

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals

Appeal from Greenville County
Court of General Sessions

RECEIVED

JUL 02 2018

The Honorable Edward W. Miller, Circuit Court Judge
S.C. SUPREME COURT

Opinion No. 2017-5503 (S.C. Ct. App. filed 7/26/17)
Appellate Case No. 2017-001965

THE STATE,

RESPONDENT,

v.

WALLACE STEVE PERRY,

PETITIONER.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The Court of Appeals correctly found the trial judge properly admitted evidence of Petitioner's prior sexual abuse of his step-daughter where the testimony of the witness constituted evidence of a common scheme or plan due to the significant similarity to the testimony of Victim 1 and Victim 2, including the age of the victims when the abuse occurred, the relationship between Petitioner and his victims, the location where the abuse occurred, the use of threats, and the manner in which the abuse occurred, and where the probative value was not substantially outweighed by the risk of unfair prejudice.

II.

The Court of Appeals correctly found the trial judge properly overruled Petitioner's objection to Dr. Henderson's testimony where the full context of the testimony reveals that Dr. Henderson was providing permissible medical testimony concerning normal findings in cases involving sexual abuse. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Petitioner's conviction.

STATEMENT OF THE CASE

Petitioner was indicted at the October 2012 term of the grand jury for Greenville County for two counts of criminal sexual conduct with a minor in the first degree (2012-GS-23-08496 & 2012-GS-23-08498) and two counts of criminal sexual conduct with a minor in the second degree (2012-GS-23-08495 & 2012-GS-23-08497). Petitioner proceeded to a trial by jury from December 1-3, 2014, in Greenville, South Carolina. At the conclusion of trial, Petitioner was found guilty as indicted. He was sentenced by the Honorable Edward W. Miller to imprisonment for a term of thirty years on each count of criminal sexual conduct in the first degree and imprisonment for a term of twenty years on each count of criminal sexual conduct in the second degree, with all sentences running concurrently.

On July 26, 2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. State v. Perry, 420 S.C. 643, 803 S.E.2d 899 (Ct. App. 2017). Petitioner subsequently submitted a petition for rehearing, which was denied on August 24, 2017. Petitioner timely submitted a Petition for Writ of Certiorari, which was granted on April 19, 2018. On May 22, 2018, Petitioner filed his Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner and Mother had two sets of twins, Victim 1 and Sister, and Victim 2 and Brother. App. pp. 51-52. Petitioner and Mother began dating in 1993 and separated in 2000. App. pp. 52-53. At the time of their separation, Victim 1 and Sister were five years old and Victim 2 and Brother were three years old. App. p. 54. Upon their Separation, Petitioner moved to Greenville and Mother remained in Spartanburg. Mother and Petitioner worked out a custody agreement whereby Mother had custody of the children during the week and Petitioner had custody on the weekends. App. p. 54. In March of 2012, Victim 2 disclosed that Petitioner was sexually abusing her. App. p. 55. Victim 2 told Mother the abuse occurred at Petitioner's apartment when they had their visitations with him on the weekends. App. p. 55. After Victim 2 disclosed Petitioner's abuse, Victim 1 told Mother she had also been sexually abused by Petitioner. App. p. 57. Mother decided to wait to call DSS until Victim 1 and Victim 2 graduated because they were involved in activities at school and she did not want anything to interfere with that. App. pp. 56-57. Following a school play, Mother made the decision to contact DSS. App. p. 59. In May of 2012, Mother was later contacted by officers from the Greenville Police Department. App. pp. 60-61.

Victim 1 was born in 1994. App. p. 110. Victim 1's first memory of Petitioner sexually abusing her occurred on a Friday night when she went into Petitioner's bedroom to watch television. App. p. 114. Victim 1 was seven years old at the time. App. p. 115. Petitioner entered the bedroom and told her to move over in the bed. App. p. 115. Victim 1 testified Petitioner then stuck his fingers down her pants. App. p. 115. Petitioner told her if she told anyone she would get in trouble and she would not be able to see her mother anymore. App. p. 115. After the first incident, the abuse began occurring every weekend. App. p. 115. Victim 1 recounted, "It was

every weekend, both Saturday and Sunday, early mornings around 5 or 6 o'clock in the morning. He would come in there and lay in the bed. And he would finger me. Just like any other time, he would threaten that we'd be taken or we'd get in trouble." App. pp. 115-16. Victim 1 shared an air mattress with Victim 2 and Sister. App. pp. 113-14. Victim 1 stated that she never said anything or made loud noises during the abuse because she was afraid of waking her sisters up. App. p. 116.

When the family moved to a new apartment, Petitioner continued to digitally penetrate Victim 1. App. p. 117. Victim 1 also recounted two occasions where Petitioner orally penetrated her. App. p. 117. Victim 1 testified that the only weekends Petitioner did not sexually abuse her were when she was on her period or when Petitioner had a girlfriend. App. p. 120. The abuse stopped when Petitioner moved to Columbia. App. p. 120. Victim 1 was fifteen years old at the time the sexual abuse stopped. App. p. 137. Victim 1 testified that she tried to tell Sister about Petitioner's abuse on one occasion but she responded, "just be quiet. Just be quiet. I don't want to hear it." App. p. 121. Victim 1 testified she believed that if it was hard for Sister to hear, it would also be hard for Mother to hear. App. p. 121.

Victim 2 was born in 1996. App. p. 70. Victim 2 recounted the first occasion when Petitioner sexually abused her, stating:

I remember one night I had a nightmare. I went to my dad's bedroom. I thought he would comfort me like a dad should. I remember waking up with my underwear on the floor. I wasn't sure if I just turned too hard or if I tossed and turned. And then it kept happening and then it happened a lot. It happened probably like on one hand. Then I woke up. It was one early morning. He had his finger in my vagina.

App. pp. 74-75. Victim 2 testified that the abuse occurred less than five times. App. p. 75. All the instances of abuse occurred at home in the early hours of the morning. App. p. 76. Victim 2 could not recall what specific age she was when Petitioner abused her, however she recalled the

abuse occurred before she was in the sixth grade. App. p. 75. Petitioner told Victim 2 that if she ever told anyone about the abuse, she and her sisters would be the ones who got in trouble and they would be taken away from their mother. App. p. 75. Victim 2 recounted another specific incident where Petitioner entered her bedroom, stating:

He would come in our bedroom because he said [Brother] was kicking him and he couldn't sleep. So he came in our bedroom early in the morning and he laid down beside [Victim 1]. I remember hearing her saying, Dad, stop, get away from me. Then I would feel - - I wouldn't feel him pull her towards him, but I could just sense it by the force that was going on in the bed.

App. p. 77-78. Victim 2 later told Victim 1 she knew what Petitioner was doing to her. App. p. 78. Victim 2 eventually decided to tell Mother about the abuse following a powerful youth church service. App. p. 81. Victim 2 previously disclosed the abuse to her youth pastor who encouraged her to tell her Mother immediately. App. p. 83. Victim 2 was sixteen years old at the time she finally told Mother about the abuse. App. p. 85.

Detective Mary Ashley Thomas of the Greenville Police Department became involved in Petitioner's case after the family made a report to DSS. App. p. 139. The DSS case worker then forwarded the case to the Greenville Police Department. App. p. 139. As part of her investigation, Detective Thomas interviewed both Victim 1 and Victim 2 at the Law Enforcement Center in downtown Greenville. App. p. 141. After completing her investigation, Detective Thomas obtained arrest warrants for Petitioner. App. p. 147.

Brandy Newcomer also testified at trial. App. pp. 202-36. Petitioner was formerly Newcomer's stepfather. App. p. 215. Petitioner and Newcomer's mother married when Newcomer was five years old and separated when she was fourteen. App. pp. 221-22. Newcomer described an incident when she was nine years old when Petitioner entered her bedroom, forced his hand into her pajamas, and inserted a finger in her vagina. App. p. 223. Following the

incident, Petitioner told her not to tell anyone because no one would believe her and it would hurt her family. App. p. 224. Petitioner digitally penetrated her on around five occasions. App. p. 225. On one occasion, the abuse progressed to oral sex by Petitioner. App. p. 226. Petitioner also forced Newcomer to bathe in front of him on one occasion. App. p. 226. Aside from the incident in the bathtub, all of the instances of abuse occurred in Newcomer's bedroom. App. p. 226. Newcomer testified the abuse continued until she was fourteen years old. App. p. 225. When she was fourteen, Newcomer told her mother about the abuse. App. p. 225. After Newcomer disclosed the abuse, her mother divorced Petitioner and the family moved away from Spartanburg. App. p. 226.

ARGUMENT

I.

The Court of Appeals correctly found the trial judge properly admitted evidence of Petitioner's prior sexual abuse of his step-daughter where the testimony of the witness constituted evidence of a common scheme or plan due to the significant similarity to the testimony of Victim 1 and Victim 2, including the age of the victims when the abuse occurred, the relationship between Petitioner and his victims, the location where the abuse occurred, the use of threats, and the manner in which the abuse occurred, and where the probative value was not substantially outweighed by the risk of unfair prejudice.

Relevant Facts

Prior to trial, the State indicated that it had a Lyle¹ motion. App. p. 21. The State then proffered the testimony of Brandy Newcomer. App. pp. 24-33. Following Newcomer's testimony, the trial judge indicated he would rule at a later time. App. p. 40. The trial judge subsequently found, "the State has shown the prior bad act by clear and convincing evidence that it is probative. It does fit under the 404(b) exception and I'm going to allow it." App. p. 162.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). An abuse of discretion occurs when the trial judge's conclusions either lack

¹ State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). “If there is any evidence to support the admission of bad act evidence, the trial judge’s ruling cannot be disturbed on appeal.” State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008).

Discussion

Petitioner asserts the trial judge erred in finding Newcomer’s testimony admissible as evidence of a common scheme or plan. Petitioner also contends the trial court erred in finding Newcomer’s testimony more probative than prejudicial under Rule 403, SCRE. These arguments lack merit, as there was a close degree of similarity between Petitioner’s prior sexual abuse of Newcomer and his sexual abuse of Victim 1 and Victim 2. Furthermore, the evidence of the prior bad act had significant probative value that was not substantially outweighed by the risk of unfair prejudice.

Evidence of Petitioner’s Prior Sexual Abuse of Brandy Newcomer was Admissible to Show a Common Scheme or Plan

Generally, evidence of prior bad acts is not admissible to prove a defendant’s guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible “to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as “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”). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, this Court has instructed:

Such evidence is relevant because proof of one is strong proof of the other. 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. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Although not a complete list, in this type of case, 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 charge: (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. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted).² Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. “Requiring a ‘connection’ between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis.” Id. at 434, n. 5, 683 S.E.2d at 278.

In the current case, all five of the factors enumerated in Wallace weigh in favor of admitting the evidence due to the substantial degree of similarity between Petitioner’s abuse of Victim 1 and Victim 2 and his abuse of Brandy Newcomer. As to the first factor, the age of the victims when the abuse occurred, all of the abuse began when the victims were at a pre-pubescent age. In her direct testimony, Victim 1 testified she was around seven when the abuse began.³ App. p. 115, 120. Victim 2 had difficulty determining what her age was when the abuse occurred, but testified it was before she was in the sixth grade. App. p. 75. Newcomer testified the first instance of abuse was when she was nine years old. App. pp. 222-23. All three victims were pre-pubescent. The ages of the victims, even accounting for the minor confusion Victim 1 and Victim 2 had in determining their age when the abuse began, are all within a few years of

² Our State’s appellate courts have upheld the admission of Lyle evidence in factual scenarios exceptionally similar to the current case long before this Court’s opinion in Wallace. See State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1999) (holding evidence of common scheme or plan was admissible where all victims were foster children of defendant, ages of victims were similar, and sexual acts were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (holding evidence of common scheme or plan was admissible where both victims were defendant’s biological daughters, ages of victims were similar, and sexual acts were similar); State v. Henry, 315 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993) (finding evidence of defendant’s sexual abuse of another one of his step-daughters was admissible where the victims experienced similar acts of abuse at the hands of the defendant that occurred in the same places during the same time frame).

³ On cross-examination, Defense Counsel asked Victim 1, “And you testified earlier that you were accusing your father of starting to touch you inappropriately at age 5?” App. p. 126. Victim 1 replied, “Yes ma’am. I think there is some kind of blockage there from the ages of 5 to 7. I tried to block it out for so long. I really can’t remember.” App. p. 127. At Defense Counsel’s further urging, Victim 1 stated she believed Petitioner started touching her at age 5. App. p. 127.

each other. The abuse also continued into the victims' preteen and early teenage years. The ages of Petitioner's victims, were thus similar at the time of the abuse.

As to the second factor, the relationship between the victims and the perpetrator, the relationship between Petitioner and each victim is strikingly similar. Petitioner was the biological father of Victim 1 and Victim 2 and the stepfather of Newcomer. Petitioner's victims all shared the unfortunate circumstance of having him as a father-figure in their life.

As to the third factor, the location where the abuse occurred, the sexual abuse occurred within the home. Victim 1 and Victim 2 testified that the abuse occurred in either their bedroom or in Petitioner's bedroom, and Newcomer testified the abuse occurred in her bedroom on every occasion except for one instance where Petitioner watched her bathe.

As to the fourth factor, the use of coercion or threats, Petitioner threatened all three victims in order to prevent them from disclosing the abuse to others. Petitioner told Victim 1 that if she told anyone she would get in trouble and she would not be able to see her mother anymore. Petitioner told Victim 2 that if she ever told anyone about the abuse, she and her sisters would be the ones who got in trouble and they would be taken away from their mother. Petitioner told Newcomer not to tell anyone because no one would believe her and it would hurt her family. As was correctly noted by the Court of Appeals, all of the threats used by Petitioner carried the common theme of harm to the family unit. The use of threats by Petitioner in his abuse of Victim 1, Victim 2, and Newcomer thus demonstrates further similarity between the prior bad act and the charged offense.

As to the fifth factor, the manner of the occurrence, the type of sexual battery was similar for Victim 1, Victim 2, and Newcomer. The primary manner of abuse for all three victims was digital penetration. Petitioner also engaged in oral sex with both Victim 1 and Newcomer. In his

Petition, Petitioner attempts to differentiate the sexual assaults on Victim 1 and Victim 2 and Newcomer by asserting the abuse of Newcomer progressed to actual sexual intercourse while Petitioner never had sexual intercourse with Victim 1 or Victim 2. Prior to the hearing on the Lyle motion, the solicitor stated with respect to Newcomer, "Of course there was digital penetration, oral sex. It did progress into actual vaginal/penile penetration. We understand that that portion of her testimony of her abuse could not be admissible because it goes beyond the scope of similar." App. p. 23. Aside from the solicitor's statements, there is no clear testimony from Newcomer during the proffer or during her direct testimony at trial that there was penile penetration.⁴ Newcomer's testimony during the proffer as well as her testimony during direct examination focused on digital and oral penetration, the exact acts Petitioner was accused of committing in this case. Even if Petitioner's abuse of Newcomer progressed to sexual intercourse, the abuse of Victim 1 and Victim 2 and Newcomer are still strikingly similar. If Petitioner did engage in sexual intercourse with Newcomer, it was merely the last step in a progression of abuse that included digital and oral penetration. Regardless of whether there actually was penile penetration, Newcomer's trial testimony consisted only of the identical acts of digital and oral penetration, thus there was no unfair prejudice to Petitioner.

In State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose that he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship

⁴ During the proffer, Newcomer testified, "One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left." App. pp. 28-29. It is unclear whether Newcomer is referring to digital penetration or penile penetration. The Court of Appeals correctly determined Newcomer never explicitly testified the abuse progressed to intercourse. See Perry, 803 S.E.2d at 908-09; Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.").

gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner – over the course of two years – reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim’s testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner – over the course of two months – hugged her and fondled her breasts while she was baby-sitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. Id. at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness’ testimony regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan but found any testimony related to the dissimilar acts was inadmissible. Id. at 582, 608 S.E.2d at 467. Following the trial, Hubner appealed his convictions and asserted the prior bad act evidence should not have been admitted. Id. at 575, 608 S.E.2d at 464. On appeal, the Court of Appeals reversed Hubner’s convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. Id. at 585, 608 S.E.2d at 469. However, this Court subsequently reversed the decision of the Court of Appeals and affirmed Hubner’s convictions after finding the trial judge properly admitted the evidence of the prior sexual assaults. State v. Hubner, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009). See also State v. Hallman, 298 S.C.

172, 379 S.E.2d 115 (1999) (holding evidence of common scheme or plan was admissible where all victims were foster children of defendant, ages of victims were similar, and sexual acts were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (holding evidence of common scheme or plan was admissible where both victims were defendant's biological daughters, ages of victims were similar, and sexual acts were similar); State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013) (holding evidence of common scheme or plan was admissible where the prior bad act testimony was sufficiently similar to the crime charged and was not too remote nor was the evidence's probative value substantially outweighed by the danger of unfair prejudice).

All five of the aforementioned factors demonstrate the significant degree of similarity between Petitioner's prior abuse of Newcomer and Petitioner's abuse of Victim 1 and Victim 2.⁵ The trial judge properly admitted the prior bad act evidence due to the similarities outweighing any potential dissimilarities.

The Probative Value of the Prior Instances of Sexual Abuse by Petitioner Was Not Substantially Outweighed by the Threat of Unfair Prejudice.

Evidence of prior bad acts must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999). Prejudicial evidence is still proper unless it amounts to undue or unfair prejudice. See State v. Beck, 342 S.C. 129, 136-37, 536 S.E.2d 679, 683 (2000) ("We find that evidence of the [prior bad act], although certainly prejudicial to

⁵ Under the circumstances of this case, the passage of time did not weaken the logical connection between the instances of abuse or suggest a common scheme or plan did not exist. Instead, the eight to ten year gap between Petitioner's abuse of Newcomer and Victim 1, and the roughly fifteen years between the abuse of Newcomer and Victim 2, is explained by the fact that Petitioner did not have a child victim of a pre-pubescent age that he was in a familial relationship with in the home until Victim 1 and Victim 2 reached a certain age. Appellant thus had no opportunity to carry out his plan until Victim 1 and Victim 2 were old enough. Temporal gaps similar to the gap in the current case have been approved in a number of cases. See Scott, 405 S.C. at 509, 748 S.E.2d at 247 (trial court did not abuse its discretion in admitting evidence of prior bad act occurring eleven to twenty years prior to crimes charged); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 440, (Ct. App. 1994) (prior bad acts occurred seven to eight years prior to the charged offense).

Appellant, is not unduly so under our previous decisions.). “‘Unfair prejudice’ within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). “Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible.” State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (2004). “Stated differently, evidence which is ‘logically relevant to establish a material element of the offense charged is not to 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)).

Due to the extreme similarities between the prior bad acts and the charged offense, the evidence had significant probative value. The evidence of prior instances of Petitioner’s sexual misconduct where he previously performed the same sexual acts with another child he was in a father figure role with enhances the probative value of the evidence as to outweigh its prejudicial effect. See State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009) (finding prior bad act evidence constituted the archetypal common scheme or plan and that the lack of physical evidence made the prior bad act testimony extremely probative to establish the charged offense). There were striking similarities in regards to the age of the victims when the abuse occurred, the manner in which the abuse occurred, the nature of the abuse, the timing of the abuse, the location of the abuse, and other important factors. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 (“Here, the

similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity.”). Any potential prejudicial effect of the evidence comes from the evidence’s legitimate probative value, and that prejudicial effect does not substantially outweigh the evidence’s probative value. The trial judge, thus, properly declined to exclude the evidence under Rule 403, SCRE. This Court should deny certiorari.

II.

The Court of Appeals correctly found the trial judge properly overruled Petitioner’s objection to Dr. Henderson’s testimony where the full context of the testimony reveals that Dr. Henderson was providing permissible medical testimony concerning normal findings in cases involving sexual abuse. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Petitioner’s conviction.

Relevant Facts

Dr. Nancy Henderson is a pediatrician employed with the Greenville Health System. App. p. 175. Dr. Henderson conducted an examination of Victim 1 and Victim 2 at the Child Advocacy Center in Spartanburg. App. p. 179.

Prior to physically examining Victim 2, Victim 2 shared details with Dr. Henderson concerning what the abuse entailed. App. p. 183. Based on Victim 2’s description of the abuse, Dr. Henderson performed a head-to-toe physical exam and conducted tests related to concerns for sexually transmitted infections. App. p. 183. Dr. Henderson testified that during such an exam she is looking specifically at the genital area for any kind of tears, scars, or discharge. App. p. 184. Dr. Henderson testified that based on what Victim 2 shared regarding the particular sexual assault, she was looking for all of the aforementioned signs during the physical

examination. App. p. 184. The Solicitor then asked, “Based on what [Victim 2] shared with you, did you expect to find any indications of injury.” App. p. 184. Dr. Henderson responded, “It would have been very unlikely based on the information that she had shared to find anything on the exam.” App. p. 184. Dr. Henderson elaborated:

At the time that I saw her, she was 16. The incidents had happened at least three years prior. So the genital area has incredibly good blood supply and even small tears or even larger tears can heal very, very quickly. So with there being years delay between the last incident and the time of the exam, it would make it unlikely to find something on the exam. Another reason that what she had shared happened often never finds any evidence on exam. So even if I had seen her earlier, the likelihood of seeing a trauma, permanent trauma related to that is extremely uncommon.

App. pp. 184-85.

Dr. Henderson testified that aside from a minor amount of vaginal discharge, Victim 2’s exam was normal. App. p. 185. The Solicitor then asked what “normal” meant. App. p. 185. Dr. Henderson responded:

Normal means that there were no tears, no scars, uh, and there were no specific findings on her exam that in and of itself would have linked to allegations of abuse. But in light of what she had shared with me and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case.

App. p. 185. The Solicitor then asked, “So in your opinion, were your findings consistent with [Victim 2] having experienced sexual abuse?” Dr. Henderson responded, “Yes.” App. p. 185. Defense Counsel objected, arguing that the testimony amounted to improper vouching by the witness. The trial judge overruled the objection, ruling, “I think she testified that your findings were consistent. So I - - it’s close, but I’m going to overrule your objection.” App. p. 185.

Dr. Henderson’s examination of Victim 1 also yielded normal results. App. p. 187. The Solicitor asked, “Based on what [Victim 1] described to you with respect to the abuse that she experienced, did you expect to find any injuries to [Victim 1]?” App. pp. 187-88. Dr. Henderson

responded, “A normal exam would be quite common almost the majority of time with those type of allegations.” App. p. 188. The Solicitor then asked, “And with respect to [Victim 1], were your findings during that examination consistent with the possibility that she had also experienced sexual abuse.” App. p. 188. Dr. Henderson replied, “Yes, a normal exam would be consistent with those types of findings, with those allegations that she had made.” App. p. 188.

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 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); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). “A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Discussion

Petitioner asserts Dr. Henderson improperly commented on the veracity of Victim 2’s testimony. In his brief to the Court of Appeals, Petitioner argued, “There is no way to interpret Dr. Henderson’s testimony other than she believed Daughter Three’s⁶ allegations were true

⁶ “Daughter 3” in Petitioner’s brief is the same as “Victim 2” in the Brief of Respondent.

despite the fact that Daughter Three had a completely normal examination.” App. pp. 320-21. In his Brief of Petitioner to this Court, Petitioner seems to acknowledge the comment is susceptible to multiple interpretations, but nevertheless contends his interpretation of the comment must be the correct one. See Brief of Petitioner p. 14. This argument lacks merit, as Dr. Henderson’s testimony was merely stating that despite the fact her examination of Victim 2 revealed no injury, that finding could still be consistent with sexual assault due to the substantial time period between the assault and the examination. Even if Dr. Henderson’s comment was deemed inappropriate, any error is insubstantial and not sufficiently prejudicial to warrant a reversal of Petitioner’s conviction.

It is improper for an expert to comment on the veracity of a child’s allegations of sexual abuse. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Looking at the full and proper context of Dr. Henderson’s testimony, it is clear that she was not commenting on the veracity of Victim 2’s testimony. Instead, Dr. Henderson provided background medical knowledge on what a “normal” examination would look like in a situation where sexual assault occurred years prior to the examination. Dr. Henderson’s statement, “But in light of what she had shared with me, and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case” related directly to the absence of any physical injury due to the delay in disclosure. Dr. Henderson’s statement was not indicating that she believed Victim 2’s allegations; Dr. Henderson was merely indicating that an absence of sexual injury can still be consistent with sexual assault given the delay in disclosure, that tears to the vagina tend to heal very quickly, and that physical exams often do not reveal injuries from digital and oral penetration. When the trial judge ruled, “I think she testified that your findings were consistent. So I - - it’s close, but I’m going to overrule your objection,” he recognized what the testimony

truly meant when viewed in the context it was made and knew it was not improper even though it could appear to be so when stripped of context.

In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the United States Supreme Court dealt with a question of whether remarks made by the prosecutor during closing argument, in the context of the entire trial, were sufficiently prejudicial to violate the respondent's due process rights. In upholding the respondent's conviction, the Court emphasized, "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Id. at 647. While Donnelly dealt with a closing argument issue, its logic is applicable to the current case. This Court should not infer that Dr. Henderson's testimony concerning what a "normal exam" was given the circumstances and whether a "normal" exam could still be consistent with sexual abuse was actually Dr. Henderson testifying she believed Victim 2's allegations. Instead, the full context reveals an intent to provide admissible expert medical testimony, not to bolster the credibility of the victims. Dr. Henderson's testimony, therefore, did not convey an improper or damaging meaning to the jury, and thus was not erroneously admitted. Cf Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("There is **no other way** to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful.") (emphasis added); State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2005) (finding the expert's recommendation that the defendant not be around Victim for any reason, could **only** be interpreted as the expert believing Victim's claim that the defendant sexually abused her) (emphasis added).

Even if this Court were to find that Dr. Henderson's testimony was an improper comment on the veracity of Victim 2's testimony, any error in the case is harmless. As a general rule, the

appellate court will decline to set aside a conviction due to insubstantial errors not affecting the result. Chavis, 412 S.C. at 109, 771 S.E.2d at 340. Determining whether an error is harmless depends on the circumstances of the particular case and no set rule governs this finding. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Instead, the materiality and any prejudicial character of the alleged error must be determined from its relationship to the entire case. Id. The comment complained of on appeal was rendered harmless by the explanation and context of the remainder of Dr. Henderson's testimony. Furthermore, Dr. Henderson's statement was isolated, vague, and offered no clear indication she believed Victim 2. Also, the comment was never mentioned again during the remainder of trial, and the solicitor made no reference to it during her closing argument. Dr. Henderson's testimony was therefore not sufficiently prejudicial to warrant a reversal of Petitioner's conviction, especially in light of significant strength of the testimony from the other witnesses. Petitioner's convictions and sentences should be affirmed.

CONCLUSION

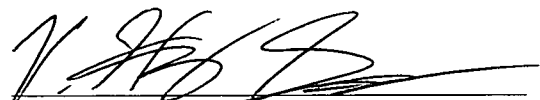
For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 2, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

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On Writ of Certiorari to the Court of Appeals

S.C. SUPREME COURT

Appeal from Greenville County
Court of General Sessions

The Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2017-5503 (S.C. Ct. App. filed 7/26/17)
Appellate Case No. 2017-001965

THE STATE,

RESPONDENT,

v.

WALLACE STEVE PERRY,

PETITIONER.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Kerri A. Rupert, Esquire, P.O. Box 6648, Columbia, South Carolina 29206, & Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 2nd day of July, 2018.


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