



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

July 8, 2020

The Honorable Scott B. Suggs
Clerk of Court, Darlington County
1 Public Sq Rm B4
Darlington SC 29532-3213

REMITTITUR

Re: The State v. Damyon Cotton
Lower Court Case No. 2013GS1601438, 2013GS1601439
Appellate Case No. 2017-002402

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,


DEPUTY CLERK

cc:

Robert Michael Dudek, Esquire
Lesley Anne Firestone, Esquire
Alan McCrory Wilson, Esquire
William Benjamin Rogers, Jr., Esquire
Lara Mary Caudy, Esquire
William M. Blich, Jr., Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Damyon Cotton, Petitioner.

Appellate Case No. 2017-002402

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27965
Heard June 13, 2019 – Filed May 6, 2020

AFFIRMED

Lesley A. Firestone, of Moore & Van Allen, PLLC, of Charleston; and Chief Appellate Defender Robert Michael Dudek and Appellate Defender Lara Mary Caudy, both of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General William M. Blich Jr., both of Columbia; and Solicitor William B. Rogers Jr., of Bennettsville, for Respondent.

PER CURIAM: In a trio of cases, this Court has been asked to reconsider the reach of the common scheme or plan exception to Rule 404(b), SCRE, particularly as it pertains to criminal sexual conduct cases and our decision in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). Today, in the first of the three opinions, we overrule *Wallace* and clarify the requirements to satisfy the common scheme or plan exception. See *State v. Perry*, Op. No. 27963 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12). In the second of the three opinions, using the new *Perry* framework, we affirm a pastor's criminal sexual conduct conviction in a case where the abuse of the victims was done in a method so unusual as to be unique. See *State v. Durant*, Op. No. 27964 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 64); see also *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984). Here, in the third of the three opinions, we reconfirm the continued viability of the common scheme or plan exception.

In this case, Petitioner met a young woman (the victim) online, picked her up in his car to take her on a date, and quickly became aggressive, forcing her to perform oral sex on him in the car. He then drove to a secluded location in the woods, threatened to shoot the victim, raped her outside the car, and drove her home. Petitioner was indicted for kidnapping and criminal sexual conduct in the first degree.

Over Petitioner's objections at trial, and pursuant to the common scheme or plan exception to Rule 404(b), SCRE, the trial court admitted testimony from a second victim (another young woman) who had suffered an essentially identical assault at Petitioner's hands. According to the second victim, Petitioner met her online, picked her up in his car to take her on a date, and quickly became aggressive, hitting her and forcing her to perform oral sex on him in the car. He then drove to a secluded location in the woods, raped the second victim outside the car, and drove her home. Notably, during the assaults, both victims attempted to dissuade Petitioner from raping them by offering excuses as to why intercourse with them would be undesirable: one claimed she was menstruating, and the other claimed she was already pregnant and had a sexually transmitted disease. In both cases, Petitioner stated he did not care and would "fix that," putting on a condom and continuing with the rape.

Petitioner was subsequently convicted of kidnapping and criminal sexual conduct in the first degree, and the court of appeals affirmed those convictions. *State v. Cotton*, Op. No. 2017-UP-356 (S.C. Ct. App. filed Sept. 6, 2017).

Using the new framework set forth in *Perry*, we find the admission of the second victim's testimony satisfied the requirements of Rules 404(b) and 403, SCRE. Because there was no abuse of discretion in the admission of the second victim's testimony, we affirm Petitioner's convictions and sentence.

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

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

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

The State, Respondent,

v.

Damyon Cotton, Appellant.

Appellate Case No. 2014-000395

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2017-UP-356
Submitted March 3, 2017 – Filed September 6, 2017

AFFIRMED

Lesley Anne Firestone, of Moore & Van Allen, PLLC, of
Charleston, and Chief Appellate Defender Robert
Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Vann Henry Gunter, Jr., both of
Columbia; and Solicitor William Benjamin Rogers, Jr.,
of Bennettsville, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The

admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show . . . the existence of a common scheme or plan. . ."); *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) ("To be admissible, a prior bad act must first be established by clear and convincing evidence."); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (noting this court is "bound by the trial court's factual findings unless they are clearly erroneous"); *id.* ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence."); *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009) ("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."); *id.* at 433, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)."); *id.* at 433-34, 683 S.E.2d at 278 (stating the factors a court should consider in weighing the similarities and dissimilarities between a prior bad act and the crime charged are "(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.* ("[T]hese factors are set out merely for guidance and . . . other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence."); *id.* ("A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility."); *Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 ("Evidence of other crimes . . . is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant."); *id.* ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case."); *id.* ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.").

AFFIRMED.

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.