STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Clarendon County
Michael G. Nettles, Circuit Court Judge

THE STATE,

Respondent,

vs.

MICHAEL JAMES DINKINS,

Appellant.

Appellate Case No. 2017-002360

AMENDED FINAL BRIEF OF RESPONDENT

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The prior bad acts were properly admitted under Rule 404(b), SCRE, as evidence of common scheme or plan as part of the continued illicit conduct between the same parties, and as evidence of Appellant's intent and motive, which Appellant made an issue at trial. Further, Appellant opened the door to the evidence during opening argument and he was not unfairly prejudiced by the evidence of the prior bad acts.

STATEMENT OF THE CASE

Appellant Dinkins was indicted for four counts of criminal sexual misconduct with a minor in the third degree. During a pre-trial motion hearing on November 2, 2017, before the Honorable Michael G. Nettles, the State moved to admit several prior bad acts. Judge Nettles disallowed the majority of these acts, but allowed two prior acts now challenged on appeal. Following trial on November 6, 2017, the jury found Dinkins guilty of one count of criminal sexual misconduct in the third degree and not guilty of another count. The jury also found Dinkins guilty of two counts of assault and battery in the second degree, which Dinkins had requested Judge Nettles instruct to the jury as a lesser included offense of criminal sexual conduct with a minor in the third degree. Judge Nettles sentenced Dinkins to six years' imprisonment suspended to three years' imprisonment and three years' probation.

STATEMENT OF FACTS

Dinkins sexually abused Victim, who was his wife's niece, in four separate incidents starting on her eleventh birthday in October, 2015 and concluding on New Year's Eve of 2015. When Victim's mother died in 2012, Dinkins and his wife (Aunt) gained custody of Victim and Victim was living with them at the time of the charged incidents.

Two extrinsic acts were admitted at trial and Dinkins challenges their admission on appeal. The first occurred while the family was on vacation in Topsail, North Carolina during spring break in 2013. While Victim and Dinkins were watching television together, Dinkins touched Victim's leg. Victim testified she wore a nightgown and Dinkins put his hand underneath her nightgown but above her underwear and rubbed his hand back and forth close to her vaginal area. R. pp. 155-58. Victim told her grandmother (Grandmother) about the event that night. R. p. 158.

The second incident occurred in the family's home in late 2014 or early 2015. Dinkins kissed the back of Victim's neck, and Victim's aunt (Aunt) saw the incident from another room. Aunt confronted Dinkins about it. R. p. 159. These two acts constitute the prior bad acts Dinkins challenges on appeal.

Regarding the charged acts, the first two occurred on the same day – Victim's eleventh birthday in October 2015. Victim laid on Aunt's bed because she was sick and trying to rest. Dinkins laid on top of her and pushed his pelvic area up and down on her. R. p. 159. Victim explained Dinkins "was on all fours with his legs separated to where my body was under his legs." R. p. 161, lines 6-7.

Later the same day, she was trying to nap on the couch and Dinkins "grabbed my hand behind me and made me touch something that was wet and kind of spongy feeling." R. p. 162, lines 14-15.

She said the incident lasted maybe two minutes and the thing he made her touch was "[l]onger than a finger's length like." R. p. 162, lines 16-21. She demonstrated in court how she was made to touch Dinkins. R. pp. 162-63. She explained it was kind of wet and also explained her hand was "kind of in the middle, like where his private area was." R. p. 163, lines 7-10. Victim explained she did not tell anybody at that time about either incident on October 27 because she knew her aunt was happy and did not want to cause her to divorce her uncle. R. pp. 163-64. The jury acquitted Dinkins of this latter charge, possibly because of the ambiguity in Victim's testimony about what occurred.

The next time Dinkins abused Victim was the day after Christmas. She set up a videogame console in the bedroom and played Minecraft when Dinkins made her sit on his lap. As she played, he put his hands under Victim's shirt and grabbed her breasts over her bra. Dinkins asked questions about the game while he did this. R. pp. 165-66. Again, Victim did not tell anyone right away because she was worried her aunt would be compelled to divorce Dinkins, and she did not want to ruin her aunt's happiness. R. p. 167.

Things came to a head on New Year's Eve. Aunt was talking to a friend of hers on the porch. Victim was lying on the couch in pajamas. She and Dinkins were watching a movie together and she fell asleep. Dinkins kissed Victim on the lips and put his tongue in her mouth. R. pp. 168-69. Victim pretended she was asleep and when she was sure he left, she went into Grandmother's room. Victim paced until Aunt came in the room and she told Aunt what happened. Aunt became upset and angry, and talked to Dinkins. She returned and told Victim and Grandmother they were leaving. R. pp. 169-71. Victim explained she disclosed immediately during the New Year's Eve incident because she now knew it was wrong and she did not need to let it go on anymore. She simply could not handle the abuse anymore. R. p. 171, lines 6-11.

Cross-examination consisted of defense counsel asking if Victim got in trouble for writing a bad word. He also asked if Victim told a Durant Center counselor that she and a friend watched pornography together. She disagreed she told that to a counselor. R. p. 174. She agreed she was seeing a counselor about the death of her mother and did not disclose the Topsail incident during counseling. R. p. 175. Defense counsel elicited that Victim's biological father (Father) suffered from epilepsy and exhibits bad behavior sometimes, all though counsel did not attempt to clarify what bad behavior. R. pp. 175-76.

Defense counsel also asked Victim about a suicide note she once wrote. On redirect, Victim clarified she wrote the note after Mother's Day 2015. R. p. 189. She last saw her therapist in August 2015, which was before the charged conduct. R. p. 191.

Grandmother testified Victim's mother passed away when Victim was seven years old. R. p. 194. Grandmother testified about the first extrinsic act: while on vacation during spring break in Topsail, Victim told her Dinkins touched her "tee-hiney," which meant her "private areas." R. pp. 196-97. Grandmother attributed the incident to alcohol. She decided to watch things rather than report or tell Aunt because it would "shatter" everything. R. pp. 197-98. Grandmother admitted she helped Victim decide not to tell Aunt, explaining, "Well, I told her that he had been drinking that day and it could have been totally a mistake or, you know, maybe it wasn't, we just didn't know. And I thought we needed to not jump to conclusions . . . ." R p. 204, lines 21-25. Grandmother only told Aunt about the Topsail incident much later after something else happened. R. p. 198. Grandmother testified on cross-examination that Victim did not tell her therapist about the Topsail incident even though she started seeing the therapist in December 2013. However, Grandmother countered, "It was because she was there for some other reason other than that." R. p. 207, lines 5-6.

Grandmother also testified about the New Year's Eve kiss. She testified that on New Year's Eve, she went to bed first. She was awakened by Victim who was upset, crying, and repeatedly asking for Aunt. Victim said Dinkins kissed her. Aunt told Grandmother and Victim they were leaving, and the three went to Grandmother's house in Sumter. R. pp. 200-02.

Defense counsel attempted to elicit testimony from Grandmother that Victim's mother was bi-polar, but Grandmother indicated that was something she did not know. R. p. 217.

Aunt testified she is a registered nurse and first met Dinkins at the hospital where they both worked. They married in 2010. She considered herself happily married until December 31, 2015. Then her world was shattered. The reason was because Victim let her know Dinkins kissed her on the lips and put his tongue in the child's mouth. R. p. 223. She told Grandmother and Victim they were leaving, never to return. R. p. 223.

Aunt testified about the second extrinsic act. She told the jury that either late 2014 or early 2015, she saw Dinkins kiss Victim on the neck while they were in the hallway. She was in the kitchen and Dinkins did not see her. R. p. 224. She recounted the incident as follows:

> He walked up behind her in the hallway, and she was heading, I believe, to the computer room and he walked up behind her in the hallway and took her hair and pulled it up on her head like that and then tenderly laid his lips on her. It wasn't like a quick smack. It was like a, like a tender, not a kiss between a parent and child.

R. p. 224, line 24 – p. 225, line 5. Victim cringed and backed away, and Aunt told Dinkins she needed to speak with him. Aunt and Dinkins sat in the car as she told him it was inappropriate, it made Victim uncomfortable, and cautioned Dinkins to never do it again. R. p. 225, lines 14-23. The prosecutor then asked, "So then whenever [Victim] told you about him kissing her on her mouth and putting his tongue in her mouth, that's why you reacted the way you reacted?" Aunt responded,

"Right, because, you know, when that incident first happened you just think that it was an innocent mistake. **But then as things progressed, you realize it was not an innocent mistake; it was a continual thing he was doing.**" R. p. 225, line 24 – p. 226, line 7.

Aunt also explained that around the time she saw the kiss on the neck, Grandmother told Aunt about the Topsail incident. When Aunt confronted Dinkins about it, he said he was intoxicated and merely grazed her. Aunt admitted giving Dinkins the benefit of the doubt at the time. R. p. 226.

She explained when Victim's mother died in 2012, Aunt received custody and made it joint custody with Dinkins so he could sign for things too. She explained Father was unable to take care of Victim because he suffers from severe epilepsy. Father's sister drives Father to visit Victim. In 2013, Victim stayed with Grandmother during weekdays and with Aunt on weekends and Aunt's time off from work. She moved in fulltime with Aunt and Dinkins in August 2014. R. pp. 228-29.

Aunt explained Victim went to therapy to deal with grief over her mother's death. She saw her therapist until August 2015. Victim would not see her therapist again until January 2016, when she reported Dinkins' attempt to stick his tongue in her mouth. R. pp. 228-31.

Aunt explained that during the evening on New Years Eve, she was on the porch while Victim and Dinkins were watching Dumb and Dumber, a movie she did not care for. R. pp. 230-31. Dinkins came out and said the movie was over and claimed Victim fell asleep and he carried her to bed. However, when Aunt went to the bedroom, Victim came out of the bathroom and said, "Leigh, Leigh, Leigh, Leigh, Leigh, Leigh, Mike just kissed me on the mouth, put his tongue on my mouth." R. pp. 232-33 (direct quote, p. 233, lines 1-3). Victim, crying, further exclaimed, "I don't know why he did it but he just put his lips on my lips and tried to stick his tongue in my mouth, I'm so scared, I'm so scared." R. p. 233, lines 3-7.

Aunt spoke to Dinkins and then returned and told Victim and Grandmother they were leaving, to grab a few things, because they were leaving quickly. R. p. 233, lines 16-19. In the car to Sumter, Victim was crying and upset. Victim kept saying, "I just didn't know what to do, I just didn't know what to do, I was so scared." R. p. 234, lines 5-6. Aunt assured Victim she was safe, they were going to Grandmother's house. R. p. 234, lines 1-9.

Aunt admitted she was simply in shock that night. She did not report the abuse to anyone. Aunt decided her next step was for Victim to see her therapist, Sarah McClam, because Victim felt safe with her. R. pp. 234-35. Aunt further explained McClam "had been so good to her after her mother's death and [Victim] really had a rapport with her and trusted her immensely." R. p. 235, lines 7-9. Victim saw McClam on January 6, 2016. McClam called law enforcement. R. p. 235.

Blowing a hole in defense counsel's "nuts"[1] strategy, Aunt denied Victim was on any medication in 2015. Victim did not start seeing the doctor that later prescribed Victim medicine until 2016. R. pp. 242-43. Aunt agreed the first time Victim told McClam about the sexual abuse was the January 7, 2016 session. R. pp. 247-48.

McClam testified she started therapy with Victim in December 2013. She explained Victim started feeling grief about a year and a half after her Mother's death. She explained Victim's grief began as Victim matured and started realizing the gravity of death. The purpose of the therapy was to resolve the grief. She saw Victim until February 2014 by which time McClam felt Victim was

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[1] See generally, Kent D. Streseman, Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991, 80 Cornell L. Rev. 1268, 1273-74 (1995) ("While modern courts have resoundingly rejected this position, courts and legislatures have long embraced other procedural and substantive hurdles that institutionalized distrust of women who allege sexual misconduct. Like rape victims, sexual harassment plaintiffs have typically faced unique legal obstacles that effectively place their virtue and veracity on trial. Reform efforts [have] targeted . . . focusing inquiry on the behavior of

doing well and handling the grief. R. p. 259. Victim returned to therapy in May 2015 because of a rough Mother's day, and McClam saw her until August 2015, when McClam decided to discharge Victim. She did not see Victim again until January 2016. At that session, Victim disclosed her uncle kissed her. McClam reported the incident to the Sheriff. R. pp. 260-62.

Victim told McClam she was afraid she would be taken away from Grandmother and Aunt. She also discussed her father's seizures. R. p. 263. McClam testified she referred Victim to a doctor for depression in May 2015, but the doctor did not prescribe any medication. R. pp. 264-65. McClam's records showed Victim was not prescribed any medications until February 2017. R. p. 265. Defense counsel on cross-examination elicited testimony that Victim's mother was possibly bi-polar. R. p. 268.

Investigator Kimberly Marlow testified when she interviewed Dinkins: "[Dinkins] first stated that he had kissed her and then he changed his story that he kissed her on the forehead . . . . He then added that he kissed his fingers and touched it to her mouth, but that he did not attempt to stick his tongue in her mouth." R. p. 295, lines 3-9.

Dr. M. Elizabeth Ralston testified as an expert in child abuse dynamics and disclosure without objection. R. p. 323. She never met Victim or reviewed the incident report or statements associated with the case. R. p. 324. She explained to the jury about delayed disclosure. Often child victims of sexual abuse delay disclosing abuse because they do not want to hurt the family. The child also may make "testing" disclosures of abuse. R. pp. 324-28. Dr. Ralston explained how a child is groomed. R. pp. 328-29. She described a child victim's hypervigilance as a symptom of abuse that is often mistaken for an attention deficit disorder. A child victim may also suffer anxiety

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the accused rather than the accuser.").

or depression. R. pp. 330-31.

Cross-examination was detrimental to various defense theories. Dr. Ralston agreed it was possible a child would be depressed from a mother dying instead of the sexual abuse. R. p. 333. When asked about whether it was possible that a child would disclose sexual abuse while in therapy for the death of the child's mother, Dr. Ralston responded it was possible, but added, "one of the things that we've learned is that children don't necessarily tell unless they're asked, and so once a child is told and gets into treatment they're more likely to give additional information. We certainly found that children who are in counseling and aren't asked about such things don't reveal such things." R. p. 333, lines 18-24. Defense counsel dug the hole deeper, asking, "But if a child has a good rapport with her counselor and speaks freely with her counselor, would you expect the child to talk about these events?" Dr. Ralston answered, "Probably not." She also disagreed medications were likely to affect a child's disclosure, she explained the medications would not alter the child's perceptions of reality. R. p. 336.

ARGUMENT

I.

French-kissing a child is a lewd and lascivious act and a rational juror could and should find intent is inferable and self-evident.

Dinkins contends the trial court erred in failing to direct a verdict on the charge of criminal sexual conduct in the third degree because the State did not prove he acted with the requisite intent and shockingly, french-kissing a minor child is merely poor taste rather than a lewd and lascivious act. A rational juror could conclude that French-kissing a child is a lewd and lascivious act. A rational juror also could reasonably conclude Dinkins committed the act with the intent to arouse Dinkins's passion or Victim's passion.

Standard of review

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to

find [the defendant] guilty." See State v. Pearson, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016).

Our Supreme Court recently noted:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Pearson, 415 S.C. at 471 n.2, 783 S.E.2d at 806 n.2 (quoting Jackson, at 319) (emphasis in the original); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

The following conduct is proscribed as criminal sexual conduct with a minor in the third degree:

> A person is guilty of [CSC with minor – third degree] if the actor is over fourteen years of age and the actor willfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age.

S.C. Code Ann. §16-3-655(C).

French kissing a minor is a lewd and lascivious act

Victim testified Dinkins, a grown man trusted with custody of the Victim, kissed Victim, eleven years old, and pushed his tongue inside her mouth. This testimony supports conviction for third degree criminal sexual conduct with a minor. A reasonable juror could conclude it was a lewd

and lascivious act intended to arouse the passions of Victim, even if Dinkins was unsuccessful. Further, a reasonable juror could conclude it was an attempt by Dinkins to arouse his own passions, whether or not his endeavor was successful in that regard.

In State v. Hammett, 642 S.E.2d 454, 458-59 (N.C. Ct. App. 2007), the North Carolina Court of Appeals found "French kissing" constituted a lewd or lascivious act within the meaning of a similar statute to Criminal Sexual Conduct with a minor in the third degree. Similar to this case, the defendant attempted to insert his tongue into the victim's mouth, she felt it on her teeth, and she resisted. The distinction in that case was the defendant did it while imploring the child to "kiss me like you love me." Id. at 458.

The North Carolina Court of Appeals relied on authority from its supreme court, State v. Banks, 370 S.E.2d 398 (N.C. 1988). In Banks, the North Carolina Supreme Court found the trial court did not err by instructing the jury that "the kissing of a child involving the insertion of an adult's tongue into the child's mouth would be a lewd or lascivious act within the meaning or intent of the statute." Id. at 406. In that case, the thirty-year old defendant waited until the other adults were in another part of the house, entered the room where the victims lay, got into bed with the victims, kissed each of them by putting his tongue in their mouths, ears, and noses. The Court concluded, as the trial court instructed, "the acts of kissing here were 'lewd or lascivious' acts within the meaning of [the indecent liberties statute]." Id. at 407.

In People v. Calusinski, 733 N.E.2d 420, 426 (Ill. App. Ct. Ill. 2000), the appellate court observed, "In the instant case, the defendant placed his tongue in the mouth of a six-year-old girl. Despite the defendant's assertions, we cannot ascribe an innocent motive to such conduct. As noted by the trial court, a 'French kiss' is an inherently sexual act which generally results in sexual

excitement and arousal."

In State v. Stout, 114 P.3d 989 (Kan. Ct. App. 2005), the Kansas Court of Appeals analyzed whether a french kiss between a teacher and her student constituted "lewd fondling or touching" to support a conviction under Kansas's unlawful sexual relations statute. After noting several cases, such as Calusinski, supporting the proposition a french kiss is an inherently sexual act, the Kansas court noted, "In contrast to these authorities, we find none which conclude that french kissing cannot be lewd touching *as a matter of law*." Id. at 993 (emphasis in the original).

In the instant case, Dinkins' attempt, successful or not, to french-kiss his niece was an inherently sexual act on his part, and a rational juror could conclude he intended to arouse at least his passions, if not the passions of his victim. Of course, Victim testified Dinkins did insert his tongue in her mouth. Dinkins, like Stout, fails to provide any case law supporting his claim a french kiss is, as a matter of law, not a lewd and lascivious act. That is because the legislature and jurors as members of society find such an act not merely distasteful, but immoral and illegal.

A rational juror could find Dinkins intended to arouse his passion or the passion of his minor victim by french kissing or attempting to french kiss Victim.

Dinkins attempts to argue he lacked intent to arouse his own passions or the passions of Victim when he attempted to french kiss the child. "Absent an admission by the defendant, proof of intent necessarily rests on inference from conduct." State v. Haney, 257 S.C. 89, 184 S.E.2d 344 (1971). "The intent with which an act is done denotes a state of mind and can be proved only by expressions or conduct considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v. Tuckness, 257 S.C.

295, 299, 185 S.E.2d 607, 608 (1971). "[W]hether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct." State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012).

Dinkins argues the trial court should have granted directed verdict because of the lack of testimony Dinkins or his victim's passions were aroused. This argument overlooks his intent to arouse passions, and not his success, is what the statute proscribes. The plain language of the statute plainly proscribes failure as well as success in arousing even a defendant's own passions. See generally State v. McCluney, 361 S.C. 607, 606 S.E.2d 485 (2004) (finding evidence supported attempt and conspiracy to purchase real cocaine under the trafficking statute, even though substance provided by undercover officer was imitation cocaine). His intent was for the jury's determination, and a rational juror could conclude he intended to arouse Victim's or his own passion. See Jackson v. Virginia, 443 U.S. 307, 319 (1979) (noting the responsibility of the trier of fact "to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). Because a reasonable juror could conclude Dinkins's intent, when he stuck his tongue in Victim's mouth, is self-evident, the trial court correctly denied the motion for directed verdict.

II.

Because defense counsel, after consulting with his client, asked the trial court to instruct the jury on assault and battery in the second degree as a lesser offense of third degree criminal sexual conduct with a minor, the issue is not preserved for review. The trial court has subject matter over the offense of assault and battery in the second degree.

Dinkins's counsel asked the trial court to instruct the jury on assault and battery in the second degree as a lesser included offense to two of the criminal sexual conduct charges. The trial court granted his request. He now claims the trial court lacked subject matter jurisdiction despite receiving what he asked for. As a judge presiding over a term of General Sessions, the trial court had subject matter over the offense. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

While the jury was out, the trial court inquired with the parties about the possibility of instructing the jury on assault and battery second as a lesser offense of criminal sexual conduct with a minor in the third degree. Defense counsel advised the trial court the issue was not yet decided, but offered his opinion that assault and battery second was akin to common law assault and battery of a high and aggravated nature and then told the trial court, "I leave that to your discretion." R. pp. 252-53. He later opined, ". . . I think the Court is correct that you can have an assault and this jury can find, in its discretion say that it did not contain lewd, lascivious conduct, but yet it was an assault. And so that, I think that would be a definition of a lesser included offense." R. p. 256, lines 4-9. The trial court suggested the parties research the matter some more and indicated it would address the issue the next day. R. p. 256.

The trial court subsequently held a charge conference in which the court and the parties discussed at length whether assault and battery in the first degree, and then assault and battery in the second degree, was a lesser included offense of criminal sexual conduct in the third degree. R. p.

338-50. Then the trial court specifically asked defense counsel whether, after consulting with his client, he wanted assault and battery in the second degree charged as a lesser included offense. Following a short recess, defense counsel announced, **"Your Honor, after conferring with my client, he would ask the Court to charge A&B second."** R. p. 351, lines 22-24. The request for the instruction was for two of the four indictments. R. p. 352, lines 2-5.

The question of whether an instruction for assault and battery in the second degree is a lesser included offense was waived by defense counsel and is not reviewable on appeal. A party cannot complain of error induced by his own conduct. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 *cert denied* 519 U.S. 1045 (1996). When a party acquiesces to an issue at trial, the party cannot complain about the ruling on appeal. Ex parte McMillan, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995). "[A] party cannot argue one theory at trial and a different theory on appeal." State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003). A party receiving the relief requested may not be heard to complain on appeal. State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 614 (Ct. App. 2012). "One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal." State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (not preserved due to failure to move for mistrial until after the verdict).

Dinkins attempts to avoid the obvious issue preservation problem by claiming a lack of subject matter jurisdiction. However the Court of General Sessions has subject matter jurisdiction over assault and battery in the second degree. Subject matter jurisdiction is merely the power for a court to hear a certain class of cases. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). General Sessions has the power over criminal charges such as assault and battery in the second degree. S.C. Const. Art. V, § 11 (Circuit courts have original jurisdiction over criminal cases except those cases

in which exclusive jurisdiction is given to inferior courts). Therefore, the trial court held subject matter jurisdiction over the charge of assault and battery in the second degree, regardless of whether or not it is a lesser included offense, or whether evidence supported an instruction on the charge. Accordingly, the issue is not preserved for review because Dinkins asked for the instruction and caused the alleged error.

III.

The prior bad acts were properly admitted under Rule 404(b), SCRE, as evidence of common scheme or plan as part of the continued illicit conduct between the same parties, and as evidence of Appellant's intent and motive, which Appellant made an issue at trial. Further, Appellant opened the door to the evidence during opening argument and he was not unfairly prejudiced by the evidence of the prior bad acts.

Dinkins primarily complains the trial court erred in admitting evidence of the Topsail incident in 2013 in which he rubbed Victim's inner thigh. Dinkins offers little substantive challenge to the other extrinsic act, the incident in which Aunt saw him kiss Victim on the back of the neck. Dinkins argues these two extrinsic acts were not admissible under Rule 404(b), SCRE,[2] and also argues it was a due process violation to admit the evidence. Dinkins's single-sentence allegation of a due process violation is not supported by authority and was not raised below.[3] The extrinsic acts were probative evidence of Dinkins's lewd or lascivious intent and as part of the continuous illicit intercourse between Dinkins and his victim under the common scheme or plan exception. Therefore, the extrinsic acts were properly admitted. Further, Dinkins opened the door to the acts and was not unfairly prejudiced as he focused on Victim's non-disclosure of these prior extrinsic acts as a defense to the later charged acts.

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[2] Dinkins objected to the extrinsic acts, along with others the trial court declined to allow, during a November 2, 2017, in limine hearing. R. pp. 94-99. Dinkins did not renew his objections when Victim recounted both extrinsic acts before the jury at trial on November 6, 2017. R. pp. 80-81. Generally, a ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000). However, where the motion is ruled on immediately prior to the introduction of evidence in question and no other testimony is presented to provide a basis for the trial court to change its ruling, the ruling is final and no further objection is necessary. State v. Tufts, 355 S.C. 493, 497, 585 S.E.2d 523, 525 (Ct. App. 2003).

[3] An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001).

Standard of Review

A trial court's decision regarding the admissibility of extrinsic acts under Rule 404(b), like other evidentiary decisions, is reviewed by appellate courts under the abuse of discretion standard. The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (Appellate courts do not review the ruling of a trial judge "on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

In camera hearing

Four days prior to trial, the trial court held an in camera hearing on the admissibility of seven extrinsic acts advanced by the prosecution for admission at trial, including the two acts that were admitted and are the subject of this appeal. R. pp. 18-21. Ultimately, the trial court only allowed the two extrinsic acts previously mentioned. R. pp. 94-99.

One of the acts, or categories of acts, proffered by the prosecutor was that "Victim disclosed during her forensic interview that, between 2013 and 2015, defendant was touching her on her legs and thighs, making her uncomfortable." R. p. 20. Note that although the trial court did not allow

this testimony in the pre-trial ruling, Dinkins' counsel elicited testimony from Victim about repeated touching during cross-examination at trial. See R. p. 187, lines 16-17.

The prosecutor moved to admit the extrinsic acts under the common scheme or plan exception, arguing the Wallace factors. See State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). **The prosecutor also noted the acts showed a pattern of behaviour consistent with grooming.**

The prosecutor further argued the extrinsic acts were admissible to establish intent and to show lack of mistake or accident, noting Dinkins' admitted to contact in his statement to the police but he asserted there was nothing inappropriate. R. pp. 21-23. The prosecutor argued the prior bad act concerning the kiss on the back of the neck was relevant because afterwards he was warned it was inappropriate, but nonetheless he subsequently french-kissed Victim on New Years' Eve. R. pp. 22-23; p. 31, lines 12-15. In arguing for admission of the extrinsic acts, the prosecution noted the importance of proving intent and motive based on the elements of criminal sexual conduct with a minor in the third degree. R. p. 23, lines 8-13.

In response, Dinkins counsel argued that although he was not challenging the sufficiency of the indictments, he claimed, "I don't know what the acts are they're actually saying he committed." R. p. 26, lines 11-14. After the prosecution set out the factual basis for each of the four charged counts, the trial court noted, "Well it sounds to me that, you know, the defendant has not moved to sever these, and this is indeed a pattern of conduct which you're alleging, and we've got four separate events, one of which took place on the same night . . . ." R. p. 30, lines 11-14. Oddly enough, Dinkins' counsel argued because Dinkins did not actually touch Victim's vagina in the Topsail incident, the incident did not fit into the common or plan exception. R. pp. 35-36. As to the kiss on the back of the neck, Dinkins' counsel argued it might just be Dinkins praising her or simply

showing affection, and a kiss to the back of the neck was substantially different than a french kiss. R. pp. 40-41.

The trial court took in limine testimony from Aunt and Victim. Aunt testified about the neck incident similarly to how she would later testify before the jury. She testified when she confronted Dinkins about the Topsail incident, he admitted to touching Victim on the thigh and "maybe grazing her vagina" with his finger. Dinkins further claimed Victim misinterpreted this and he must have accidently touched her while stretching. R. p. 51, lines 2-10. Aunt understood the Topsail incident to be touching above clothing. R. p. 63, lines 10-21.

Victim testified and explained the first time Dinkins made her uncomfortable was the Topsail incident when "he touched my upper leg. That was the first time." R. p. 80, lines 21-22. It happened when they were alone in the room watching a movie. R. pp. 81-82. She explained further, "he touched my leg very close to my private area." R. p. 82, line 18. She also explained Dinkins kissed the back of her neck multiple times. R. p. 80, lines 8-13. He also showed her pictures of women he told her he wanted her to look like when she was older. She was pretty sure one of the pictures was of a woman in a bikini. R. p. 84. She explained Dinkins touched her thighs and rubbed them. This happened often, "whenever he had the chance to do it when nobody was in the room." R. p. 88, lines 2-17. Dinkins's counsel elicited testimony that Dinkins was an affectionate person. R. p. 93.

At the conclusion of testimony, without further argument, the trial court announced its ruling. Applying the Wallace factors, the trial court noted all the conduct was between the same parties. He observed the abuse all took place in the home with the exception of the Topsail incident, which the trial court noted was still within "the family confines." The trial court also took into consideration the absence of threats or coercion. R. pp. 94-95. The trial court found the Topsail incident and the

kiss on the back of the neck relevant and admissible. R. p. 95, lines 6-13. The trial court found other acts inadmissible, such as Dinkins showing Victim a Victoria's Secret catalog and some texts he sent Victim. R. p. 96. Inexplicably, the trial court did not allow testimony about Dinkins repeatedly touching her leg area when others were not around. R. pp. 96-97. Another episode in which Dinkins was intoxicated and made both Grandmother and Victim uncomfortable was not allowed based on differences in recollection between Victim's testimony and "other witnesses." R. p. 97.

Rule 404(b)

"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. A prior bad act, which is not the subject of conviction, must not only fit in an exception but also must be established by clear and convincing evidence. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) (citing State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 683 (2000)). Further, the probative value of the prior bad act must not be outweighed by the danger of unfair prejudice. State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 896 (2009).

In the instant case, Dinkins does not challenge whether the evidence is supported by clear and convincing evidence, although this standard was easily met with Victim's in camera testimony. State v. Ford, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) (finding the clear and convincing standard was met because the victim testified from direct knowledge that the defendants robbed and attempted to rob him and his testimony was partially corroborated by a detective).

The gist of Dinkins's argument is the acts were not sufficiently similar and Dinkins' belief Wallace at some point in the future may cease to be good law. However, Dinkins's counsel did not

argue against the continuing vitality of Wallace at trial. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding the argument on appeal was not raised and ruled on below and therefore not preserved for review).

Further, Dinkins fails to suggest an alternate standard of judging the admissibility of common plan or scheme evidence. The evidence of the two extrinsic acts was properly admissible under the law as it existed prior to Wallace and afterwards to the extent Wallace allegedly changed the law. The Courts of this state have long held prior bad acts admissible when they serve to prove some fact or element related to the crime charged. See e.g., State v. Houston, 17 S.C.L. 300, 301, 1 Bail. 300 (S.C. App. L. & Eq. 1829) (admitting evidence of prior forgeries in a forgery case "to shew that the prisoner has passed other counterfeit notes of a similar character" . . . "for although these may be the foundation of other prosecutions, yet they afford evidence, and sometimes very strong evidence, of the knowledge of the falsity of the paper, on which the indictment is founded."); State v. Winter, 83 S.C. 251, 65 S.E. 243, 245 (1909) (finding evidence of prior similar acts—buying stolen goods—provided proof defendant received stolen goods knowing them to be stolen); In re Corley, 353 S.C. 202, 205-06, 577 S.E.2d 451, 453 (2003) ("In the context of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged.").

Dinkins accuses the prosecution of seeking to admit these two acts "to portray the appellant to the jurors as a child molester in hopes the jurors will convict him based on the prior bad act rather than the evidence presented at trial." Br. of App. 11. The record does not support this accusation. First, the prosecution only sought to admit evidence of Dinkins's conduct with Victim and not other possible victims. The jury was only confronted with the question of whether Dinkins molested

Victim and nobody else. Second, the conduct in the prior acts was not more egregious than the charged conduct, so the prospect of the evidence being prejudicial was greatly diminished.

The most convincing evidence indicating he was a child molester was he attempted to french-kiss Victim, simulated intercourse with her as she lay sick, and decided the day after Christmas to grope her breasts while she was playing video games she received for Christmas. In other words, the best evidence he was a child molester was the conduct for which he was charged. See State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995) ("[U]nder our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts"). The prosecution's arguments at trial shows the purpose for seeking admission was simply to provide probative evidence to the jury in the manner allowed by Rule 404(b), SCRE. In the instant case, the two extrinsic acts were properly admissible not to show propensity but as evidence of Dinkins' lewd and lascivious intent and the common scheme or plan to groom Victim for increasingly sexually-exploitive acts.

Intent

First, the evidence was admissible to show Dinkins' intent. "In the context of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged." In re Corley, 353 S.C. 202, 205-06, 577 S.E.2d 451, 453 (2003).

For instance, in drug cases, our courts have recognized evidence of prior drug transactions may be relevant to show intent when the defendant is charged with possession of a controlled substance with intent to distribute. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989)). In Gore, the Court held evidence of

prior sales by defendant was admissible to show intent where the prior sale occurred one month before the charged offense. Gore, 299 S.C. at 370, 384 S.E.2d at 751 ("The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question.").

Similarly, the Supreme Court found prior similar crimes against other elderly women became relevant to prove the defendant's intent in the burglary of an elderly woman's house. The burglary was relied upon to prove an aggravating circumstance to support the death penalty for the elderly woman's murder. State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) ("The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered [victim's] house since he already knew her to be an elderly woman.") *reversed on other grounds by* Simmons v. South Carolina, 512 U.S. 154 (1994).

In State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999), the victim, Wells, was robbed of cash at gunpoint by Ford and his codefendant in December 2015. This Court upheld admission of evidence that the defendants also robbed Ford at gunpoint in August 2015 and attempted to rob him again in October 2015. During the first robbery, they told him they would shoot him if he did not give them $200 every time he saw them. Id. at 451, 513 S.E.2d at 385. This Court found the previous robberies were a necessary element in understanding the defendants' motive and intent during the December robbery. Id. at 452, 513 S.E.2d at 389. **This Court noted the "highly probative" value of the prior robberies because the defendants disputed the State's allegations about their motives and intent. Id.**

Dinkins made both motive and intent issues immediately during opening argument:

> And [Dinkins] comes from a strong family and in his family people showed affection towards each other, and that happens in a lot of families. . . . But what happens whenever you're a man and you get accused of inappropriate touching of a child who at the time was around 11 years old? And what is inappropriate? Can you tickle that child, for example, under the underarms? Can you kiss the child, okay. . . . So the question is, what is that line? What is the line that you pass to the conduct where it's lewd and lascivious conduct. And the statute goes on to say with the intent to arouse or appeal of to gratify the lust, passions, or the sexual desires of the actor or the child.

R. p. 148, line 11 – p. 149, line 4.

Dinkins continued to dispute the adequacy of intent later in opening argument,

> And he was raised in a situation, large family himself, where, you know, he was affectionate towards a child; but the question is, does affection rise to the level of a lewd act. And that's what you guys have to decide. You know, were these actions, do they rise to the level of lewd act on a minor?

R. p. 151, lines 10-16.

Testimony revealed Dinkins first admitted to police he kissed Victim, but he modified his statement to claim he kissed his finger and placed his finger on her lips. During closing argument, Dinkins argued:

> [Dinkins] said he didn't do any of this, that the most he did was show affection to this child. Are we going to start convicting people of molesting children for showing affection, kissing them, tickling them, having fun with your children, having fun with children that you want to show attention to because they may have lost a loved one? Are we going to start doing that? Then the jail is gonna be full of child molesters.

R. p. 376, line 25 – p. 377, line 9. He continued:

> If we start saying that men cannot show affection to their nieces, to their daughters, where do we go from there? What do we do? Is it that, hey, I'm sorry, my four year old daughter, you can't come get in my lap and give daddy a kiss because that might be considered child

> molesting. That's the next step here. That's the next step of what's gonna happen.

R. p. 377, lines 12-19. Accordingly, Dinkins made intent and motive an issue by attempting to put his actions on par with parents' appropriate acts of affection with their children as an appeal to the jury to find his actions failed to meet the requirement of lewd and lascivious intent necessary for conviction.

In support of his challenge, Dinkins generally relies on this Court's opinion in State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009). On certiorari, the Supreme Court subsequently adopted this Court's analysis as its own and affirmed, finding that the opinion anticipated its decision in Wallace. State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011). This Court's opinion is analyzed below.

In Fonseca, the defendant was tried for a lewd act committed on his victim in October 2003. The State was allowed to also introduce evidence of a separate lewd act on the same victim in August 2001. In the 2003 incident, while both he and the victim were fully clothed, he rubbed up against the victim, simulating sexual intercourse. In the other incident in 2001, the defendant exposed his penis and subsequently touched victim under clothes and felt and groped her genitals. Id. at 643-44, 681 S.E.2d at 2. The trial court did not find the incident established a common scheme or plan but found it demonstrated the defendant's intent for the purpose of gratifying his lust, passion, or sexual desires. Id. at 644, 681 S.E.2d at 3.

This Court found it was error to admit the prior bad act on the basis of intent or motive because the defendant denied contact ever occurred and "intent was not made a material issue." Id. at 648-49, 681 S.E.2d at 5. This Court also expressed its concerns about an exception that would swallow the rule since intent is a necessary element of most crimes. Id.

In the instant case, unlike Fonseca, Dinkins made motive and intent an issue from the start, suggesting Dinkins was prosecuted for merely being an affectionate caretaker whose motives were misinterpreted because he comes from a big, affectionate family. Accordingly, the extrinsic acts were appropriately introduced as evidence tending to prove Dinkins's motive and intent was to arouse his own passions or the passions of Victim, he acted with lewd and lascivious intent, and he was not merely being affectionate.

Opened the door

Not only were intent and motive made issues, making the extrinsic acts admissible under Rule 404(b), but Dinkins' opening argument opened the door to the admission of these acts, regardless of the trial court's pretrial ruling. In State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003), Dunlap was on trial for distribution of crack cocaine. During opening argument, Dunlap's attorney told the jury Dunlap, "had been in trouble with the law from the time he was fifteen years old," and was addicted to drugs, but "[h]e never sold [crack cocaine], but he used it." Id. at 541, 579 S.E.2d at 319. The Supreme Court found Dunlap's opening argument opened the door to a drug conspiracy conviction and a distribution of an imitation drug conviction because the opening argument "created the impression that [Dunlap] had no prior connection to the sale of narcotics." Id.

In the instant case, because Dinkins' counsel suggested in opening that Dinkins was being prosecuted merely for being affectionate rather than being lewd and lascivious, he opened the door to the extrinsic acts even if they were not originally admissible under Rule 404(b). "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012).

Common Scheme or Plan: continuous illicit conduct between parties

Additionally, the extrinsic acts are admissible under the common plan or scheme exception of Rule 404, SCRE. Under Rule 404(b), evidence of common scheme or plan may be found admissible. "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 if there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-278 (2009) (citation omitted). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id. The Supreme Court provided some factors to consider including: (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. at 433-434, 683 S.E.2d at 278.

In the instant case, there is a single victim, so the relationship was identical between parties. Dinkins had custody of Victim and he was her uncle by marriage. She was not significantly younger for purposes of analysis at the time of the Topsail incident – she was eight years old at Topsail and just turned eleven years old when the charged conduct started. The kiss on the neck occurred close enough in time, within a year, to the charged acts so her age is similar. The Topsail incident, as the trial court observed, occurred in a family setting even if occurring on vacation in another jurisdiction. The kiss on the neck occurred in the residence as did the charged acts. All the acts were committed when family was home but not present in the room. Dinkins did not use threats or coercion in any of the extrinsic or charged acts, he just relied on his position of parental authority. As to the manner of occurrence, in the Topsail incident, as the day after Christmas and on New Year's Eve, Victim was

in front of a television screen, watching television each time except for the day after Christmas, when she was playing a game. Likely, Dinkins intended the screen to be a distraction from his conduct. The kiss on the neck may be seen as desensitizing Victim to sexual conduct leading to other acts inlcuding the more intrusive french kiss. It is also probative because the jury might wonder why no witnesses saw anything inappropriate when all the acts were supposed to occur while family was present in the house. The acts taken together evince Dinkins's intent to groom the victim for increasingly sexual conduct. Accordingly, under the Wallace factors, the evidence is admissible.

Granted, the enumerated factors in the Wallace opinion are geared towards prior bad acts committed on victims separate from the victims of the charged conduct. This is because when multiple acts are committed against the same victim, the existence of a common scheme or plan is often patent as in this case. For instance, in State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911), Richey was charged with carnal knowledge of a girl under fourteen years of age. The Supreme Court found evidence that he continued this relationship beyond the age of fourteen years of age admissible, holding: "acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties." Id. at 242, 70 S.E. at 730.

Both the South Carolina Supreme Court and this Court have upheld the continuing illicit conduct standard to admit other bad acts as part of a common scheme or plan. See State v. Clasby, 385 S.C. 148, 157, 682 S.E.2d 892, 897 (2009); State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct. App. 2008). As this Court explained in Kirton: "All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity." Kirton, 381 S.C. at 36, 671 S.E.2d at 121-22 (emphasis added).

In Clasby, the Supreme Court considered the admissibility of prior bad acts in a case involving repeated acts directed at the same victim, Clasby's daughter. Clasby was indicted after her daughter alleged Clasby digitally-penetrated her vagina as they were lying on the floor of Clasby's sister's bedroom. Id., 385 S.C. at 153, 682 S.E.2d at 894. At trial, the victim was permitted to testify about several earlier occasions of sexual abuse suffered at Clasby's hands. Id. The victim detailed several incidents: (1) Clasby touched and rubbed the victim's vagina while they were in a bathtub together; (2) Clasby rubbed the victim's vagina inside of her underwear while they watched a movie together under a blanket; (3) Clasby inappropriately touched the victim while they slept together in the victim's father's bed; and (4) Clasby rubbed the victim's vagina and sucked on her breasts while at Clasby's father's home. Id., 385 S.C. at 152-153, 682 S.E.2d at 894. This Court affirmed the admission of the prior bad acts, finding the prior incidents "established a pattern of escalating abuse which ultimately culminated in Clasby's digital penetrations of [Clasby's daughter]. The four prior incidents of sexual misconduct by Clasby reveal the same illicit conduct with [daughter] during periods of visitation prior to [the indicted offenses]." Id., 385 S.C. at 156, 682 S.E.2d at 896.

In State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999), this Court favorably quoted Supreme Court precedent that held the common plan or scheme exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties." (quoting State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)); see also State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding the "prosecutrix's testimony regarding prior attacks was admissible under [the common scheme] exception to show the continued illicit intercourse forced upon her by Appellant."). In State v.

Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003), this Court observed, favorably citing both Weaverling and McClellan, that common scheme or plan evidence is admissible when there is a pattern of continuous illicit conduct because the pattern "clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion."

In the instant case, the Topsail incident is important and carries significant probative value because this is when Dinkins started grooming Victim and attempting to desensitize her to increasingly sexual contact. This point is exemplified, when during Victim's cross-examination, Dinkins's counsel accidently elicited more of Dinkins's grooming behavior. Dinkins brings up the Topsail incident, elicited testimony from Victim that Dinkins was not charged with the Topsail incident, and then asked, "So the only thing that you're saying that he did wrong to you was in Topsail?" After Victim answered no, Dinkins asked, "What else did he do wrong to you?" Victim answered, "He repeatedly touched me and put – he kissed me on my neck and he put his tongue in my mouth." R. p. 187, lines 16-17. Similarly, evidence Dinkins kissed Victim on the neck also demonstrates escalating conduct that led him to attempt the even more intrusive act of inserting his tongue in Victim's mouth. These acts all occurred in a similar fashion: Victim was either asleep or focused on a television screen or monitor, and the remainder of the family was elsewhere in the house.

Probative value is not substantially outweighed by danger of unfair prejudice

Even if the evidence is clear and convincing and falls within a Rule 404(b) exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Weaverling, 337 S.C. at 468, 523 S.E.2d at 791. Prejudicial evidence is still proper unless it amounts to unduly 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 Appellant, is not unduly so under our previous decisions.").

In the instant case, the evidence was probative because it showed continued illicit conduct establishing a pattern of grooming and escalating conduct by Dinkins towards Victim. Therefore these two acts in conjunction with the four charged acts were probative evidence the charged assaults occurred. Tutton. As the Supreme Court explained in Clasby: "Given there was no physical evidence to corroborate [the victim's] testimony regarding the indicted offenses of CSC with a minor, first degree, and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child." Clasby, 385 S.C. at 158-59, 682 S.E.2d at 898.

On the other hand, the extrinsic acts did not create a risk of unfair prejudice. "'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 danger of unfair prejudice comes from the concern the jury may consider "an accused's inclinations rather than his actual conduct in the incident before the court." State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983). It is unlikely the jury considered Dinkins's inclinations rather than his conduct. By their nature the extrinsic acts were less egregious than the charged acts because they were predicate acts – the stepping stones – to the escalation of sexual conduct found in the charged acts. Accordingly, it is unlikely the jury would convict on an improper basis rather than the proper basis as explained in Tutton. Indeed, the jury took a critical view of the evidence and determined guilt for each act independently of the others. Dinkins was convicted as charged for the french kiss, but acquitted of one of the remaining charges and found guilty of lesser included offenses for the remaining two charges. The verdicts demonstrate the jury did not base its

verdict on some improper consideration of the extrinsic act evidence introduced by the State, but on due consideration of the evidence under the State's burden of proof.

Lack of prejudice

Further, Dinkins was not unfairly prejudiced. "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted).

As mentioned above, Dinkins did not renew the objection before the jury to the two extrinsic acts. Regardless of whether this was required for purposes of preserving the objections, it seems likely Dinkins did not renew the objection for strategic purposes. Consider the following portion of Dinkins's cross-examination of Victim about her therapy after the Topsail incident, but prior to the charged incidents:

> Q: And in . . . psychiatric meetings with [your] counselor you opened up to [your] counselor; did you not?
>
> A: Yes, sir.
>
> Q: You told [your] counselor some pretty intimate details; did you not?
>
> A: Yes, sir.
>
> Q: And part of the accusation here today is that when you were eight and at Topsail your uncle inappropriately touched you?

A: Yes, sir.

Q: Okay. Between the time you were at Topsail and January of 2016 when these allegations came out, you didn't disclose any of that to your counselor, did you?

A: No, sir.

R. p. 175, lines 1-16. Until her visit following the New Year's Day assault, Victim last saw her therapist in August 2015. She was not seeing the therapist during the time of the October 2015 incidents or the 2015 holiday incidents. R. p. 190, lines 14-19. So without the Topsail incident to refer to, or for that matter, the evidence that he kissed Victim on the back of the neck in 2014 or 2015, Dinkins could not claim Victim failed to disclose abuse to her therapist during her sessions. Because Dinkins would not be able to pursue this failure-to-disclose-to-the-therapist defense without evidence of the extrinsic acts, Dinkins was not prejudiced by the admission of the extrinsic acts.

Dinkins counsel continued to pursue this strategy during Victim's cross-examination:

Q: And you had a counselor and you opened up to that counselor about very intimate details of your life.

A: Yes, sir.

Q: And in fact, you talked to her about that, about that suicide note; didn't you?

A: Yes, sir.

Q: And you told her all of the problems that you were having?

A: Yes, sir.

Q: And you never mentioned Uncle Mike was a problem?

A: No, sir.

R. p. 178, line 23 – p. 179, line 8.

Dinkins's counsel also continued this defense while questioning Grandmother on cross-

examination. Counsel elicited testimony from Grandmother establishing Victim was in counseling several months after the Topsail incident and did not disclose the Topsail incident. Dinkins's counsel even intimated through a question to Grandmother that the reason Victim did not disclose the Topsail incident was because "it was not a big deal[.]" R. pp. 206-07 (direct quote, p. 207, lines 3-4). Dinkins's counsel further referred to a "suicide" note Victim wrote well before the charged conduct and asked Grandmother, "Now at no time in that suicide note did she say, I'm doing this because Uncle Mike touched me?" (The suicide note was the result of Victim grieving for her deceased mother; the fact that her grief for her mother took primacy over Dinkins's sexual contact apparently presented some sort of defense to the charges). Dinkins's counsel returned to the subject of the May 2015 note and that Victim saw a therapist after the note, and then counsel asked if there was any mention during counseling of the Topsail incident or anything about Dinkins. R. p. 218, lines 1-18. Dinkins's counsel then cross-examined Aunt about whether Victim discussed any inappropriate contact by Dinkins with the therapist. R. pp. 240-41.

Finally, when McClam, the therapist, testified, Dinkins's counsel asked her if at any point during the 2013 session if Victim indicated she was worried about Dinkins or mentioned Dinkins. R. p. 270, lines 10-12; p. 272, lines 2-9. Likewise, Dinkins's counsel asked McClam if Victim reported during the May 2015 counseling that she got along with Aunt and Dinkins and she did not report anything bad about Dinkins. R. pp. 276-77. Dinkins's counsel later returned to the question if Victim reported any bad conduct to McClam. R. p. 282, lines 16-19. Again, without the extrinsic acts in evidence, the jury would not know of any reason for Victim to report anything about Dinkins during therapy, because the charged conduct occurred after these sessions. It was part of the defense strategy to use the prior bad acts, and Victim's failure to report them to the therapist, to attack Victim's credibility.

In the instant case, the danger of prejudice to Dinkins was the legitimate probative force of the extrinsic evidence which showed the early stages of a progression of grooming and escalating conduct. The danger of unfair prejudice is limited by the less egregious nature of these stepping-stones acts compared to the later lewd and lascivious acts for which Dinkins was charged. Further, the acts provided context necessary for Dinkins to pursue his defense – the proposition that because Victim did not report these earlier acts to her therapist, then her reports of the charged acts must not be credible. Therefore, Dinkins was not unfairly prejudiced by the alleged error.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 18, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-002360

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SC Court of Appeals

THE STATE,

Respondent,

vs.

MICHAEL JAMES DINKINS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Amended Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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STATE OF SOUTH CAROLINA
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Appeal From Clarendon County
The Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No: 2017-002360

STATE OF SOUTH CAROLINA, Respondent,

vs.

MICHAEL JAMES DINKINS, Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within **Amended Final Brief of Respondent** on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Steven Smith McKenzie, Esquire
Coffey & McKenzie, PA
2 North Brook Street
Manning, South Carolina 29102

I further certify all parties required by Rule to be served have been served.
This 18th day of September, 2020.

CAROLINE COLLINS
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Caroline Collins

From: Caroline Collins
Sent: Friday, September 18, 2020 2:52 PM
To: 'smckenzie@ccmlawsc.com'
Cc: David Spencer; William Blitch
Subject: The State v. Michael James Dinkins (2017-002360)
Attachments: DINKINS Michael - Motion to Submit Amended Final Brief of Respondent - 2017-002360 (02382562xD2C78).PDF; DINKINS Michael - Amended Final Brief of Respondent - 2017-002360 (02382572xD2C78).PDF

Good Afternoon Mr. McKenzie,

Attached please find a copy of a Motion to Submit Amended Final Brief of Respondent and a copy of the Amended Final Brief of Respondent in The State v. Michael James Dinkins (2017-002360). These documents will be submitted to the Court of Appeals today via the AIS One Drive System. In addition to this email, two copies will be placed in the mail.

If you will, please reply to this email to confirm receipt.

Thank you!

Caroline Collins
Administrative Coordinator
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