evidence and give it such weight that you think it deserves.

R. 105, l. 23 – 106, l. 11.

Court of Appeals Opinion

In its opinion affirming Petitioner's conviction, the Court of Appeals held the evidence of prior bad acts was relevant because it was intimately connected to the abuse and provided context regarding the time period in which the abuse occurred. The court further asserted the evidence was probative to demonstrate "continuous illicit intercourse between Washington [Petitioner] and Minor."

Moreover, citing to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), the court held the evidence was admissible pursuant to Rule 404(b), SCRE under the common scheme or plan exception. Specifically, the court concluded “the similarities between all of the incidents described by Minor in the interview strongly outweigh the dissimilarities.” The court listed the similarities as follows: (1) Minor was the victim; (2) all of the alleged assaults constituted sexual battery; (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) Petitioner made Minor wear a blindfold or cover her eyes each time. The court maintained there were only two dissimilarities: (1) the location within the house—the tattoo room, her mother’s bedroom, and her brother’s bedroom—where the abuse occurred; and (2) the type of sexual battery that occurred. Because the court concluded the “similarities strongly outweigh the dissimilarities,” it held the trial judge did not abuse his discretion by admitting the evidence of alleged subsequent acts as an exception to Rule 404(b), SCRE.

The Court of Appeals further held the evidence was admissible as part of the *res gestae* “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 court asserted the acts were all relatively close in time as they occurred over the course of two months. Second, the court determined the bad acts evidence provided context to the crime as part of Petitioner’s “sustained illicit conduct” thereby helping the jury to understand “the alleged sexual battery was not a one-time event that may have been misinterpreted or misremembered.” Third, the court found the evidence was necessary to complete the “story of the crime on trial.”

Lastly, the Court of Appeals determined the probative value of the bad acts evidence substantially outweighed the danger of unfair prejudice. It asserted the risk of unfair prejudice

was low because the bad act evidence, like the evidence of the offense itself, hinged on Minor's credibility. It further found the probative value of the evidence was "extremely high" because there was no physical evidence of assault. Consequently, the court concluded the trial judge did not abuse his discretion by admitting the evidence of subsequent alleged misconduct.

Discussion

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 Petitioner was indicted and constituted "unindicted crimes" since Petitioner was only indicted for conduct that occurred "on or about the 1st of July, 2010." R. 101, ll. 4-6; See R. 213.

However, the judge erred by admitting this evidence of unindicted sexual misconduct since this evidence was not part of the *res gestae* and was not admissible pursuant to Rule 404(b), SCRE. Moreover, the evidence was unfairly prejudicial to Petitioner since the subsequent acts were not similar to the conduct for which Petitioner 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 judge found the subsequent acts of alleged sexual abuse 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), SCRE, 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 Petitioner 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 Petitioner 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), SCRE, and the *res gestae* theory, this 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 Petitioner'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 this Court held testimony about four *prior* incidents of uncharged misconduct was admissible under Rule 404(b), SCRE, 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 Petitioner 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 Petitioner 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, l. 16 – 105, l. 5. The solicitor's argument is further evidence of how the admission of the uncharged misconduct prejudiced Petitioner and is proof that the jury likely improperly considered the subsequent acts as evidence of Petitioner's guilt or innocence.

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

Finally, the Court of Appeals erred in declining to recognize that the similarities analysis announced in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), which was used by the court in affirming Petitioner's conviction, is inconsistent with the traditional interpretation of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Respectfully, this Court should overrule Wallace.

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.

Recently, in a concurring opinion in State v. Perez, 423 S.C. 491, 816 S.E.2d 550, 556-557 (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 and armed robbery case, this 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. 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 which used the traditional Lyle connection analysis. See State v. Henry, 313 S.C. 106, 108-109, 432 S.E.2d 489, 491 (Ct. App. 1993).

In State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718-719 (1998), this 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). 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. This Court’s opinion in Wallace should be overruled and the traditional connection test of Lyle and Rule 404(b), SCRE, should be applied in *all* cases, including cases involving sexual abuse allegations. In State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327-328 (2000), this 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.”

The Court of Appeals did not address the inconsistencies between the similarity analysis announced in Wallace and the traditional analysis of Rule 404(b) and Lyle when raised by Petitioner in his petition for rehearing. While the Court of Appeals lacks the authority to overrule this Court’s precedent of Wallace, the Court of Appeals erred in declining to recognize that the Wallace similarities analysis is inconsistent with the traditional interpretation of Rule 404(b) and Lyle.

Respectfully, this Court should grant certiorari and ultimately hold the trial judge abused his discretion by admitting evidence of the alleged subsequent uncharged sexual misconduct and reverse Petitioner’s conviction and sentence. Further, this Court should overrule Wallace as it is inconsistent with this Court’s holding in Lyle and Rule 404(b), SCRE.

The Court of Appeals erred in holding the trial judge properly denied Petitioner's motion for a directed verdict when the state failed to present any evidence that Petitioner engaged in sexual battery, which is a material element of first degree criminal sexual conduct with a minor, on or about July 1, 2010, the date alleged in the indictment.

How the Issue was Presented Below

At the conclusion of the state's presentation of evidence, Petitioner moved for a directed verdict. Defense counsel argued there was no evidence Petitioner engaged in sexual battery with Minor on or about July 1, 2010, which is the conduct for which he was indicted. Specifically, counsel asserted that during her testimony and during the forensic interview, Minor claimed that the first episode of abuse, which is alleged to have occurred at the beginning of July, happened in the "tattoo room" and strictly involved touching on the outside of her "private" and "butt," which would constitute only third degree criminal sexual conduct with a minor. R. 138, l. 4 – 139, l. 10. Counsel concluded, "[D]espite the other things [subsequent acts] that have been alleged, [Petitioner is] not charged with those. You've [the judge has] explained to the jury that they can't consider those as evidence of guilt or innocence and we would ask for a directed verdict of acquittal." R. 139, ll. 11-14.

Citing State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991), which involves the sufficiency of an indictment, the assistant solicitor argued that "date and time is not an element of the offense of criminal sexual conduct. The solicitor maintained that the "on or about" language in the indictment put Petitioner on notice that a timeframe was alleged. He concluded, "[Date and time is] not an element of the crime, and therefore the jury ca[n] convict if

they find it happened on or about that timeframe, which is what the child [Minor] testified to.” R. 139, l. 16 – 141, l. 8.

The judge ultimately ruled, “I’m not looking for anything but existence of evidence or nonexistence of evidence, and I think that viewing that standard there is evidence upon which the jury could find that that event with penetration, however slight as provided by the statute, took place on or around the July timeframe. I don’t necessarily think it’s a requirement, but I think that they could, regardless of the subsequent acts. For that reason I’m going to deny your motion. And for the reason stated by Mr. Sheek [the assistant solicitor] on the record as well.” R. 141, ll. 9-22.

Court of Appeals Opinion

The Court of Appeals held the trial judge properly denied the motion for a directed verdict. It asserted the date of the alleged sexual battery is not a material element of first degree criminal sexual conduct with a minor. Therefore, the court concluded that because the indictment was sufficient to put Petitioner on notice of the crime for which he was accused, the state was only required to prove that the sexual battery occurred before the date of the indictment. It maintained Minor testified Petitioner put his “private” in her butt sometime in July around the time of the first incident. The court determined that this testimony alone constitutes evidence of sexual battery upon which the jury could have found Petitioner guilty of first degree criminal sexual conduct.

Discussion

The Court of Appeals erred by holding the trial judge properly denied the motion for a directed verdict when the state failed to present any direct evidence or substantial circumstantial

evidence that Petitioner 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)).

Petitioner 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 Petitioner 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 Petitioner 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 Petitioner assaulted her was in the “tattoo room” when Petitioner 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, Petitioner was entitled to a directed verdict.

In State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004), this 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. This 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 Petitioner engaged in sexual battery with Minor on subsequent occasions, there was no evidence he engaged in sexual battery “on or about the 1st of

July, 2010” as alleged in the indictment. Because there was no evidence Petitioner engaged in sexual battery on the date specified in the indictment, the trial judge erred by refusing to grant a directed verdict.

In affirming Petitioner’s conviction, the Court of Appeals wholly ignored this Court’s opinion in Brown. Instead, the Court of Appeals relied on State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991), as did the state at trial, which concerns the sufficiency of an indictment and not a directed verdict. Thompson is easily distinguished from this case. Thompson, who was convicted of first degree criminal sexual conduct, moved pretrial to quash the indictment because it failed to sufficiently allege the time of the offense. The Court of Appeals held in Thompson that because the date is not a material element of criminal sexual conduct, the indictment, which alleged the offense took place on or about December 9, 1988, was sufficient. Thompson, 305 S.C. at 500-501, 409 S.E.2d at 423.

Respectfully, this Court should grant certiorari, reverse the Court of Appeals and direct a verdict of acquittal in Petitioner’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.”).

CONCLUSION

Based on the foregoing argument, this Court should grant the petition for writ of certiorari and order further briefing on the questions presented.

Respectfully Submitted,

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APR 03 2020

Certiorari to Abbeville County
Honorable R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 2020-UP-003 (S.C. Ct. App. filed 1/8/2020)
11-GS-01-00389

THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

PETITIONER.

CERTIFICATE OF SERVICE

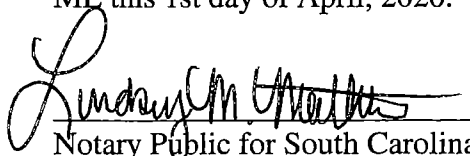
The undersigned hereby certifies that a copy of the Petition for a Writ of Certiorari and Appendix in the above referenced case have been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Shane Alexander Washington, #367946, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 1st day of April, 2020.

s/ Lara M. Caudy

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of April, 2020.

 (L.S)
Notary Public for South Carolina

My Commission Expires: October 22, 2024.