

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable Maite Murphy, Circuit Court Judge

JOHNNY TAMAR BROWN,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000738

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing the state to introduce evidence that appellant was listed on the sex offender registry and evidence of a prior bad sex act because the prejudicial value of this evidence viewed either separately or cumulatively outweighed any probative value.

STATEMENT OF THE CASE

Appellant Johnny Brown was found guilty of third degree criminal sexual conduct with a minor and two counts of first degree criminal sexual conduct with a minor per jury trial held during the April 2015 term of the Charleston County General Sessions Court before Judge Deadra L. Jefferson. Appellant was sentenced to LWOP on both of the first degree criminal sexual conduct convictions and fifteen years (concurrent) on the remaining third degree criminal sexual conduct conviction. App. 7-413. Charles Cochran represented petitioner at trial, and Debbie Herring-Lash appeared on behalf of the state. Appellant did not enjoy the benefit of a direct appeal in his case.

On March 29, 2016, appellant filed a PCR application with the Charleston County Office of the Clerk of Court. App. 415-421. On June 23, 2016, the respondent filed a return requesting that a PCR hearing be held in response to appellant's PCR action. App. 422-424. Appellant filed an Amended PCR application on December 3, 2017. App. 426-427.

A PCR hearing was convened on January 31, 2018, at the Charleston County Courthouse before Judge Maite D. Murphy. App. 428-463. Appellant was present at the PCR hearing and represented by James Kristian Faulk, and Assistant Attorney General Megan Harrigan Jameson appeared on behalf of the state. During the hearing, appellant alleged that trial counsel erred in failing to appeal his convictions and sentences and in failing to object to nurse Katherine Fabrizio's testimony as an expert witness in the case.

On April 9, 2018, Judge Murphy issued an Order granting appellant's request for a belated appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), but denied appellant's remaining allegations of ineffective assistance of trial counsel in the case. App. 465-479.

Appellant appealed Judge Murphy's Order. This petition follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." Clasby, 385 S.C. at 154, 682 S.E.2d at 895; see State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia*, the existence of a common scheme or plan. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

ARGUMENT

The trial judge erred in allowing the state to introduce evidence that appellant was listed on the sex offender registry and evidence of a prior bad sex act because the prejudicial value of this evidence viewed either separately or cumulatively outweighed any probative value.

At trial, the minor testified that in June 2013, (which was before her 13th birthday), a man named Squirt (appellant's moniker) entered her mother's house where she lived, and that while they were in her mother's bedroom, he began tickling her on the bed until she fell on her stomach, and at that time he pulled her pants to the side, got on top of her and put his private part in her "butt" and "tootsie" (vagina), and then fled. App. 64, l. 15-p. 79, l. 2, App. 86 l. 12-p. 89, l. 7. The minor also testified that when she was six or seven that appellant put his private parts in her "butt." App. 94, l. 16- p. 99, l. 3; App 111, l. 9 – p.114, l. 14.

PRIOR BAD SEX ACT EVIDENCE

With respect to the prior crime when the minor was six or seven and (2006 or 2007), the minor testified that appellant put his "private parts" in her "butt," and then appellant "left" Charleston. App. 94, l. 16- p. 99, l. 4; App. 111, l. 9 – p. 114, l. 14. The presumption was that appellant "left" Charleston for prison for committing a sex crime against either the minor in this case, or a crime against another unknown person. Defense counsel objected to this prior 2006/2007 prior bad sex act testimony described by the minor as prejudicial and inadmissible under 404(b) common scheme or plan, or under the motive/intent exception, or any other prior bad act exception. App. 99, l. 14-p. 108 l. 14. The Court ruled that the minor's claim as to what appellant allegedly did to her in 2006/2007 was admissible into evidence at trial. App. 108, l. 18- p. 110, l. 22.

In sex abuse cases, Rule 404(b) allows evidence of common scheme or plan to be admitted as proof of one being strong proof of the other, but admission is approved only if the similarities prove a connection between the prior act and the act for which a defendant is on trial, and the similarities outweigh the dissimilarities, and the probative value outweighs the prejudice. However, in appellant's case, there were no such similarities between one alleged act against the minor in 2006/2007 and the alleged act against the same minor in 2015, which meant there was no connection between the acts that would rise to a continuous cause of conduct that would support the common scheme or plan prior bad act exception. For example, the alleged sexual assault in 2006/2007 was at the minor's grandmother's house and involved anal sex whereas the alleged sexual assault in 2015 was at her mother's house and the act involved vaginal sex. Also, there must be a pattern referencing a continuous course of conduct under the common scheme or plan exception as well. State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (2003). In Tutton the Court held that there was no pattern showing a connection to support the common scheme or plan exception and found no common scheme due to the dissimilarities in the case where one alleged sex act was digital vaginal penetration and the prior bad that occurred four or five years before was an oral sex act. See State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), where the majority held the Court held that prior bad acts with the stepdaughters at the same age and inside the family home while the mother was absent satisfied the required similarities, but note the following dissent:

I respectfully dissent. In my opinion, our 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. Compare, e.g., *436 Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct. App. 1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice." State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005) vacated on other grounds 371 S.C. 511, 641

S.E.2d 24 (2007) *internal citations omitted*, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414 Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions, I believe that scrutiny is warranted.

Moreover, there was nearly a decade between the two events in the case at bar. Note State v. Hubner, 362 S.C. 572, 608 S.E.2d 463 (2005), where the prior sex act and the act for which the defendant was on trial occurred fourteen years apart; and therefore, the South Carolina Court of Appeals found dissimilarities and no continuous conduct to support a shared common scheme or plan, but the South Carolina Supreme Court reversed due the concurrence of common features in the sex acts. Hubner at 384 S.C. 436, 683 S.E.2d 279 (2009). Here, the trial judge erred in allowing the prior bad act that occurred in 2006/2007 to be admitted as evidence at the trial on the criminal sexual conduct charges that allegedly occurred in 2015 for which appellant was on trial.

Also, the prejudice in admitting the 2006/2007 evidence prejudiced appellant's case, primarily because the prior involved a sex crime as appellant was being tried on sex crimes. Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Even if prior crimes are considered under the Lyle¹ exceptions, nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, there is a heightened prejudice in

¹ Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

admitting a prior crime that is strikingly similar to the one for which the accused on trial because it suggests that appellant had the propensity to commit the similar crime charged. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, and leads to confusion of the issues of misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). The trial judge erred in allowing the 2006/2007 prior bad act as admissible evidence for the jury to hear at appellant's trial.

PRIOR BAD SEX ACT AS AN ELEMENT OF THE OFFENSE CHARGED

The State charged appellant with CSC with a minor in the first degree under S.C. Code Ann. §16-3-655 (A)(2), which reads as follows:

- (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
- (1) The actor engages in sexual battery with a victim who is less than eleven years of age; or
 - (2) The actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

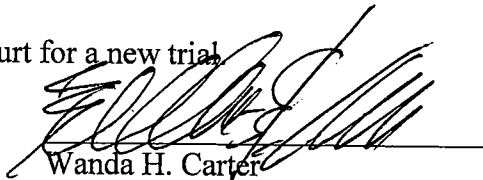
Prior to trial, defense counsel objected to the prejudicial impact of proof of the sex offender registry element found under section (A)(2) where appellant was included therein because this would have been clearly interpreted to mean that appellant probably committed a prior sex act that landed him on that list, which is in and of itself prejudicial, particularly since the jury was left to speculate as to whether it was an act connected to the minor for the CSC first offense for which he was on trial, or the minor on the CSC third offense for which he was also on trial or another unknown person altogether. App. 16, l. 12- p.25, l.5. App. 84, l. 15-25, App. p.

36, l. 20-25. The state confined its proof under that element to the extent that appellant was listed on the sex offender registry. App. 224, l. 22- p. 225, l. 6. Nonetheless, the prejudice was obvious and remained alive. Ultimately, the trial judge ruled that the sex registry proof was an element of 16-31 655(A)(2) and denied petitioner's motion that the same was excludable as prejudicial and a violation of due process. App. p. 80, l. 4-p. 86, l. 31, App. 106, l. 8- p. 110, l. 23. The trial court erred in allowing into evidence appellant's placement on the sex offender registry in 2006/2007 as an element of proof under the statute.

In the case of Old Chief v. United States, 519 U.S. 172 (1997), the Court held that the state's reliance on the defendant's prior indictment for assault causing serious bodily injury to establish a possession of a firearm by one with a prior felony conviction was unnecessary to prove the gun charge and prejudicial to the defendant in violation of Rule 403 of the Federal Rules of Evidence. Note further that in State v. James, 355 S.C. 25, 538 S.E.2d 745 (2003), the Court held that the State's introduction of seven prior burglary crimes to prove first degree burglary outweighed the probative value. The rationale is the same here. Under a balancing test under Rule 403, SCRE, the prejudicial value of the appellant's sex registry placement evidence, which formed a clear suspicion that appellant might have been a serial sex assaulter, coupled with prior bad sex act evidence, which did not pass admissibility under the common scheme or plan test under the similarities test or the continuous acts test, all meant that the cumulative compilation of this accumulated evidence of appellant's past outweighed any probative value and undoubtedly denied appellant's right to a fair trial. Furthermore, note that there was another charge (CSC 3rd offense with a minor) for which appellant was on trial also exacerbated speculation of appellant's portrayal as a serial sex assaulter. The lower court erred in admitting both pieces of evidence in the case.

CONCLUSION

Based on the foregoing arguments, appellant's convictions and sentences should be reversed and his case remanded to the lower court for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable Maite Murphy, Circuit Court Judge

JOHNNY TAMAR BROWN,

APPELLANT

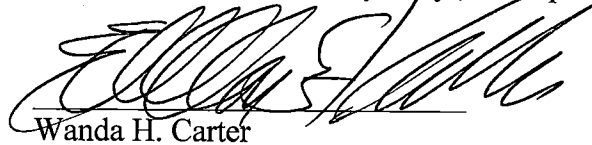
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STATE OF SOUTH CAROLINA,

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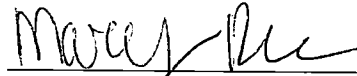
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant Pursuant to White v. State have been served on Johnny Tamar Brown, #244979, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 31st day of October, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.