STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lancaster County
Hon. Roger E. Henderson, Circuit Court Judge
Appellate Case Tracking No. 2020-000498

The State, Respondent,

v.

Guadalupe Guzman Morales, Petitioner.

Opinion No. 2020-UP-001 (S.C. Ct. App. filed January 8, 2020)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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II. The Court of Appeals properly concluded it could not overrule this Court's decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Further, there is no reason to overrule the decision in Wallace because it is entirely consistent with this state's prior case law. Finally, the issue is not preserved for review on appeal.

STATEMENT OF THE CASE

Procedural History

In October 2002, Petitioner was arrested for two counts of criminal sexual conduct (CSC) with a minor second degree and one count of attempted CSC with a minor second degree. He was subsequently indicted in 2003 for the charges, but a fire in the Lancaster Courthouse in 2008 destroyed the indictments. (5/26T.6-7; R. 6-7) Petitioner was re-indicted in 2016 on charges of CSC with a minor first degree, CSC with a minor second degree, and assault with intent to commit CSC with a minor second degree. (True-billed Indictments; R. 402-407).

After two pretrial hearings, Petitioner proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury returned verdicts of guilty on all charges. (8/21T.293; R.387). Judge Henderson sentenced Petitioner to thirty years imprisonment for CSC with a minor first degree; ten years imprisonment, to be served consecutively, for CSC with a minor second degree; and ten years imprisonment, to be served concurrently, for assault with intent to commit CSC with a minor second degree—totaling forty years in prison. (Sentencing Sheets; R. 408-410).

Petitioner timely served and filed his Notice of Appeal on August 25, 2017. After briefing and without oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Morales, Op. No. 2020-UP-001(filed January 8, 2020). Petitioner filed a Petition for Rehearing, which was denied on February 20, 2020. A Petition for Writ of Certiorari was served on March 17, 2020. This Return follows.

Factual Background

When the victim was younger[1], she lived with her mother, Petitioner, and two younger sisters. (8/21T.43-44; R. 137-138). The victim's sisters were about two and five years younger than her. While she lived with Petitioner, the victim believed he was her biological father, but found out later he was not. (8/21T.46; R.140).

Petitioner began sexually touching the victim when she was just four years old. She and her family lived in a different trailer. The victim and her middle sister were jumping on the bed. Petitioner flipped her onto her back and pulled her to the edge of the bed. He spread her legs and rubbed his groin against hers on the outside of her clothing. (8/21T.49-50; R. 143-144). When the victim turned around seven, Petitioner began digitally penetrating her. Most of the time it occurred at home, but also in the car or at the river. The victim's mom was rarely home when it occurred or occasionally would be in the shower. (8/21T.50-52; R. 144-146).

The abuse continued to escalate to Petitioner raping the victim. When she was eleven years old the family planned to go to Carowinds for her birthday. The family was getting ready and her mom was in the shower when Petitioner, who the victim believed was her dad, told her to get on the bed with him if she wanted to go to Carowinds. She tried to resist, but he insisted. Petitioner then raped the eleven year old victim. (8/21T.47-48; R. 141-142). Later that summer, the victim's mom and sisters went to the store. The victim was in trouble and confined to her room. Petitioner entered and again raped the eleven year old girl. She realized the window was open and tried to scream, but Petitioner put his hand over her mouth. (8/21T.54-55; R. 148-149). The victim never told anyone because she was scared, did not want to be called a liar, and did not want to be judged. (8/21T.56; R.150).

[1] At the time of trial, the victim was twenty-eight years old. (8/21T.42; R. 136).

After the victim was kicked out of the house with her mother and Petitioner, she went to live with her Uncle Jimmy and his girlfriend Michelle. (8/21T.43; 57; R. 137; 151). Michelle walked the victim to the bus stop for school. One day the victim was being very quiet or distant. Michelle asked if the victim was doing okay. (8/21T.57; 166-167; R.151; 260-261). The victim disclosed the years of abuse by Petitioner.

Petitioner also sexually abused the middle sister, the second victim. She believed Petitioner was her father at the time of the abuse, but was unsure of the truth as she got older. The abuse began when she was about three years old. Petitioner would have her sit on his lap and would touch her under her underwear. The abuse occurred in the home. (8/21T.175-176; R.269-270). When the second victim was eight, Petitioner saw that she could not sleep and had her get in the bed with him. Her mom was not home at the time. Petitioner lay in the bed behind the second victim and pulled down her pants and underwear. She felt his penis touch her buttocks. (8/21T.178; R. 272). The second victim did not tell anyone when the abuse was occurring, but later told her grandmother about the abuse after her older sister disclosed to Michelle and their grandmother. (8/21T.178; R.272).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

I. The Court of Appeals properly determined the trial court did not err in admitting the testimony of the second victim pursuant to Rule 404(b), SCRE. However, the Court of Appeals should have concluded any issue was waived and not preserved for review on appeal because Petitioner's trial counsel acknowledged the similarities and waived any issue regarding Rule 404(b).

The Court of Appeals correctly found the trial court did not err in admitting testimony by a second victim pursuant to Rule 404(b), SCRE. However, the Court of Appeals should not have addressed the merits because the issue was expressly waived by Petitioner's trial counsel and was not properly preserved for review on appeal.

Waiver/Preservation

Petitioner's trial counsel waived any issue regarding the admission of the second victim's testimony pursuant to Rule 404(b). While counsel did raise an objection to the second victim testifying at a pre-trial hearing, arguing the testimony was inadmissible under Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), he waived this ruling at trial.

Initially, the pre-trial hearing regarding the testimony did not result in a final ruling. Specifically, the trial court stated: "I'm prepared to issue a conditional ruling" and later reiterated: "Again it is a conditional ruling . . . .". (7/26T. 38; R. 113). He ended his ruling by stating: "So -- that's not a ruling that's just, you know, and inclination . . . an inclination on my part at this point in time so - - but I am conditionally ruling with regards to the testimony of [the second victim], though." (7/26T.38-39; R. 113-114). Because this was an *in limine* ruling, it was not a final ruling by the trial court. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving

party, therefore, must make a contemporaneous objection when the evidence is introduced."); State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) ("Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced."); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.").

Additionally, once at trial, Petitioner's trial counsel acknowledged the similarities of the testimony by agreeing the witnesses are saying the "same thing" and that the testimony established a "conspiracy" or a "pattern." Essentially, he admitted the second victim's testimony was sufficiently similar to the victim's testimony to establish a common scheme or plan and waived any objection on the basis now being raised on appeal.

> Your Honor, since the ruling that you made in Chesterfield on a temporary basis. We heard some testimony. We haven't heard Lisa's testimony but we did hear it there that day. It appears to me that it is becoming a little bit more clear as to where the conspiracy is, if that's what you want to call it; **the pattern. And I think that now I'm seeing a pattern** of – I'm seeing a pattern of conspiracy.
>
> . . . .
>
> But the consortium of witnesses **that are saying the same thing for the same reason**. . . . But now after hearing Jessica's testimony it appears to be clear that's what it is. So we think that the testimony of Lisa is -- will be improper bolstering of Jessica's testimony.

(8/21T.119; R. 213) (emphasis added). As a result of his acknowledgement regarding the similarities in the testimony, he altered his objection from one based on Lyle and 404(b) to one based on improper bolstering. Accordingly, any issue regarding Lyle and 404(b) was waived and is not preserved for review on appeal. See State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (where counsel acquiesces in the judge's ruling and makes no other objections

regarding the issue, the issue is not preserve for appeal); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (an issue conceded at trial cannot be argued on appeal); Richland Cty. v. Carolina Chloride, Inc., 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct. App. 2009) (an issue expressly waived during trial is not preserved for appellate review), aff'd in part, rev'd in part on other grounds, 394 S.C. 154, 714 S.E.2d 869 (2011).

Further, as his actual objection to the testimony at trial was based on improper bolstering, Petitioner cannot now raise a different issue on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

On the merits, the trial court properly admitted the testimony of the second victim in order to establish a common scheme or plan and this common scheme or plan was exemplified by looking at the similarities between the victim's testimony and that of the second victim. Properly applying this Court's precedent of Wallace, the trial court considered the similarities and dissimilarities in testimony and found that a common scheme or plan was established.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities

outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. This Court provided some factors to consider including: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not be excluded merely because it "incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

The Court of Appeals, then Chief Judge Hearn, explained the common scheme or plan exception:

> Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was established. See 2 Wigmore, § 304 (stating that where separate offenses are sufficiently similar, there is an inference that they are manifestations of a common scheme or plan). Accordingly, the evidence in such cases speaks to the existence of the defendant's plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred.

State v. Tutton, 354 S.C. 319, 330-31, 580 S.E.2d 186, 192 (Ct. App. 2003).

In analyzing the factors articulated in Wallace and comparing the similarities and dissimilarities in this case, the trial court properly concluded a common scheme or plan existed. As discussed above, both victims believed Petitioner was their dad at the time of the abuse. Petitioner took advantage of this relationship for his sexual gratification. They both indicated the abuse began when they were very young, three and four years old. They both testified Petitioner

began by touching them under their clothes. Both victims indicated the abuse generally happened at home when the mom was either not home or occupied and their sisters were not in the same room. The extent of the abuse against the victim—which included intercourse—was worse than the abuse against the second victim—which only included Petitioner placing his penis against her buttocks. However, this is likely only because of the disclosure by the victim which ended the opportunity of Petitioner to do more to the second victim. As the trial court found, and Petitioner's counsel conceded, the testimony presented by both victims indicated a clear pattern, a common scheme or plan by Petitioner to use his position as their alleged father to sexually abuse them while their mother was either out of the home or occupied.

Cases from both appellate courts support the trial court's decision. The Supreme Court in State v. McClellan found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in a prosecution for similar acts against the youngest daughter because the "experiences of each daughter parallel that of her sisters . . ." State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Specifically, the Court noted: "[T]he initial attack occurred around age twelve; Petitioner entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to "Honor thy Father"]." Id.[2]

In State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. The Court of Appeals found the testimony admissible, noting the following:

[2] It should be noted all three of these cases occurred prior to this Court's issuance of Wallace, and all three relied on the significant similarities and the "parallel" of events to find a common scheme or plan.

> . . . All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were **sufficiently similar** to the charged offense to be admissible.

Blanton, 316 S.C. at 32, 446 S.E.2d at 439 (emphasis added).

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman's home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman's home. The victim and two other women each testified that the abuse began shortly after they arrived at Hallman's farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman's penis. The events in each case took place in the bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the farm at four years old and was made to rub his penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

In finding the prior bad acts admissible, this Court noted the following:

> The prior bad acts here occurred while each of the young women was a foster child to appellant and of **similar** age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of the abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the **same manner** under **similar circumstances.**

Id., 298 S.C. at 175, 379 S.E.2d at 117 (emphasis added). As in McClellan, Blanton, and Hallman, the testimony in this case established the requisite link and commonality to be admissible as a common scheme or plan. The Court of Appeals properly concluded on the merits that the testimony of the second victim was admissible as a common scheme or plan and the Petition for Writ of Certiorari as to Question I should be denied. If this Court grants the Petition as to Question I, it should only be to vacate the Court of Appeals opinion and find that it should not have addressed an issue that was waived and not properly preserved for review on appeal.

II. The Court of Appeals properly concluded it could not overrule this Court's decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Further, there is no reason to overrule the decision in Wallace because it is entirely consistent with this state's prior case law. Finally, the issue is not preserved for review on appeal.

The Court of Appeals correctly found it did not have authority to overrule this Court's decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Further, the issue is not properly preserved for review on appeal. Even if properly presented, this Court should not overrule Wallace because it is entirely consistent with the prior case law in this state.

Preservation

Petitioner never asked the trial judge to rule Wallace inapplicable, nor did he make any assertion the trial court was applying an incorrect standard in determining whether a common scheme or plan was established when the trial court presented its analysis of the similarities versus the dissimilarities. (8/21T.120; R. 214). As a result, Petitioner's Question II is not preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Merits

There is no reason for this Court to overrule its decision in Wallace or to reverse this case based on an application of the then appropriate case law. The decision in Wallace is entirely consistent with prior case law in which a common scheme or plan was found and cases in which the appellate courts concluded the evidence failed to demonstrate a common scheme or plan.

The Courts of this state have long held prior bad acts admissible when they serve to prove some fact or element related to the crime charged. See e.g., State v. Houston, 17 S.C.L. 300, 301, 1 Bail. 300 (S.C. App. L. & Eq. 1829) (admitting evidence of prior forgeries in a forgery

case "to shew that the prisoner has passed other counterfeit notes of a similar character" . . . "for although these may be the foundation of other prosecutions, yet they afford evidence, and sometimes very strong evidence, of the knowledge of the falsity of the paper, on which the indictment is founded."). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. This Court provided some factors to consider including: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not be excluded merely because it "incidentally reveals the accused's guilt of another crime." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

This Court's decision in Wallace did not change the admissibility of prior bad act evidence. Instead, it merely clarified this Court's long-standing consideration of prior bad act evidence. Under common law in America, as in England, "there never did exist any rule of evidence . . . excluding proof of other offences of the accused where such proof was relevant to

a fact in issue. All that there was to be found was a very narrow rule excluding proof where the relevance was merely to the evil disposition of the accused." Julius Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 990 (1938). South Carolina case law supports this conclusion. See e.g., State v. Petty, 16 S.C.L. 59, 62, Harp. 59 (S.C. Const. App. 1823) (finding admissible proof of prior instances when a defendant passed forged notes during trial for passing a forged note and holding: "But let it be admitted that it is a crime, yet if the proof of it has a tendency to support the issue, in the case before the court, it is admissible. It has been determined, as to this very offence, that proof of a man's having passed other forged notes, may be given in evidence."); State v. Winter, 83 S.C. 251, 65 S.E. 243, 245 (1909) (finding evidence of prior similar acts—buying stolen goods—provided proof defendant received stolen goods knowing them to be stolen); see also, State v. Odel, 2 Tread. 758, 3 Brev.552 (1816) (finding if prior bad act had been the same as current crime it would have been admissible into evidence, but since significant dissimilarities existed it was inadmissible).

In State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923), this Court articulated five reasons for admitting evidence of other bad acts: "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (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 others; (5) the identity of the person charged with the commission of the crime on trial." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923) (quoting People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901)). "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923).

This Court in Wallace merely explained that the logical relevance in a case considering a common scheme or plan can usually be found in the fact the other bad act and the act for which the defendant is on trial are similar. A review of some of the cases from this Court and the Court of Appeals in which evidence was found inadmissible is apposite to proper application of Rule 404(b) and Lyle, especially when those cases are juxtaposed to cases in which prior bad act evidence was admissible as a common scheme or plan.

In State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983), evidence was presented establishing Stokes committed a lewd act upon his juvenile victim when the child came to his house to purchase a frozen treat. Id. at 192, 304 S.E.2d at 814. Over objection, the trial judge admitted testimony indicating Stokes once asked another child to meet him at the railroad tracks for an undisclosed purpose, which the child speculated Stokes intended to rape her. Id. On appeal, this Court reversed, finding no connection between the acts, which were in no way similar, and determining the trial judge erred in admitting the evidence. Id. at 193, 304 S.E.2d at 815.

The Court of Appeals decision in Tutton is another example of when the dissimilarities were so great that they precluded a finding of a common scheme or plan. In Tutton, two sisters testified Tutton rubbed their butts and private parts with his hands while they were sleeping near him. Tutton, 354 S.C. at 323, 580 S.E.2d at 188. Over objection, one of the sisters also testified Tutton performed oral sex on her, forced her to perform oral sex on him, and threatened her not to tell several years prior to the charged incidents. Id. at 324, 580 S.E.2d at 189. The Court found:

> The balancing of the similarities in cases concerning the admission of common scheme or plan evidence is a difficult task. While inferential leaps are at the heart of such decisions, we are compelled to find that the similarities in this case are insufficient to

> support the inference that Tutton employed a common scheme or plan to commit the assaults alleged in this case.

Id. at 333, 580 S.E.2d at 194.

In State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997), which came years before Wallace, this Court reviewed the similarities of two armed robberies. The Court found "the only point of similarity with any merit is the alleged similar clothing worn by the robbers." Id. at 53, 488 S.E.2d at 326. As a result, this Court found: "We find there is insufficient similarity between the two crime sprees to prove a common scheme or plan under Lyle." Id.; see also, State v. Berry, 332 S.C. 214, 219, 503 S.E.2d 770, 773 (Ct. App. 1998) ("In this case, there are insufficient similarities between the attack on the victim and the attack on Polite to connect the incidents as part of a common scheme or plan. The incidents occurred fifteen months apart, under different circumstances, at different times, in different places, and in different ways. That both women coincidentally wore glasses and both claimed Berry grabbed their throats does not render the attacks sufficiently connected or similar to justify admission of evidence of the Polite incident under the common scheme or plan exception."); State v. Davenport, 321 S.C. 134, 138, 467 S.E.2d 258, 260–61 (Ct. App. 1996) (finding "to be admissible under the common scheme exception, the similarity or connection between the prior bad act and the current charge must be close" and concluding the use of a knife and the lack of a connection between the victims and Davenport was insufficient to establish a common scheme or plan).

These cases can be juxtaposed to some of the cases in which the Courts have found the similarities sufficient to establish a common scheme or plan. In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984); and State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994)—as discussed above—the

appellate courts relied on the similarities in actions to justify admission as a common scheme or plan.

Wallace did not change the standard for finding a common scheme or plan, nor did it create a new standard for sexual assault and similar cases. It merely clarified the longstanding findings of the appellate courts which demonstrated that when sufficient and logical similarities existed, the connection required to find a common scheme or plan existed. The Court in Wallace provided some guidance to the courts regarding the type of similarities which provided the necessary connection between events. Nothing in Wallace should be overturned and, even if it were the incorrect standard and this Court would find the language in Tutton or similar articulated a different standard, it would not warrant reversal in this case where a clear connection has been established. As a result, this Court should deny the Petition for Writ of Certiorari as to Petitioner's Question II.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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