⑤

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CLARENDON COUNTY

Court of General Sessions

Michael G. Nettles, Circuit Court Judge

RECEIVED
MAY 21 2019
SC Court of Appeals

Case No. 2016-GS-14-0098

The State..Respondent,

v.

Michael James Dinkins...Appellant

BRIEF OF APPELLANT

Steven S. McKenzie
P.O. Box 1292
2 North Brooks Street
Manning, SC 29102
(803) 435-8847 (Telephone)
(803) 435-8915 (Facsimile)
smckenzie@ccmlawsc.com

TABLE OF CONTENTS

Table of Authorities..3

Statement of Issues on Appeal..2

Statement of the Case..4

Facts..4

Argument

I. DID THE COURT ERR IN NOT DIRECTING A VERDICT OF NOT GUILTY ON COUNT THREE OF THE NDICTMENT?..6

II. DID THE COURT LACKED SUBJECT MATTER JURISDICTION TO CHARGE THE JURY THAT THEY COULD FIND ASSAULT AND BATTERY SECOND AS A LESSOR INCLUDED OFFENSE CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE THIRD DEGREE?..8

III. DID THE TRIAL COURT COMMIT ERROR BY ADMITTING EVIDENCE OF PRIOR BAD ACTS?..9

Conclusion..17

ISSUES ON APPEAL

1. Did the General Assembly intend for "French Kissing" to be a sexual act in South Carolina?
2. Is Assault and Battery Second Degree a lessor included offense of Criminal Sexual Conduct With a minor in the third degree?
3. Is State v. Wallace, 384 S.C. 428, 431, 683 S.E.2d 275 (2009), still the law in South Carolina when it comes to prior bad acts?

TABLE OF AUTHORITIES

Case Law

Old Chiefs. U.S., 519 U.S. 172,182 (1997)....................11

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)....................13,14, 15

State v. Cody, 186 S.E. 165, 167 (S.C. 1936))....................10

State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983)....................14

State v. Parker, 315 S.C. 230, 433 S.E.2d 831, (1993)....................14

Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997)....................9

State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997)....................14

State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998)....................13

State v. Brooks, 341 S.C. 57, 62,533 S.E.2d 325,328 (2000)....................12, 14

State v. Watson, 349 S.C. at 375, 563 S.E.2d at 337 (2002)....................9

State v. Ellison, 586 S.E.2d 596, 597 (S.C. Ct. App. 2003)....................10

State v. Wallace, 384 S.C. 428, 431, 683 S.E.2d 275 (2009)....................12,13,14, 15, 16, 17

State v. Clasby, 385 S.C. 148, 152, 682 S.E.2d 892, 894 (2009)....................12

State v. Pagan . 369 S.C. 201, 631 S.E.2d 262, (2006)....................14

State v. Fonseca , 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011)....................15

State v. Parker, 344 S.C. 250, 256, 543 S.E.2d 255, 258 (Ct. App. 2001)....................10, 15

State v. Tuffour, 364 S.C. 497,504,613 S.E.2d 814, 818 (Ct. App. 2005)....................17

Statutes

S.C. Code Section 16-3-651 (1976 as amended)....................9, 10, 11, 12

S.C. Code Section 16-3-655 (1976 as amended)....................9, 10, 11, 12

Rules

SCRE Rule 404....................11,12, 13, 14, 15, 17

Statement of the Case

The Defendant was tried in Clarendon County Court of General Sessions on November 6th and November 7th of 2017 (R. p 18, lines 1-25). The Appellant was indicted on four counts of Criminal Sexual Conduct with a minor, third degree (R. p 18, lines 6-7). The Appellant was convicted by jury of the lessor included offense of Assault and Battery Second Degree as to counts 1 and 4 of the indictment (R. p 408, lines 1-25). As to count two of the indictment, the jury found the Appellant not guilty (R. p. 408, lines 15-18) As to count three of the indictment, the jury found the Appellant guilty of Criminal Sexual Conduct with a minor, third degree (R. p 408, lines 18-21). The Appellant was sentenced by the Honorable Michael G. Nettles to six years, provided upon the service of three years in the South Carolina Department of Corrections for the Criminal Sexual Conduct, third degree (R. p. 416, lines 9-15). The balance of the sentence was suspended with three years probation (R. p. 416, lines 15-20) . The remaining two counts of Assault and Battery second degree were run concurrent with the conviction for Criminal Sexual Conduct with a minor, third degree (R. pp. 416-417, lines 21-25 and 1-5). This appeal followed the conviction.

Factual Background

The minor child (victim) in this matter was eleven when the alleged incidents in the indictment occurred between October 2015 and December 2015. (R. pp.4-6).

The minor child is the niece of the former wife of the Defendant. The minor child came to live with the aunt and Defendant after the death of minor child's mother in 2014. (R. p. 55, lines 1-25). The minor child started grief counseling in December of 2013 with Sumter Psychiatry Associates. On May 8, 2015, the minor child wrote an apparent suicide letter and was taken back to Sumter Psychiatry (R. pp. 7-10). The alleged incidents occurred after the May 8, 2015 "suicide letter and after the minor child was diagnosed with Major Depressive

Disorder, General Anxiety Disorder, and Attention Deficit Disorder (R. pp. 7-10).

As stated above, the minor child was diagnosed with Major Depressive Disorder, General Anxiety Disorder, Unresolved Grief, Panic Attacks, and Attention Deficient Disorder. She was taking or currently taking the following medications: Lexapro (depression); Buspar (anxiety); Clonidine (anxiety) and Metadate (ADD) (R. pp. 7-10).

The minor child's mother had a history of bipolar disorder. The minor child's father has severe epilepsy that renders him disabled and incapable of having custody of the minor child. (R. p. 60, lines 1-25).

The Defendant is a registered nurse, Army veteran and has no prior criminal history (R. p. 412, lines 3-16).

The Defendant originally had three warrants served on him on January 20, 2016. The first warrant 2016A-14-10100010 states: "On October 27, 2015 the defendant, Michael Dinkins, did knowingly and willingly commit the offense of criminal sexual conduct with a minor 3rd degree in that he put the 11 year victim's hand on his penis. The victim disclosed this incident to a counselor as well as a forensic interviewer....." The second warrant 2016A-14-10100011 states: Between the dates of October 27, 2015 and January 1, 2016 the defendant, Michael Dinkins, did knowingly and willingly commit the offense of criminal sexual conduct with a minor 3rd degree in that he did get into the 11 year old victim's bed, straddle her, and make a grinding motion on top of her body. The victim disclosed this incident to a counselor as well as a forensic interviewer...." The final warrant served on the Defendant was 2016A-14-10100012 and it states: "On January 1, 2016 the defendant, Michael Dinkins, did knowingly and willingly commit the offense of criminal

sexual conduct with a minor 3rd degree in that he did kiss the 11 year old victim and attempt to put his tongue in her mouth. The victim disclosed this incident to a counselor….." (R. pp. 4-6).

The Defendant was indicted by the Clarendon County Grand Jury on four counts of criminal sexual conduct with a minor (R. p. 3).

I. DID THE COURT ERR IN NOT DIRECTING A VERDICT OF NOT GUILTY ON COUNT THREE OF THE NDICTMENT?

The allegations of Count three of the indictment center on the conduct of the Appellant on December 31, 2015. The minor victim testified that the "I was asleep and he came up to me and kissed me and put his, kissed me on the lips and put his tongue in my mouth". (R. p. 169, lines 17-17-25). At the close of the State's case, the Defendant moved for a directed verdict of not guilty as to all counts of the indictment because the State failed to prove "intent" as required by the statute (R. p. 355, lines 9-25, R. p. 356, lines 1-9). Said motion was based upon the State's failure to introduce any evidence as to specific intent. Specific intent is a requirement of CSC with a minor third degree. The Defendant was convicted of CSC 3rd on Count three of the Indictment. CSC 3rd states: "A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon the body, or its parts, of a child under sixteen years of age with the **intent of arousing, appealing to, gratifying the lust, passions or desires of the actor or the child."** S.C. Code Ann. § 16-3-655. The Appellant would show that the state offered no evidence of the **intent** that was either evident or circumstantial to support

the fact that the Defendant was aroused, his lust was gratified, his passions or desires were appealed to. In fact, the only evidence that was submitted to the jury by the State was that victim was not aroused, gratified or appealed to by the Appellant kissing her (R. p. 60, lines 1-25). The testimony in the pretrial motion hearings regarding admission of other alleged "bad acts", the victim's aunt testified that neither the victim nor the Appellant was sexually aroused by the appellant kissing the victim on her neck (R. p. 60, lines 1-25). The appellant would show that act of kissing the child on the lips and allegedly putting his tongue in her mouth, if true, would be in poor taste, but without proof of intent as delineated above is not illegal in South Carolina. The trial court in denying the motion for a directed verdict of not guilty relied on circumstantial evidence of all the alleged touching of the Appellant on the person of the victim and that this was proof of intent. (R. p. 356, lines 8-25). The testimony is clear that the minor victim came to live with her aunt and uncle (appellant) after the death of her mother (R. p. 195, lines 15-25). The victim admitted that "her uncle Mike" was an affectionate person and loved her (R. p 93, lines 1-16). The jury found that no other acts contained in the indictment rose to the level of criminal sexual conduct with a minor third degree except Count three (Kissing on the lips) (R. p. 408, lines 7-25 wherein the jury found the appellant not guilty of counts one, two and four of criminal sexual conduct with a minor third degree and guilty on count three).

By way of illustration, the South Carolina legislature has defined "intimate parts" as primary genital area, anus, groin, inner thighs, or buttocks of a male or female being and the breasts of a female human being (S.C. Code Section 16-3-651). Therefore, no "intimate part" was alleged to have been touched in count three of the indictment. As a

result the jury could not infer intent from the actions of the Defendant. Merely to kiss the child on the mouth and not show intent does not prove the elements of criminal sexual conduct with a minor third degree.

II. DID THE COURT LACKED SUBJECT MATTER JURISDICTION TO CHARGE THE JURY THAT THEY COULD FIND ASSAULT AND BATTERY SECOND AS A LESSOR INCLUDED OFFENSE CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE THIRD DEGREE?

The Court lacked subject matter jurisdiction to convict the Defendant of Assault and Battery in the Second Degree. Assault and Battery in the Second Degree adds an additional element to the CSC 3rd and thus is not a lessor included offense of CSC 3rd. To be a lessor included offense, the lessor offense must not contain an additional element not found in the original offense. A&B 2nd requires an injury or offer of an injury. The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." State v. Watson, 349 S.C. at 375, 563 S.E.2d at 337 (citation omitted). "If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997) (quoting State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995)). To that end, under any circumstance, if a person can commit the greater offense without being guilty of the purported lesser offense, then the latter is not a lesser included offense. State v. Parker, 344 S.C. 250, 256, 543 S.E.2d 255, 258 (Ct. App. 2001). However, even if the elements of the greater offense do not include all the elements of the lesser offense, we may still construe the lesser offense as a lesser included offense if it "has traditionally been considered a lesser included offense of the greater offense." Watson, 349 S.C. at 376, 563 S.E.2d at 338. "A person commits the offense of assault and battery in the second degree if person unlawfully injures

another person, or offers or attempts to injure another person with the present ability to do so, and:...." Nowhere in the CSC 3rd with a minor statute is an injury or offer of an injury an element of the offense. Thus the Court lacked subject matter jurisdiction to send A&B 2nd to the jury for their consideration. It is well established that subject matter jurisdiction cannot be consented to by the parties to the action. South Carolina appellate courts have repeatedly announced that trial courts lack subject matter jurisdiction over pleas and convictions that are not properly indicted. See, e.g., State v. Ellison, 586 S.E.2d 596, 597 (S.C. Ct. App. 2003) ("it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if at all, of the particular offense charged in the bill of indictment") (quoting State v. Cody, 186 S.E. 165, 167 (S.C. 1936)).The Court either has subject matter jurisdiction or it does not have it. Here, the trial court lacked subject matter jurisdiction to instruct the jury that it could consider assault and battery second as a lessor included offense of criminal sexual conduct with a minor third degree.

DID THE TRIAL COURT COMMIT ERROR BY ADMITTING EVIDENCE OF PRIOR BAD ACTS?

At the November 2, 2017 pretrial hearing to determine the admissibility of prior bad act evidence, the state sought to introduce the following "bad acts" of the appellant:

1. During spring break of 2013, the defendant reached under the victim's nightgown and touched the victim on her vaginal area. The victim did not tell anyone until after several months later when she told her grandmother. Grandmother spoke with the victim's aunt who in turn told the defendant that this behavior was inappropriate and made victim uncomfortable.

2. Between 2013 and 2015 the defendant kissed victim on the back of her neck. This incident was witnessed by the victim's aunt who confronted the defendant, informed him that his behavior was inappropriate and made victim uncomfortable. She asked the defendant to refrain from such behavior.

3. Between 2013 and 2015 the defendant touched victim's legs and thighs making victim uncomfortable.

4. Between 2013 and 2015 the Defendant showed the victim pictures of models from Victoria Secret catalog. He told the victim that this was how he wanted the victim to look when she grow up.

5. Between 2013 and 2015 the defendant offered to buy victim revealing bathing suit.

6. Around 2014 the defendant touched victim's leg under the table. This incident was witnessed by victim's grandmother who notified victim's aunt. Aunt told the defendant that this type of behavior made victim uncomfortable.

7. On or about December 26, 2015 the Defendant send the victim the text message "LUKUAMU," which stands for "Love You, Kiss You, Already Miss You." He also sent the victim a message "You're the bomb.com."

(R. pp. 13-14).

The prosecution sought to admit this evidence to portray the appellant to the jurors as a child molester in the hopes the jurors will convict him based on the prior bad act rather than the evidence presented at trial. "[P]ropensity would be an 'improper basis' for conviction." *Old Chiefs. U.S.,* 519 U.S. 172,182 (1997).

At the pretrial hearing, the trial Court 1 and 2 above but did not allow 3-7 to be admitted as prior bad acts pursuant to *Wallace*.

Appellant would show that the Court should have exclude all evidence of prior bad acts for the following reasons. First, the evidence is not admissible under Rule 404(b), SCRE. Second, if this Court determines this evidence admissible as an exception to Rule 404(b), then South Carolina's rule allowing admission of propensity evidence in child sexual abuse cases violates due process.

"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. The State has the burden of establishing one of these exceptions. If the Court determines the evidence to be admissible as an exception to Rule 404(b), then "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case." State v. Brooks, 341 S.C. 57, 62,533 S.E.2d 325,328 (2000). *See also* Rule 403, SCRE.

At the *in camera* hearing it is necessary to determine both the applicability of one of these exceptions to this rule and, if necessary to weigh the prejudicial effect and the probative value. *E.g.* State v. Wallace, 384 S.C. 428, 431-432, 683 S.E.2d 275,277 (2009) ("[A]fter an in camera hearing, the trial judge allowed Sister to testify that she was also sexually abused by respondent."); State v. Clasby, 385 S.C. 148, 152, 682 S.E.2d 892, 894 (2009) ("[T]he trial judge conducted an *in camera* hearing regarding the alleged prior bad act evidence.").

1. Rule 404(b).

The evidence offered by the Solicitor was not admissible under Rule 404(b) for three reasons. First, the evidence was not admissible under a traditional interpretation of Rule 404(b). Second, although the prosecution relied on State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) (charged offense and defendant's prior bad act of sexually

abusing victim's sister were sufficiently similar for evidence of the bad act to be admissible under Rule 404(b) to show common scheme or plan), there is substantial uncertainty about the continued validity of *Wallace.* Third, even if the Court finds this evidence to be admissible, the prejudicial effect of the evidence substantially outweighs the probative value.

A. The evidence is not admissible under a traditional interpretation of Rule 404(b).

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. 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. ***Both rules are grounded on the policy that character evidence is not admissible for pmposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.***

State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998) (internal quotations and citations omitted) (emphasis added). Traditionally, admissibility under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). *Lyle* and Rule 404(b) is ***not*** determined by similarity. Regarding the admissibility of prior crimes, our Supreme Court warned in *Lyle:* True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude. *Lyle*, 125 S.C. at 420, 118 S.E. at 808. "The substance of these common law rules has now been codified in" Rule 404, SCRE. *Nelson* , 331 S.C. at 6, (fn. 7), 501 S.E.2d at 718-19, (fn. 7). Under the traditional interpretation of the rule, "[i]f the

court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected." State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). *See also* State v. Fletcher, 379 S.C.17, 25 (fn. 3), 664 S.E.2d 480, 484 (fn. 3) (2008) ("Prior acts must be so intimately connected to the crimes charged that their introduction is appropriate to complete the story of the crime charged."); State v. Pagan , 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); State v. Timmons, 327 S.C. 48, 52,488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); *State v. Parker,* 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) ("noting that "a general similarity . . . [is] insufficient to support the common scheme or plan exception."); *State v. Johnson,* 293 S.C. 321,234, 360 S.E.2d 317, 319 (1987) (Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); *State v. Stokes,* 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ('The 'common scheme or plan' exception requires more than a mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted.").

The prosecution relied on the perceived similarities between the allegations and the prior bad acts as stated in her 404 Motion (R. pp. 4-108). The State relied on *Wallace, supra.*[1] In *Wallace,* by focusing on similarity, our Supreme Court departed

from the traditional interpretation of Rule 404(b).2 In Argument II(B), *infra,*

Appellant will explain why the continued validity of *Wallace* is in question. However, even under *Wallace,* prior bad act evidence is not automatically admissible. *E.g. State v. Fonseca* , 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011) ("The Court of Appeals properly held that the circuit court erred in permitting the State to introduce evidence of the 2001 incident, and properly summarily disposed of the State's additional sustaining ground.").

Wallace requires "the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of

1. The defendant in *Wallace* did not challenge the admission of the prior bad act evidence as a violation of due process. *See* Argument III, *infra.*
2. At least one state court has returned to the traditional application of Rule 404(b) in sexual abuse cases. *Lannan v. State,* 600 N.E.2d 1334, 1339 (Ind.,1992) ("We hasten to add that abandoning the depraved sexual instinct exception does not mean evidence of prior sexual misconduct will never be admitted in sex crimes prosecutions . It means only that such evidence will no longer be admitted to show action in conformity with a particular character trait. It will continue to be admitted, however, for other purposes such as proof of motive , opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.").

coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery." *Wallace,* 384 S.C. at 433-34, 683 S.E.2d at 278. Applying these factors, the prosecution cannot meet its burden of proof. Only some of the factors are similar:

Event	*alleged incident*	*similarity*
Spring break 2013	**Under nightgown/vaginal area. Told Grandmother several months later.**	**No accusation in the Warrants, statements to police or counselor about touching of the vaginal area**
Between 2013-2015, Defendant kissed alleged victim on the back of the neck	**Kissing on the back of the neck**	**No accusation of kissing on the neck**
Between 2013 and 2015 touched legs	**Touched alleged victims legs making her uncomfortable**	**No charges of improper touching legs**
Between 2013 -2015 showed pictures	**Victoria's Secrets picture were shown to the alleged victim**	**No other accusation of photos shown**
Between 2013-2015 bathing suit	**Offered to buy alleged victim a revealing bathing suit**	**No other accusations of offers to pay or buy things for the alleged victim**
December 26, 2015 text Message	**Text message sent LUKUAMU**	**No allegations of improper messaging**

If the suspicious expansion of the incident dates is excluded, only some similarities exist. Even considering this suspect evidence, the majority of the evidence is dissimilar. Courts have strictly required similarities for all the *Wallace* factors. *E.g. State v. Taylor* , 396 S.C. 193, 202, 720 S.E.2d 522, 526-527 (Ct. App. 2011) Turning to the *Wallace* factors, (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."In sum, with the exception of the relationship between the victim and perpetrator, the State cannot prove any of the other *Wallace* factors. After considering the *Wallace,* factors the

court found incident one and two admissible (November 2, 2017, Tr. p 81, lines 1-25, p.82, lines 1-25, p. 83, lines 1-11). Incident one occurred when the victim was on spring break in 2013 (November 2, 2017 Tr. p.36, lines 6-25). At the pretrial hearing the State sought to introduce this evidence "...and the reason why we want to introduce it is because he was told don't do it and yet he kept on. I guess he continued his behavior (November 2, 2017 Tr. p. 38, lines 18-24). The appellant would show that admitting the this prior bad act was in error because admitting it because to show the appellant was warned is not admitting to prove a common scheme or plan.

2. Uncertainty about the continued validity of *State v. Wallace.*

Because the composition of our Supreme Court has changed, the continued validity of *Wallace,* is uncertain. There is a reasonable probability there are sufficient votes on the current court to overturn *Wallace.*

Justice Pleicones dissented in *Wallace,* noting our Supreme Court's "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." *Wallace,* 384 S.C. at 435-36, 683 S.E.2d at 279. Chief Justice Pleicones is now off the Supreme Court. *See State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009) (Pleicones J. dissenting) ("For the reasons given in my dissent in *State v. Wallace* . . . I respectfully dissent.").

Justice Burnett, who authored *Wallace.* and Justice Waller, who voted with the

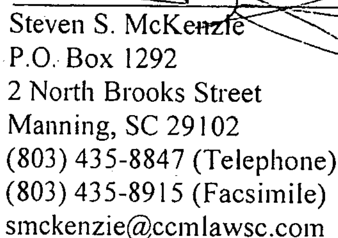
majority m *Wallace,* have retired from the Court. They have been replaced by Justices Hearn and Kittredge. It is reasonable to believe Justice Hearn would vote to overrule the Supreme Court's opinion that reversed the Court of Appeals opinion she authored in *State v. Wallace,* 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005) . Based on his prior, scholarly opinion rejecting propensity evidence, it is reasonable to believe Justice Kittredge would vote to ove1rule *Wallace. See State v. Tuffour,* 364 S.C. 497,504,613 S.E.2d 814, 818 (Ct. App. 2005) ("The appellate courts of this state have unwaveringly adhered to the rule of exclusion of prior bad act evidence to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence.") *vacated by State v. Tuffour,* 371 S.C. 511,641 S.E.2d 24 (2007).

Justices, Heam, and Kittredge, therefore, could provide the necessary votes to overturn *Wallace.* The Defendant, therefore, believes it is likely our Supreme Court will eventually adopt the Court of Appeals opinion in *Wallace.*

Conclusion

For the above mentioned reasons the appellant would respectfully request that the appellant's sentence be vacated and his case remanded for a new trial.

Respectfully submitted,



Steven S. McKenzie
P.O. Box 1292
2 North Brooks Street
Manning, SC 29102
(803) 435-8847 (Telephone)
(803) 435-8915 (Facsimile)
smckenzie@ccmlawsc.com

May 13, 2019