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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ALEXANDER WASHINGTON,

APPELLANT.

APPELLATE CASE NO. 2020-000567

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in holding the trial judge did not abuse his discretion by admitting evidence of subsequent acts of unindicted sexual misconduct allegedly committed by Petitioner when such evidence was not part of the *res gestae*, was not admissible pursuant to Rule 404(b), SCRE, or State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and was unfairly prejudicial to Petitioner pursuant to Rule 403, SCRE, since the subsequent acts were not similar to the conduct for which Petitioner was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury?

STATEMENT OF THE CASE

An Abbeville County Grand Jury indicted Petitioner on September 30, 2011 for first degree criminal sexual conduct (CSC) with a minor. R. 213-214. His case was called to trial on April 6, 2015 before the Honorable R. Lawton McIntosh, and a jury. R. 1. Petitioner was tried in his absence after he did not appear for trial. Assistant Solicitors Lance Sheek and Yates Brown represented the state, and Janna Nelson represented Petitioner. R. 1.

On April 8, 2015, the jury found Petitioner guilty. R. 201, l. 15 – 202, l. 3. The sealed sentenced was opened on April 20, 2016 by the Honorable Donald B. Hocker. R. 203. Petitioner was sentenced to thirty years' imprisonment. R. 206, l. 25 – 207, l. 2.

A timely notice of intent to appeal was served on April 29, 2016. Undersigned counsel perfected the direct appeal and, on January 8, 2020, the South Carolina Court of Appeals filed an unpublished opinion affirming Petitioner's conviction and sentence. State v. Washington, Op. No. 2020-UP-003 (S.C. Ct. App. filed January 8, 2020); App. 1-13. Petitioner filed a petition for rehearing on January 23, 2020. App. 14-28. The Court of Appeals denied the petition for rehearing by order dated February 20, 2020. App. 29.

On April 3, 2020, Petitioner filed a petition for writ of certiorari with this Court. The state filed a return to this petition on April 8, 2020. By order dated August 24, 2020, this Court granted the petition for writ of certiorari as to Question 1 and ordered further briefing pursuant to Rule 242(i), SCACR.

This brief of petitioner follows.

STATEMENT OF FACTS

Minor, who was twelve years old at the time of trial, claimed that Petitioner, who was her stepfather, sexually abused her when she was seven years old. R. 127, l. 13 – 129, l. 2. Minor first disclosed to her biological father on September 3, 2010. She said the abuse had been "going on every once in while" for a couple of months and that the last occurrence was the day before, which was September 2, 2010. R. 123, l. 9 – 124, l. 4. Minor's father immediately called the police and reported the allegations. R. 129, ll. 19-22. During an investigation, Minor attended a forensic interview at Beyond Abuse and was physically examined by a pediatrician for signs of sexual abuse. R. 87, ll. 1-10; R. 69, l. 22 – 70, l. 2. There were no physical findings and Minor's exam was considered "normal." R. 71, ll. 12-14; R. 72, l. 7 – 73, l. 10.

During this time period, Minor was living with her mother, her five siblings, and Petitioner in a four bedroom mobile home. Her mother, Petitioner, and her two youngest siblings slept in the master bedroom. Minor shared a bedroom with her two sisters, and her brother had his own room. The fourth bedroom was used by Petitioner, who was a tattoo artist, for his business. The family called this bedroom "the tattoo room." R. 34, l. 21 – 43, l. 20.

Minor claimed during her forensic interview that the first time Petitioner touched her was in the "tattoo room." She alleged that on this occasion Petitioner touched her "private" and "butt" with his hand on the "outside." R. 116, ll. 12-25; R. 130, ll. 3-21; R. 131, l. 3 – 132, l. 6; R. 133, ll. 16-23; See Court's Exhibit No. 1 (DVD of Forensic Interview). In the weeks or months that followed, Minor claimed Petitioner touched her again. She described one time where Petitioner allegedly forced her to engage in oral sex in her brother's bedroom and another time where Petitioner allegedly anally penetrated her in her mother's bathroom. R. 135, ll. 5-21; See Court's Exhibit No. 1 (DVD of Forensic Interview). Minor claimed the latter was the last

time Petitioner had touched her, meaning the abuse would have taken place on September 2, 2010, the day before she disclosed to her father. R. 115, l. 15 – 116, l. 11; See Court's Exhibit No. 1 (DVD of Forensic Interview).

Minor's description of these alleged encounters occurred during her forensic interview on October 14, 2010. R. 87, ll. 1-10; See Court's Exhibit No. 1 (DVD of Forensic Interview). Contrastingly, her testimony before the jury, which occurred nearly five years later, was very vague.

Minor told the jury that Petitioner touched her "private" and "rear end" under her clothing with his hand and his "private." R. 126, l. 2 – 127, l. 2. She claimed the *first time* Petitioner touched her was "around summertime in July" and that on this occasion Petitioner touched "both of [her] spots" *on the "outside."* R. 127, ll. 13-22 (emphasis added). She alleged that on subsequent occasions Petitioner "put his private inside [her] rear end" and that this occurred "around July in the summertime" in the "tattoo room" and her mother's bathroom. R. 127, l. 23 – 129, l. 2.

For whatever reason, the state chose to indict Petitioner only for the first occasion of alleged sexual misconduct. The indictment alleged, "That Shane Alexander Washington [Petitioner], did in Abbeville County, state aforesaid, **on or about the 1st of July, 2010** being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one Minor, date of birth: [Redacted], 2002, in violation of Section 16-3-655(A)(1) of the South Carolina Code of Laws, 1976, as amended. R. 213 (emphasis added).

The jury found Petitioner guilty as indicted. R. 201, l. 15 – 202, l. 3. As required by statute, the judge had the jury indicate as part of its verdict which of the acts that constitute a sexual battery it found Petitioner had committed. See S.C. Code Ann. § 16-3-655(D)(1). The jury found Petitioner committed "fellatio" and "any intrusion however slight into any part of her genital or anal openings or any object being inserted into her genital or anal openings." R. 201, ll. 19-24.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting Pagan, 369 S.C. at 208, 631 S.E.2d 262, at 265) (internal quotation marks omitted).

ARGUMENT

The Court of Appeals erred in holding the trial judge did not abuse his discretion by admitting evidence of subsequent acts of unindicted sexual misconduct allegedly committed by Petitioner when such evidence was not part of the *res gestae*, was not admissible pursuant to Rule 404(b), SCRE, or *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), and was unfairly prejudicial to Petitioner pursuant to Rule 403, SCRE, since the subsequent acts were not similar to the conduct for which Petitioner was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury.

How the Issue was Presented Below

Before Minor's testimony, the state presented the recording of her forensic interview through Charlotte Ehney, the director of Beyond Abuse, who interviewed Minor on October 14, 2010. R. 86, l. 17 – 87, l. 10. As the forensic interview was being played for the jury, defense counsel informed the judge that she had a matter of law and the judge excused the jury from the courtroom. R. 92, ll. 11-18.

Counsel argued that the remainder of the video should be excluded because Minor goes on to describe subsequent uncharged allegations of sexual abuse. Counsel explained that when Minor first reported the allegations on September 3, 2010, she claimed the abuse had been happening for a couple of months and that the last time it happened was the day before, which was September 2, 2010. Accordingly, the warrant alleged a timeframe of July 1, 2010 until September 2, 2010. Defense counsel continued:

> However, the indictment, **the Grand Jury elected to indict Mr. Washington [Petitioner] for activity strictly on July 1st. On or about July 1st of 2010.** So I have to presume that that would be when things started happening because it's the first date listed in the warrant. I didn't have any idea what Minor was going to say happened on July 1st. **But she, in the rest of the course of this interview, talks about two other incidents . . . she has now talked about everything**

> **related to the first incident. She's asked by the interviewer tell me - - tell me what happened the first time. And we've been through that. And I would submit to you, Judge, that that's what he [Petitioner] is indicted for because July 1st is supposedly when this started if you take the incident report and warrant to be - - to have their dates correct. He's indicted for July 1st. She has described the first event. The rest of the interview goes on to ask, were there any other times that it happened.** Tell me about the last time that it happened. And throughout the rest of the time Minor describes the last time that something happened which she said was what sounds like anal penetration in her mother's bathroom . . . If that's the last time something happened that must have been - - if you take what she reported is true, that would have been the day before the report was made, September 2nd, which is not what he's indicted for. She describes some other incident of fellatio in her brother's bedroom.
>
> So, Your Honor, that's my position is that **everything else on this video is irrelevant and overly prejudicial under Rules 401 and 403 and do[es] not relate to the offense that Mr. Washington is charged with in this case.**

R. 92, l. 20 – 26, l. 20 (emphasis added).

In response, the assistant solicitor argued that "statutorily time is not of the essence" and suggested that "on or about the 1st day of July, 2010" encompassed all of "the summertime months." R. 94, ll. 22-25. Defense counsel disagreed and asserted that "on or about means on July 1st or very close to it." She emphasized that "when [the state] want[s] to indict for a timeframe [it] can." R. 96, ll. 6-24. However, for whatever reason, the state chose to indict Petitioner only for alleged conduct that occurred on or about July 1, 2010. See R. 213-214.

The solicitor also argued the alleged subsequent acts should be admissible under the *res gestae* theory, which allows the state "to present the evidence that completes the entire story, instead of presenting a very disjointed story." R. 95, ll. 7-20. He later contended that the alleged subsequent acts are a part of the *res gestae* because the acts put the abuse "into context." He asserted, "[W]hat I have found from doing these cases . . . is that if you present the picture to a jury that you've got these kids living there. It happens on one day and it's never happened any other time, it leaves the jury wondering what *precipitated* that one event where it's showing the

pattern of conduct puts it in the context that they can understand. It certainly makes it more logical. And it certainly would go to prove that this child is not misinterpreting something that happened. It wasn't a bathing or helping change clothes and a touch that the child misinterpreted. But this was a pattern of conduct." R. 99, ll. 7-19 (emphasis added).

As to *res gestae*, defense counsel asserted that her understanding of the theory is – "I have to explain to you that somebody stole this car because this is the same car he used an hour later in this armed robbery or this bank robbery. That's not what we've got here. We've got three incidents that are . . . very different." R. 99, l. 21 – 100, l. 4. Counsel also cited to State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009). She explained that in Clasby this Court affirmed the admission of evidence of "similar acts" of "continued elicit intercourse" that happened "prior to the indicted offense" as "kind of a grooming theory." Before being cut off by the judge, counsel distinguished this case from Clasby by asserting that the uncharged acts admitted in Clasby were *prior* to the indicted act and were used to show what led up to the indicted crime where here the uncharged acts were *subsequent* to the conduct for which Petitioner was indicted. R. 102, l. 17 – 103, l. 5.

The trial judge found the alleged subsequent acts were "unindicted crimes." R. 101, ll. 4-6. However, citing State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), and State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), the judge found the subsequent acts were admissible as part of the *res gestae*. R. 103, ll. 6-10. He concluded that the unindicted conduct goes "to show motive and intent, not [a] mistake - - it would also go to show a full presentation of the evidence of the context and environment in which this setting took place." R. 101, ll. 7-17.

At the end of the judge's ruling, defense counsel raised Rule 404(b), SCRE. Counsel argued that the unindicted subsequent acts were propensity evidence under Rule 404(b), SCRE,

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and not part of the *res gestae*. She emphasized that "on the tape she [Minor] has already explained the complete act for which Mr. Washington [Petitioner] is indicted and it is unfairly prejudicial to allow any other act that he is not on notice for, Your Honor." R. 103, l. 23 – 104, l. 11. Despite this additional argument, the judge did not alter his ruling and made it clear he had made his determination. R. 104, ll. 3-13.

Subject to Petitioner's objection, the judge gave the following limiting instruction to the jury before the remainder of the forensic interview was published:

> Ladies and gentlemen, there may be reflected on the video evidence of other acts allegedly committed by the Defendant on the witness. The indictment in this matter only charges the Defendant with conduct that occurred on or around July 1st, 2010. To the extent that any evidence is presented other than the alleged acts on or around July 1st, 2010 you shall not consider the Defendant's innocence or guilt in committing these acts because he had not been indicted for these acts. This evidence, if any, may be considered by you for the sole purpose of considering the Defendant's motive, intent, absence of mistake, and/or to present a setting of the case and its environment. Ladies and gentlemen, it's up to you to evaluate the weight of the evidence and give it such weight that you think it deserves.

R. 105, l. 23 – 106, l. 11.

Court of Appeals Opinion

In its opinion affirming Petitioner's conviction, the Court of Appeals held the evidence of prior bad acts was relevant because it was intimately connected to the abuse and provided context regarding the time period in which the abuse occurred. App. 6. The court further asserted the evidence was probative to demonstrate "continuous illicit intercourse between Washington [Petitioner] and Minor." App. 6.

Moreover, citing to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), *overruled by* State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), the Court of Appeals held the evidence was

admissible pursuant to Rule 404(b), SCRE, under the common scheme or plan exception. App. 7-8. Specifically, the court concluded "the similarities between all of the incidents described by Minor in the interview strongly outweigh the dissimilarities." App. 8. The court listed the similarities as follows: (1) Minor was the victim; (2) all of the alleged assaults constituted sexual battery; (3) the assaults occurred in Minor's home; (4) the assaults occurred while Minor's mother was asleep or out of the house; (5) most of the assaults occurred at night; and (6) Petitioner made Minor wear a blindfold or cover her eyes each time. App. 8. The court maintained there were only two dissimilarities: (1) the location within the house—the tattoo room, her mother's bedroom, and her brother's bedroom—where the abuse occurred; and (2) the type of sexual battery that occurred. App. 8. Because the court concluded the "similarities strongly outweigh the dissimilarities," it held the trial judge did not abuse his discretion by admitting the evidence of alleged subsequent acts as an exception to Rule 404(b), SCRE. App. 8-9.

The Court of Appeals further held the evidence was admissible as part of the *res gestae* "because the unindicted conduct was so intimately tied to the charged offense that it was necessary for a full presentation of the case." App. 9. First, the court asserted the acts were all relatively close in time as they occurred over the course of two months. App. 9. Second, the court determined the bad acts evidence provided context to the crime as part of Petitioner's "sustained illicit conduct" thereby helping the jury to understand "the alleged sexual battery was not a one-time event that may have been misinterpreted or misremembered." App. 9. Third, the court found the evidence was necessary to complete the "story of the crime on trial." App. 9.

Lastly, the Court of Appeals determined the probative value of the bad acts evidence substantially outweighed the danger of unfair prejudice. App. 10. It asserted the risk of unfair

prejudice was low because the bad act evidence, like the evidence of the offense itself, hinged on Minor's credibility. App. 10-11. It further found the probative value of the evidence was "extremely high" because there was no physical evidence of assault. App. 11. Consequently, the court concluded the trial judge did not abuse his discretion by admitting the evidence of subsequent alleged misconduct. App. 11.

Discussion

The trial judge properly recognized the alleged sexual misconduct described by Minor during her forensic interview and later during her testimony before the jury that occurred after the first episode of abuse was not evidence of the charge for which Petitioner was indicted and constituted "unindicted crimes" since Petitioner was only indicted for conduct that occurred "on or about the 1st of July, 2010." R. 101, ll. 4-6; R. 213-214.

However, the judge abused his discretion by admitting the evidence of unindicted sexual misconduct since this evidence was not part of the *res gestae* and was not admissible pursuant to Rule 404(b), SCRE. Moreover, the evidence was unfairly prejudicial to Petitioner since the subsequent acts were not similar to the conduct for which Petitioner was indicted, involved escalating allegations of abuse, and could only have confused and misled the jury.

"South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Clasby, 385 S.C.

at 154, 682 S.E.2d at 895). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id.

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." Clasby, 385 S.C. at 155, 682 S.E.2d at 895 (quoting State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) (internal quotation marks omitted). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (quoting Gaines, 380 S.C. at 29, 667 S.E.2d at 731) (internal quotation marks omitted). "Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896).

"Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). "In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity." Id. "Proof that a defendant has been guilty of another crime equally as heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty." Id. (quoting Lyle, 125 S.C. at 416, 118 S.E. at 807) (internal quotation marks omitted).

The *res gestae* theory "recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." King, 334 S.C. at 512, 514 S.E.2d at 582 (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds by*

State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014)). This Court explained the theory of *res gestae* in State v. Adams:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-371 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)) (alterations in original). "Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime." King, 334 S.C. at 513, 514 S.E.2d at 583 (citing State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)).

Citing State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004), and State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999), the trial judge in this case found the subsequent acts of alleged sexual abuse were admissible pursuant to Rule 404(b), SCRE, and as part of the *res gestae*. R. 103, ll. 6-10. This was an abuse of discretion.

In Sweat, this Court affirmed the admission of evidence of a prior bad act of domestic violence pursuant to Rule 404(b), and as part of the *res gestae*. Sweat was charged with first degree burglary, assault and battery with intent to kill, and three counts of assault of a high and aggravated nature after he invaded a home occupied by his estranged wife, her boyfriend, and several others on December 11, 2001. Sweat, 362 S.C. at 121-122, 606 S.E.2d at 510-511. The state introduced testimony from Sweat's estranged wife about a domestic violence incident that took place two months earlier in October 2001. Id. at 122, 606 S.E.2d at 511. Sweat's wife

reported the prior incident and Sweat spent forty-five days in jail. Id. While he was in jail, Sweat's wife ended their relationship and became romantically involved with another man. Id.

This Court held the prior episode of domestic violence was admissible under Rule 404(b) as evidence of motive and intent. Id. at 124, 606 S.E.2d at 512. The Court found from the October incident that the jury could have inferred both (1) motive—that Sweat was driven by anger over his estranged wife causing him to go to jail and terminating their relationship; and (2) intent—that Sweat maliciously sought to inflict harm upon his estranged wife and her boyfriend. Id. at 126, 606 S.E.2d at 513. This Court held the evidence was relevant because it tended to make the state's version of the case more probable and was logically related to why Sweat went to the house that night and to his intentions once there. Id. at 127, 606 S.E.2d at 514.

Additionally, this Court held the evidence was admissible as part of the *res gestae* and was properly admitted to "complete the story of the crime on trial." Id. at 133, 606 S.E.2d at 517. The Court concluded that the October incident, and the events that followed, including Sweat's estranged wife moving out and ending their relationship, provided the jury with "an appropriate context in which to place the December 11 attack." Id.

Sweat is easily distinguishable from this case. Here, the alleged unindicted acts occurred *subsequent* to the conduct for which Petitioner was indicted as opposed to before and did not explain or give context to the prior indicted misconduct like the prior act of domestic violence did in Sweat. In short, the indicted conduct was not dependent on the uncharged conduct as was the case in Sweat. See State v. Curry, 330 N.E.2d 720, 725 (Ohio 1975) (explaining the *res gestae* exception is necessary because "it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts").

The uncharged conduct was also not relevant to show motive or intent, exceptions under Rule 404(b), like the prior incident of domestic violence in Sweat. Motive for the alleged crime in this case was apparent and therefore not an issue at trial. See State v. Curry, 330 N.E.2d 720, 724 (Ohio 1975) ("A person commits or attempts to commit statutory rape for the obvious motive of sexual gratification."). Additionally, if the indicted sexual misconduct, which occurred on or about July 1, 2010, was true as Minor described it, then there can be no dispute as to Petitioner's intent and no argument that Petitioner's actions were some sort of mistake or accident. Consequently, evidence of the subsequent uncharged conduct was not relevant as to these exceptions found in Rule 404(b). The subsequent uncharged acts only went to propensity—to show Petitioner was capable of committing the indicted act of sexual abuse because he later committed additional acts of escalating misconduct against Minor.

In King, this Court held it was reversible error to admit evidence of prior thefts allegedly committed by King as evidence of motive or as part of the *res gestae*. 334 S.C. 504, 514 S.E.2d 578. King was accused of murdering his father-in-law, Billy Turbeville. Turbeville received two checks each month totally $2200. After paying his monthly bills totaling $400, Turbeville kept the remaining cash inside his wallet in the front pocket of his pants. No wallet or cash was found on Mr. Turbeville when his body was discovered. King, 334 S.C. at 508, 514 S.E.2d at 580. The trial court allowed King's ex-wife to testify that King regularly pawned household items, stole cash from her purse, forged checks on her bank account, stole cash from her bank account by using her ATM card, and stopped paying his share of the bills in the months that preceded the murder. Id. at 511, 514 S.E.2d at 582.

After considering both Rule 404(b), SCRE, and the *res gestae* theory, this Court held the remote thefts were not admissible under any theory, and that the evidence merely showed King's

bad character and his propensity to commit crimes. Id. at 513, 514 S.E.2d at 583. The Court further held the admission of the evidence was not harmless because the prior thefts suggested King had a drug problem, which was highly prejudicial, and all the evidence against King was circumstantial. Id. at 514, 514 S.C. at 583.

The subsequent unindicted acts of sexual misconduct in this case similarly show Petitioner's propensity to commit sexual battery and were not admissible under any of the exceptions found in Rule 404(b). Again, the exceptions contained in Rule 404(b) include motive, intent, lack of mistake or accident, a common scheme or plan, and identity of the perpetrator. As argued above, the evidence was not relevant to show motive, intent, or lack of mistake or accident. Moreover, identity of the perpetrator was never an issue at trial. Either Petitioner sexually abused Minor as she claimed "on or about" July 1, 2010, or he did not. There was never a dispute that someone else may have abused her.

The sexual abuse that allegedly occurred "on or about" July 1, 2010 was a completely separate event from the later uncharged crimes, which involved escalating allegations of misconduct, including sexual battery. The charged and uncharged events were not mutually dependent on each other. Unlike in State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009), where this Court held testimony about four *prior* incidents of uncharged sexual misconduct against the same child was admissible under Rule 404(b) as evidence of a common scheme or plan, the conduct here occurred *subsequent* to the indicted act, was not similar to the facts of the indicted charge, and did not support any sort of grooming theory. Therefore, the prior bad act evidence in this case was not admissible pursuant to the common scheme or plan exception found in Rule 404(b).

The admission of the subsequent uncharged conduct was unfairly prejudicial to Petitioner because the acts involved escalating allegations of sexual misconduct. See Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008) (citing State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001)). The evidence was indisputably used by the state to prove Petitioner committed the crime for which he was indicted. Despite the limiting instruction given by the judge before the admission of the evidence, the assistant solicitor urged the jury to consider the uncharged conduct as substantive evidence of the indicted offense during his closing argument:

> Now, the argument will be made, because I'm not dumb and I've done this for a long time, what evidence did they [the state] have that it happened on July 1st. She [Minor] said it had been going on for a couple of months and that ***the first incident was touching*****, and then later it was sticking something inside her.** Folks, that's the reason the indictment says what it says. On or about July 1st. On or about, he engaged in sexual battery on Minor. **If you find as a jury that he stuck his penis in her bottom, he stuck his penis in her mouth like she testified, if you find that she told the truth, then you find the Defendant guilty.**

R. 172, l. 15 – 173, l. 1 (emphasis added).

This argument could only have confused and misled the jury as to the purpose the trial judge admitted the evidence of the unindicted subsequent acts and how the jury was permitted to consider the evidence. See R. 104, l. 16 – 105, l. 5. The solicitor's argument is further evidence of how the erroneous admission of the uncharged misconduct unfairly prejudiced Petitioner and is proof that the jury likely improperly considered the subsequent acts as evidence of Petitioner's guilt or innocence and therefore convicted him on an improper basis. See Kirton, 381 S.C. at 24, 671 S.E.2d at 115 ("The determination of prejudice must be based on the *entire* record, and the result will generally turn on the facts of each case.") (emphasis added).

In its opinion affirming Petitioner's conviction, the Court of Appeals erroneously held Petitioner's contention that the state's closing argument was proof of unfair prejudice was unpreserved for appellate review since Petitioner did not object to the improper closing argument at trial. Notably, Petitioner did not challenge the state's improper closing argument as a separate ground for reversal of Petitioner's conviction on appeal since no objection to the argument was raised below. However, as appellate courts often do, Petitioner asserted the state's closing argument was proof that the erroneous admission of the prior bad act evidence unfairly prejudiced Petitioner. This argument is certainly preserved for appellate review.

Lastly, the Court of Appeals extensively relied on this Court's opinion in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), which was recently overruled by this Court in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), in holding the prior bad act evidence was admissible under the common scheme or plan exception to Rule 404(b). Under the correct common scheme or plan framework outlined by this Court in Perry, the prior bad act evidence admitted against Petitioner should have been excluded because the evidence had no logical relevance to the offense for which Petitioner was on trial and met none of the exceptions found in Rule 404(b). Again, as more thoroughly argued above, it was merely propensity evidence.

Respectfully, this Court should hold the trial judge abused his discretion by admitting the subsequent unindicted allegations of sexual misconduct against Petitioner, reverse Petitioner's conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of September, 2020.