

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County
The Honorable R. Lawton McIntosh, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

SHANE ALEXANDER WASHINGTON,

Petitioner.

Appellate Case No. 2020-000567

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, SC 29649-0516
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

STANDARD OF REVIEW6

ARGUMENTS

 Because all of Petitioner’s sexual batteries on the same victim occurred in a two-month span in the same location, any uncharged acts were admissible as res gestae and under the common scheme or plan as part of a continuous pattern of illicit conduct. Further, Petitioner was not prejudiced by the admission of other bad acts and the probative value outweighed the danger of unfair prejudice7

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases:

<u>Anderson v. State</u> , 354 S.C. 431, 581 S.E.2d 834 (2003).....	10
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	14
<u>State v. Aiken</u> , 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996).....	13
<u>State v. Clasby</u> , 385 S.C. 148, 682 S.E.2d 892 (2009)	11, 12
<u>State v. Gaster</u> , 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).....	6
<u>State v. Howard</u> , 32 S.C. 91, 10 S.E. 831 (1890)	12
<u>State v. Johnson</u> , 334 S.C. 78, 512 S.E.2d 795 (1999).....	10
<u>State v. Kirton</u> , 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008)	11
<u>State v. Mathis</u> , 287 S.C. 589, 340 S.E.2d 538 (1986)	11
<u>State v. McGee</u> , 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014).....	10
<u>State v. McClellan</u> , 283 S.C. 389, 323 S.E.2d 772 (1984)	11
<u>State v. Peak</u> , 134 S.C. 329, 133 S.E. 31 (1926).....	8, 9
<u>State v. Perry</u> , 430 S.C. 24, 842 S.E.2d 654 (2020).....	12
<u>State v. Preslar</u> , 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005).....	10
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000).....	6
<u>State v. Reeves</u> , 301 S.C. 191, 391 S.E.2d 241 (1990).....	14
<u>State v. Richey</u> , 88 S.C. 239, 70 S.E.2d 729 (1911)	10, 13
<u>State v. Rutledge</u> , 232 S.C. 223, 101 S.E.2d 289 (1957).....	8
<u>State v. Sweat</u> , 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004).....	10

<u>State v. Torres</u> , 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010).....	6
<u>State v. Tutton</u> , 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003).....	13
<u>State v. Wallace</u> , 384 S.C. 428, 683 S.E.2d 275 (2009)	12
<u>State v. Weaverling</u> , 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).....	10, 11, 13
<u>State v. White</u> , 410 S.C. 56, 762 S.E.2d 726 (Ct. App. 2014)	8
<u>State v. Whitener</u> , 228 S.C. 244, 89 S.E.2d 701 (1955)	11, 13
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001).....	11
<u>Other Authorities:</u>	
S.C. Code § 16-3-651(h).....	7
S.C. Code § 16-3-655(A).....	7

PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL

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 or misled the jury.

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Because all of Petitioner's sexual batteries on the same victim occurred in a two-month span in the same location, any uncharged acts were admissible as res gestae and under the common scheme or plan as part of a continuous pattern of illicit conduct. Further, Petitioner was not prejudiced by the admission of other bad acts and the probative value outweighed the danger of unfair prejudice.

STATEMENT OF THE CASE

A jury convicted Petitioner Washington of criminal sexual conduct with a minor in the first degree following trial on April 6-8, 2015. Washington did not appear for trial and disclosed to Victim's Mother prior to trial that he was going to leave South Carolina. R. pp. 61-63. Following the verdict, the presiding Judge, the Honorable R. Lawton McIntosh, placed the sentence under seal. On April 20, 2016, Washington was brought before the Honorable Donald B. Hocker, who sentenced him to thirty years imprisonment.

In an unpublished opinion, the Court of Appeals affirmed the conviction and sentence. State v. Washington, 2020-UP-003 (S.C. Ct. App. filed January 8, 2020). The Court of Appeals denied Washington's petition for rehearing by order dated February 20, 2020. Washington filed a petition for writ of certiorari. Following the State's return, this Court granted the petition of writ of certiorari on the issue of the admissibility of extrinsic acts, but denied the petition as to the issue of directed verdict.

STATEMENT OF FACTS

Victim was sexually assaulted by her mother's boyfriend, Petitioner Washington, multiple times during the summer of 2010. The warrant specifies a time frame between July 1, 2010 and September 2, 2010. R. p. 93. The indictment indicates the sexual misconduct occurred on or around July 1, 2011. R. p. 214.

Victim lived with several of her nine siblings, her mother (Mother), and Washington in a trailer. Washington operated a tattoo parlor in the trailer on the other side of the house from the master bedroom. Mother testified Washington spent most of his time in the tattoo parlor, and sometimes stayed up all night, making tattoos, gaming on the game console, or watching movies. R. pp. 34-37. She described the home as "a fairly large mobile home." R. p. 43, line 4.

Mother explained in September 2010, as she was rushing around and getting the children ready, Victim told her she needed to tell her something, but Victim's biological father (Father) arrived to pick her up, and Victim never had a chance to tell her. R. pp. 43-45. Instead, the Due West Police Department later told Mother that Victim disclosed she was sexually abused. R. pp. 44-45. Mother agreed with defense counsel that she stayed in a relationship with Washington even afterwards. R. pp. 47-48.

Charlotte Ehney from the Beyond Abuse Child Advocacy Center testified she interviewed Victim on October 14, 2010. The interview was published for the jury. R. p. 86; p. 92. During the interview, the conduct Victim first disclosed was that Washington touched Victim in the "butt" and "privates." Court's Exhibit No. 1 (16:00-16:45). Washington would take her into the "tattoo" room. Victim explained Washington would pull her pants down and touch Victim with his hands on the

outside of her privates and butt. Washington told Victim not to tell anybody and said DSS would take her if she told. (18:30-18:45). Victim said this occurred more than one time. (19:15-19:30).

Victim told the interviewer the abuse started when she was seven years old and occurred day and night. The first time was daytime. (20:00-20:30; circa 35:00). The interviewer asked for Victim to tell her about the first time something happened. Victim explained the first time, Washington brought her into the tattoo room and made her take her clothes off, and he “was rubbing on her.” Washington covered her eyes with a scarf. He told her to not peek. He pulled his pants down and made her bend over. (21:00-22:00). She told the interviewer Washington did something, she did not know what. She told the interviewer she felt something wet on her butt afterwards. Washington told her to pull up her pants and took the blindfold off. (22:30-23:30). Victim would later explain that everytime the abuse occurred, she would either wear a blindfold or cover her eyes. (54:30-55:00).

The interviewer asked Victim to describe the last time something happened, and she explained Washington put his private in her butt. He then touched her private with his hand. (25:45-26:45). However, that was only the last time he put his private in her butt – Victim explained this happened more than one time. (circa 28:30). She described another occurrence when Washington picked Victim up while she was sleeping. He stuck his penis in her private and he touched her privates with his hands. She described the penis as feeling soft. (29:00-31:30).

Victim told the interviewer Washington put his penis in her mouth and moved it as if writing in her mouth. She said this occurred in the brother’s room. She said this occurred other times when her mother went shopping. (33:00-36:30).

By the time of trial, Victim was twelve years old and living with her grandfather. R. p. 118.

Victim testified she used to live with Mother, Washington, and several of her eight siblings at the time of the assaults. She went to Father's on weekends. R. p. 118, pp. 120-22. The assaults started when she was seven years old. R. p. 124, lines 10-12. While visiting her father, she disclosed to him that "[Washington] was touching me in the wrong place." R. p. 123, lines 9-19. She described it as going on "every once in a while." R. p. 123, lines 20-22. The sexual abuse was going on for weeks. She testified Washington touched her "private" under clothing with his hand and his private on her skin. The touching started "around summertime in July." She explained the touching was on the outside of her private area. R. pp. 126-27 (direct quote p. 127, lines 13-15). She further testified that "around the same time," he penetrated her in the rear. **This happened more than one time. This also occurred "during July – around July in the summertime."** She explained the anal intrusion occurred in the tattoo room and her mother's bathroom. R. pp. 128-29 (direct quote p. 128, line 25 – p. 129, line 2).

Referencing the forensic interview, defense counsel asked about the first time something happened, Victim confirmed it occurred in the tattoo room, and he touched her butt and private. R. p. 133, lines 16-23. Then defense counsel asked about the last time something happened, and whether it was different from the first time. She confirmed it was. R. p. 134, lines 2-21. She confirmed there was a time Washington put his private in the butt in the master bathroom, and that it was a different time from the first time, which occurred in the tattoo room. R. pp. 134-35. However, note Victim said both the digital and penal assaults occurred more than one time. Defense counsel never asked during cross-examination about all the times in between the first and last sexual assaults.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see 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." (emphasis added)).

ARGUMENT

Because all of Petitioner's sexual batteries on the same victim occurred in a two-month span in the same location, any uncharged acts were admissible as res gestae and under the common scheme or plan as part of a continuous pattern of illicit conduct. Further, Petitioner was not prejudiced by the admission of other bad acts and the probative value outweighed the danger of unfair prejudice.

Washington complains the trial court erred in allowing testimony about acts other than the acts that occurred on or around July 1, deeming much of the conduct described as uncharged conduct. However, the acts constituted charged conduct and further, if determined to be extrinsic acts, would be admissible as evidence of a pattern of illicit conduct between the same parties and res gestae of the crime. The trial court, therefore, did not abuse its discretion by admitting this conduct.

Criminal sexual conduct with a minor in the first degree proscribes a sexual battery with a victim less than eleven years of age. S.C. Code § 16-3-655(A). Note time is not an element of the offense. Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code § 16-3-651(h).

The indictment alleged the following:

That Shane Alexander Washington, did in Abbeville County, state aforesaid, on or about the 1st day 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 [Victim] date of birth, [xx/xx/2002], in violation of Section 16-3-655(A)(1)

R. p. 214. The indictment, therefore, did not allege a specific type of sexual battery.

During the forensic interview, Victim accused Washington of (1) anal penetration, (2) making her perform fellatio, and (3) digital touching of her private area. She explained to her interviewer that each of these categories of abuse occurred more than one occasion. The trial court instructed that in order to convict Washington of criminal sexual conduct with a minor, the jury needed to unanimously agree on one of the five categories of sexual battery defined by statute. The jury convicted Washington of (1) fellatio and (2) “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. p. 201, lines 19-23.

Given that the grand jury did not indict for a specific form of sexual battery and time is not an element of the offense for criminal sexual conduct with a minor, all the acts alleged constitute a sexual battery on Victim. Therefore, none of these acts could be considered extrinsic acts, but instead are part of the charged conduct. A variance of time between an indictment and the State’s proof does not render any of the acts “uncharged conduct.” “[I]t is not necessary to prove the precise day laid in an indictment except where time enters into the nature of the offense, or is made a part of the description of it.” State v. Rutledge, 232 S.C. 223, 229-30, 101 S.E.2d 289, 292 (1957). In Rutledge, the Supreme Court rejected the Petitioner’s argument that a material variance existed because of several weeks’ difference between the times alleged in two receiving goods indictments. Id.

In State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926), the indictment alleged the deceased was shot by appellant and died on December 7, 1924, when the deceased did not die until several days

later. The appellant objected to the State's motion to amend the indictment. This Court held, "The indictment was free from fault in the first instance, **and did not need any amendment**. Any date could have been alleged prior to the time of giving out the bill to the grand jury, and the true date could have been proven." Peak, 133 S.E. at 34 (emphasis added).

In the instant case, the Court of Appeals, in its opinion, correctly questioned the dubious assertion Washington argued – that all the acts occurring after the first act constitutes extrinsic acts. The Court of Appeals found, "While we do not agree that all four incidents described by Minor in the remainder of the video constitute evidence of subsequent bad acts, at a minimum, the last incident described likely constitutes evidence of a subsequent bad act." Washington. The Court of Appeals then stated it would review whether the trial court erred in admitting the entire forensic interview. Id. However, because all the acts are part of the charged conduct, analysis on the admissibility of extrinsic acts is unnecessary.

Further, even assuming some conduct occurring prior to September 3 constitutes uncharged conduct, it was properly admissible as res gestae of the crime. What is clear from Victim's interview and her trial testimony is these acts were intermingled and all occurred more than once in a time period beginning "around summertime" in July until shortly before disclosure in early September. The Court of Appeals referenced as a possible extrinsic act conduct it attributed to September 2, the day before the September 3 disclosure. Therefore, even if it could be described as an uncharged act, it is obviously relevant as being the act that ultimately motivated Victim to disclose the abuse. Both the first act and the last act as described in the forensic interview appear to involve Victim being made to bend over, incur a possible penile intrusion in the anal area, and digital fondling of the

vaginal area afterward. Therefore these two acts are similar. All the acts are so intimately connected that their admission provides a full picture of the abuse occurring within a sixty-four day timeframe when she was seven years old. Accordingly, all the acts are admissible as *res gestae*. “Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case.” Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility). “When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*.” State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) (internal quotation marks omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)).

Further, any subsequent acts are admissible under the common plan or scheme exception of Rule 404, SCRE. 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 (emphasis added).

In State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999), the Court of Appeals favorably quoted this Court’s 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.”).

Additionally, this Court and the Court of Appeals have both 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). Similar conduct occurred on multiple occasions in Clasby and the Court found the admission of the uncharged prior bad act evidence “consistent with our jurisprudence.” Clasby, 385 S.C. at 158, 682 S.E.2d at 897 (citing Weaverling, Kirton, State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984); State v. Mathis, 359 S.C. 450, 464, 597 S.E.2d 872, 879 (Ct. App. 2004)).

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. In the present case, the probative value of the demonstrated continuous illicit intercourse substantially outweighs any prejudice resulting from its admission. As this 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.

In the instant case, in a short period of time, a mere two months, Washington executed a plan to sexually abuse Victim several ways, inside Victim’s home, either while Mother and siblings were asleep or elsewhere. Victim either wore a blind fold or covered her eyes. Washington told her she would be taken away by DSS if she told anyone. The absence of physical evidence made Victim’s testimony probative and gave the jury the full picture of the abuse inflicted by Washington on his child victim. Washington claims the supposed extrinsic acts were more prejudicial because they depicted escalating conduct. However, all four types of acts described were sexual batteries constituting criminal sexual conduct with a minor in the first degree – equally proscribed and equally punished by the legislature. These acts all occurred multiple times and overlapped with each other, evidencing a pattern of sustained illicit misconduct. Clasby, supra. For sure, whether considered charged or uncharged, the acts were all continuous, but not escalating as Washington claims. They were multiple occurrences of the same crime within the sixty-four day period.

Washington notes State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) was recently overruled by State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). Washington claims there was no “logical relevance” for the evidence. In Perry, this Court found extrinsic acts must bear a logical connection to the charged acts after finding the Wallace balancing test departed from prior precedent. Id. at 41, 842 S.E.2d at 633.

However, Perry does not alter the result of this case. The logical connection in the instant case between the charged and uncharged conduct is all the acts occurred with the same child in the

same home during a mere two-month span. As demonstrated in above authority, continuing course of conduct between parties in sexual assault cases has been admissible since before and after Lyle, and before Wallace. See Richey, Whitener, Weaverling. For instance, in State v. Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003), the Court of Appeals 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.”

Finally, because the charged and any uncharged acts both were solely proven by Victim’s testimony, the danger of unfair prejudice was negligible at best. This point was demonstrated in State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996). In Aiken, the co-defendant on a robbery charge testified as to other robberies Aiken and the co-defendant committed together in the area. This Court found the testimony admissible under the common plan or scheme exception to Rule 404, SCRE, and then observed the following concerning the danger of unfair prejudice:

[T]he chance that the admission of this evidence unfairly prejudiced Aiken was small because if the jury found [co-defendant] to be credible, it would likely believe his testimony that Aiken was guilty of the [robbery] he was charged with and have no reason to consider the testimony concerning the other robberies.

Id. at 181, 470 S.E.2d at 406-07. Likewise, the intermingled conduct is dependent on the same proof, primarily Victim’s testimony and forensic interview.

This simple reality also renders any perceived error harmless. “Harmless error rules . . . ‘serve a very useful purpose insofar as they block setting aside convictions for small errors or defects

that have little, if any, likelihood of having changed the result of the trial.” State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)). The “materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

In the instant case, the trial court did not abuse its discretion and Washington was not prejudiced by the supposed error.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY:



DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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