STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-001965

The State, Respondent,

v.

Wallace Steve Perry, Petitioner.

PETITION FOR REHEARING

On May 6, 2020, a majority of this Court reversed and remanded Appellant's convictions for two counts of criminal sexual conduct with a minor in the first degree. The majority found the trial court applied an incorrect standard in determining prior bad act testimony was admissible as a common scheme or plan under Rule 404(b), SCRE. The majority determined State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), needed to be overturned because it eliminated the "logical connection" or "logical relevance" requirement in determining an admissible common scheme or plan. Finally, the majority determined the facts of the underlying case when juxtaposed with the testimony of the step-daughter who provided the prior bad act evidence was insufficient to establish an admissible common scheme or plan and found that testimony unduly prejudiced Petitioner. However, the majority of the Court has overlooked the actual facts of this case, the long history of the admission of prior bad act testimony in South Carolina, and the very logical, well-reasoned opinion of Justice Kittredge's dissent. Accordingly,

pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing; find State v. Wallace did not need to be overruled, but merely clarified; find, especially in light of a correct application of this Court's standard of review, the trial court properly found the facts of this case supported a common scheme or plan; and affirm Petitioner's convictions and sentences.

ARGUMENT

Initially, the majority of this Court overlooked, or has attempted to rewrite, South Carolina's long history of handling prior bad act testimony before State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), between Lyle and Wallace, and since Wallace. In its opinion, the majority states:

> For the first time in our jurisprudence, contrary to over eighty years of interpretation of Rule 404(b) and its pre-Rules predecessor Lyle, the Court stated, "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility."

The majority then quotes Justice Hearn's concurring opinion in State v. Perez, 423 S.C. 491, 502, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring), finding Wallace was a "marked departure" from prior case law. These comments and the majority's opinion fail to reconcile the vast history of South Carolina jurisprudence in which similarity—as articulated by Wallace—was the primary consideration for whether or not a logical connection was found. Wallace, contrary to this Court's opinion, did not eliminate the requirement of a logical connection. The Court just recognized what this Court and the Court of Appeals have found numerous times—significant similarities demonstrate the necessary logical connection in order to establish the existence of a common scheme or plan.

Years before Lyle, the Court of Appeals of Law and Equity found the admittance of evidence of prior forgeries committed by the defendant were proper "to shew that the prisoner

has passed other counterfeit notes of a **similar** character" as substantive evidence of his guilt on the current forgery. State v. Houston, 17 S.C.L. 300, 301, 1 Bail. 300 (S.C. App. L. & Eq. 1829). Other cases from years before Lyle support similar propositions. 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).

More recent cases from after Lyle but before the Court's alleged "departure" in Wallace also support this Court's prior determination that similarities are important for establishing the connection. 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. This Court found the testimony admissible, noting the following:

> . . . **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). The Court of Appeals decision certainly focused on the significant similarities, and just as this Court concluded in Wallace, those similarities were sufficient to render the prior bad act admissible.

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). Instead of recognizing Wallace was not the "first" case to ever rely on similarities and was not actually "a marked departure" from prior

case law, the majority determines that to the extent Hallman is similar to Wallace, it too should be overruled.

This Court cites significantly to State v. McClellan, which found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception. State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). It appears the majority holds this case out as the gold standard for a determination that a common scheme or plan existed. However, the majority's discussion of the facts in McClellan relies on the "unique" detail of relying on the Bible. What this Court actually concluded in McClellan was the prior bad acts were properly admitted 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) (emphasis added). Specifically, this Court noted: "[T]he initial attack occurred around age twelve; Appellant 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. This Court in McClellan did not discuss the uniqueness of the circumstances; instead, this Court discussed the **similarities** in the victims' testimony and how the fact the abuse of one daughter paralleled that of the others. The gold standard relied on by the majority relied on similarities in order to determine a common scheme or plan existed and to find otherwise is to alter the holding of McClellan.

Even cases in which no common scheme or plan has been found, the Courts of this state discussed the similarities, or lack thereof, in determining admissibility. In State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997), which came many 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 (emphasis

added). 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. (emphasis added); 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.") (emphasis added); 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) (emphasis added). These cases were overlooked by the majority of this Court in its determination that Wallace altered the requirement that must be shown to establish a common scheme or plan because this Court and the Court of Appeals have multiple times referred to the extent of similarity to determine admissibility.

In another case from 1979, well after Lyle but well before Rule 404(b) and Wallace, this Court described what is required to establish a common scheme or plan and articulated: "a defendant's previous sexual conduct with persons other than the named prosecutrix is inadmissible unless the **close similarity of the charged offense and the previous act** enhances the probative value of the evidence so as to overrule the prejudicial effect." State v. Rivers, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979) (citations omitted). In the case, the Court ultimately

found: "the testimony concerning the sexual activities with [defendant's] wife is not relevant because it bears **insufficient similarity** to the acts allegedly performed on the prosecutrix and, therefore, does not comply with the rigid rule of admissibility" for common scheme or plan. Id. at 78, 254 S.E.2d at 301.

This Court places significance on then Chief Judge Hearn's opinion in State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). The Court of Appeals 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.**

Tutton, 354 S.C. at 330-31, 580 S.E.2d at 192 (emphasis added). In Tutton, two sisters testified Tutton rubbed their behinds 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 explained:

> 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. Wallace and Tutton are entirely consistent in their analysis of whether the facts presented in the case, when juxtaposed to the prior bad act, demonstrate a common scheme or plan. Applying the Wallace standard would have led to the same conclusion in Tutton because there were no significant similarities to justify establishment of a common scheme or plan.

Historically, numerous cases outside of Wallace have focused on the similarities between the current case and the evidence of prior bad acts in determining whether the prior bad acts can be admitted as common scheme or plan. This Court overlooked this extensive history in overruling Wallace. This Court should find, consistent with its prior history, significant similarities are sufficient to establish the "logical connection" required throughout our jurisprudence because the similarities allow the jury to conclude that a common scheme or plan existed and that the defendant sought to execute that common scheme or plan in the crime charged.

Even if something more than significant similarities is required, this Court overlooked extensive case law in defining the "logical connection" or "logical relevance" required. Instead of recognizing that the "logical connection" is a means by which the jury can find that the defendant created a plan (as established by the prior bad act) and executed that plan in a similar fashion during the charged crime, the majority relies on the existence of "unique" facts to hold a common scheme or plan existed. As Justice Kittredge indicated in his dissent: "the majority opinion can be read to rewrite Rule 404(b) to require a *unique* scheme or plan rather than a *common* scheme or plan." As this Court and the Court of Appeals have noted in the past, it is not uniqueness that establishes the admissibility of a common scheme or plan; it is the commonality—or similarity—between the crime charged and the prior bad act that allows the

jury to consider "the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred."

The majority of this Court finds more than significant similarities are needed to establish a requisite common scheme or plan. As stated in Tutton: "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." What better way to establish this criminal scheme than to demonstrate how a defendant has done the same thing to multiple similar victims in the same manner. If a person seeks to abuse a specific type of victim, repeatedly finds that type of victim and then abuses them in the same manner, it seems very logical that that defendant has a criminal scheme—a common scheme or plan—which would necessarily be probative as substantive evidence of guilt in a current case in which the defendant has utilized this scheme or plan. The majority of this Court overlooks or misapprehends the nature of the common scheme or plan and what it is being admitted to prove. If the jury can find the defendant has a plan that he utilizes, and then sees a similar plan at work in the current case, the plan itself is probative of the defendant's guilt and admissible under Rule 404(b) and all of this State's long-standing case law.

Finally, and most significantly, this Court misapplied its standard of review and the relevant facts of this case in determining that the trial court abused its discretion in admitting the step-daughter's testimony under Rule 404(b) to demonstrate a common scheme or plan. "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)); see also, State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude

in ruling on the admissibility of evidence . . . ."). Instead of determining whether there is any evidence to support the conclusion of the trial court—who specifically found significant similarities existed between the testimony of the step-daughter and the daughters—the majority of this Court conducted its own de novo analysis as if it were the trial judge and fully injected its opinions on the interpretations of the facts instead of giving the requisite wide discretion to the trial court.

This Court has warned against an appellate court substituting its own conclusions for those of the trial court. See Wallace v. Timmons, 237 S.C. 411, 421, 117 S.E.2d 567, 572 (1960) (stating that in reviewing a trial judge's decision under an abuse of discretion standard, this Court may not substitute its judgment simply because it might have reached a different conclusion had it been in the trial judge's place); Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393 (1957) (in addressing whether an abuse of discretion occurred: "it is not our function, nor is it within our power, to substitute our judgment for that of the circuit judge simply because we might have reached a different conclusion had we been in his place."). However, in this case, the majority of the Court clearly reached a different conclusion from the trial court and substituted its own factual findings for those of the trial judge in reaching its conclusion there was no evidence supporting a common scheme or plan.

The State will not endeavor to point out the numerous instances in which this Court incorrectly substituted its opinion for that of the trial court or incorrectly interpreted the facts of this case in order to find dissimilarities to justify its ultimate decision. Justice Kittredge's incredibility thorough and well-reasoned dissent presents all the evidence demonstrating the significant similarities between the testimony of the step-daughter and the testimony of the two

victims at trial. Further, he properly analyzes those similarities and determines a common criminal scheme was established in this case.

The State reiterates Justice Kittredge's belief that the facts as testified to by the step-daughter and the two victims demonstrate a common system existing in Petitioner's mind and set in motion to sexually abuse his daughters. Petitioner established a plan of victimizing young, pre-pubescent females residing in his household.[1] He established a plan to attack them in his residence, but more often in their bedrooms. He threatened or manipulated the victims into not telling of the abuse. Finally, the abuse, while involving occasional discrepancies, predominantly included digital penetration. These facts are all supported by the evidence in the record and all support the trial court's admission of the testimony in this case. Even if the majority is determined to overrule Wallace, it should still find the evidence in this case was properly admitted, find "unique" circumstances are not required, and find that a common scheme or plan exactly what Petitioner set in motion when he abused both daughters and the step-daughter.

[1] The State notes the majority's discussion of the ages of the girls is the clearest demonstration of a violation of this Court's standard of review. The trial court found the ages to be similar. In reality the age of the step-daughter (the prior bad act victim) is within just a couple years of each of the daughters. This fact supports the trial court's determination and, instead, the majority uses this as an example of a dissimilarity after substituting its opinion for that of the trial court.

CONCLUSION

For all of the foregoing reasons, the State requests the Court grant the petition for rehearing; find Wallace need not be overturned because it is entirely consistent with our long-standing jurisprudence; conclude a common scheme or plan existed in this case notwithstanding this Court's determination on Wallace of the standard to apply; and affirm Petitioner's convictions and sentences.

Respectfully submitted,

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