RECEIVED
Jan 08 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge

---

Appellate Case No. 2019-002097

---

THE STATE, Respondent,

v.

ERIC CHARLES PETERSON, Appellant.

---

# INITIAL BRIEF OF RESPONDENT

---

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

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

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North Street
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Rules**

## STATEMENTS OF ISSUES ON APPEAL

I.

The trial judge did not abuse his discretion in admitting testimony that Appellant "played naked" with victim because it falls within the common scheme or plan exception for which 404(b) evidence can be used

II.

The trial judge did not abuse his discretion in admitting four journal entries written by Appellant because they were relevant to his consciousness of guilt related to the charges against him.

III.

The trial judge did not abuse his discretion in denying Appellant's motion for a mistrial.

## STATEMENT OF THE CASE

Appellant was indicted by a Greenville County Grand Jury for four counts of criminal sexual conduct with a minor in the third degree. Appellant proceeded to a jury trial on December 9-12, 2019, in the Greenville County Court of General Sessions before the Honorable Donald B. Hocker. The State was represented by Assistant Solicitor Christine Kednocker Sustakovitch. Brian P. Johnson represented the Appellant. The jury found Appellant guilty as indicted on each count and he was sentenced to fifteen years' imprisonment on each count, all sentences to run concurrently. This appeal follows.

## STATEMENT OF FACTS

Mother of Victim (Mother) and Appellant Eric Peterson began dating in 2009. (Tr. 145, 265). When they began dating, Mother had a daughter (Victim) from a previous relationship. (Tr. 265). Mother and Appellant married in 2011 when Victim was nine years old. (Tr. 265).

Mother and Appellant began having marital problems in 2015. (Tr. 267). They went to marriage counseling, but the counseling was unsuccessful. (Tr. 267). Appellant was asked to move out in March of 2016 when problems were not resolved. (Tr. 269).

Mother was concerned there may be something criminal in nature on Appellant's computer so she took the computer to law enforcement in April 2016. (Tr. 268). Mother met with James Perry, an investigator in computer crimes with the Greenville County Sheriff's Office. (Tr. 95, 268). Ultimately, nothing was found on the computer, but Perry set up an appointment for Victim to come in and talk with someone based on mother's concern of what might be found on the computer. (Tr. 273).

Victim met with Cheri Lyda, an investigator with crimes against children division of the Greenville County Sheriff's Office. (Tr. 275). Lyda did not remember meeting with Victim, however she stated that a report would not have been generated if the child did not disclose anything. (Tr. 244).

In July 2016, Victim wrote a letter about four different instances of sexual abuse by Appellant. (Tr. 150-151). Victim gave the letter to Mother to turn in to the police. (Tr. 152). Victim testified that she knew Mother was going to the police station to "turn other things in and there had to have been somebody to help, so I turned it in." (Tr. 152).

On July 20, 2016, Mother met with Investigator Perry. (Tr. 97-98). She gave him the letter in a sealed envelope. (Tr. 97). Perry testified he opened the letter, made a copy for Mother and placed the letter in a case file. (Tr. 98-100). Mother testified that she was under the

impression she would later be contacted with a case number and steps to move forward. (Tr. 275).

On October 10, 2016, Mother went to the Sheriff's Office to get a status on the case because she had not heard anything. (Tr. 276). She spoke with Lorraine Henderson, an investigator in the Sex Crimes Unit at Greenville County Sheriff's Office, who was working the front desk that day. (Tr. 276). Henderson could not find any case connected with Victim. (Tr. 129). After discussing Victim's case with Henderson and contacting Perry, they ultimately found the letter misplaced in another case file. (Tr. 277). After reading through the letter, Henderson directed Mother to law enforcement in Greer because the disclosures within the letter were in that jurisdiction. (Tr. 132).

On October 10, 2016, Matthew Wise, a uniform patrol officer for Greer City Police Department, was dispatched to the lobby of the Greer Police Department. (Tr. 76). Mother explained to Wise that she had been directed there by the Greenville County Sheriff's Office. (Tr. 78-80). Wise took an initial report and concluded that there needed to be further investigation. (Tr. 81). Wise contacted Jason Bash, a detective with the Greer City Police Department.

Bash reviewed the initial incident report and made contact with Mother. (Tr. 315). He gathered background information and interviewed Mother. (Tr. 315). After gathering information, Bash referred Victim to the Julie Valentine Center (JVC), the local rape crisis and child abuse center, for a forensic interview. (Tr. 315).

On November 3, 2016, Christine Carlberg, an interviewer at JVC, met with Victim. (Tr. 114). Detective Bash was able to observe the interview from another room. (Tr. 116). During the

interview, Victim disclosed to Carlberg that she was sexually abused by Appellant in four specific instances. (Tr. 114, 318).

On the first occasion, Victim testified that when she got out of the shower Appellant asked her what had taken so long. (Tr. 155). Victim stated she was having trouble grooming her pubic hair. (Tr. 155). Appellant told Victim to lie down and he began to groom her. (Tr. 156). Victim testified she repeatedly asked him to stop and he would not. (Tr. 157). The second occasion occurred when Victim was thirteen. (Tr. 159). Victim testified she had injured her shoulder playing softball and had asked Appellant to give her a back massage. (Tr. 159). Appellant agreed but, asked to turn it into a full body massage to which Victim responded no. (Tr. 159). Victim testified that he began massaging her, but progressed down her back and went under her pants and underwear. (Tr. 160). Victim testified he also massaged her breasts. (Tr. 161). On the third occasion Victim testified that Appellant asked her if she had ever given herself a breast exam. (Tr. 163). When Victim stated she had not, Appellant began rubbing Victim's breasts. On the fourth occasion Victim testified Appellant made her shower with him to "save water." (Tr. 165). She testified she could feel his penis on her back and that she was uncomfortable. (Tr. 165).

Appellant was ultimately arrested and indicted for four counts of criminal sexual conduct with a minor in the third degree.

## STANDARD OF REVIEW

### Issues 1 and 2

"In criminal cases, the Appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "A trial judge has considerable latitude in ruling on admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id.

### Issue 3

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). Whether a mistrial is necessary is decided on a case by case basis. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." State v. Rowlands, 343 S.C. 454, 457-458, 539 S.E.2d 717, 719 (Ct. App. 2000)(citations omitted). This Court "favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976)(emphasis added)(quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a

trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

## ARGUMENT

### I.

**The trial judge did not abuse his discretion in admitting testimony that Appellant "played naked" with victim because it falls within the common scheme or plan exception for which 404(b) evidence can be used.**

Appellant contends that the trial judge erred in admitting testimony from Victim that she used to "play naked" with Appellant. Specifically, Appellant believes the testimony by Victim was inadmissible under Rule 404(b) as it "served no purpose other than to portray [Appellant] as a sick and strange individual." (Initial Brief of Appellant pg. 8). Appellant further contends that even if allowed, the testimony was extremely prejudicial to Appellant pursuant to Rule 403. Appellant's argument lacks merit because the testimony that victim "played naked" is admissible as common scheme or plan, an exception to the Rule 404(b), and further the evidence's probative value was not significantly outweighed by unfair prejudice.

"If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). "To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011)(quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

"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, absence of mistake or accident, or intent." Rule 404(b), SCRE. "To be admissible, a bad act must logically relate to the crime with which the defendant has been charged." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483

(2008). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. Even if prior 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. Rule 403, SCRE.

"When there is a close degree of similarity between a charged crime and a prior bad act, evidence of the prior bad act is admissible to demonstrate a common scheme or plan." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013). "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there us a close degree of similarity." State v. Clasby, 385 S.C. 155, 682 S.E.2d at 896 (2009). "A close degree of similarity exists between prior bad acts and the charged offense when the similarities outweigh the dissimilarities." State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (2013). "A common scheme or plan involves more than the commission of two similar crimes; some connection between the two is necessary." State v. Tutton, 354 S.C. 319, 326, 580 S.E.2d 186,189 (Ct. App 2003). "In making similarity determination between prior acts evidence and the charged offense, focus is placed upon whether each particular bad evidence is sufficiently similar to the crime charged, not whether the different bad acts are sufficiently similar to each other." State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (2013).

"While it is true as a general rule that in a trial for one crime testimony of other distinct and independent crimes is not admissible, exception is made where such testimony tends to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Such 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 illicit intercourse between the same parties." State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955). Similarly, the court in State v. Weaverling held that a victim's testimony regarding a pattern of sexual abuse was properly admitted as part of a common scheme or plan exception in trial for criminal sexual conduct with a minor where the testimony showed the same illicit conduct with the same victim under the same circumstances over a period of several years. Weaverling, 385 S.C. 148, 682 S.E.2d 892 (2009). The court in State v. Clasby, held that a victim's testimony regarding four prior incidents of uncharged sexual misconduct was admissible as evidence of common scheme or plan and stated that "each of the incidents established a pattern of escalating abuse which ultimately culminated in Clasby's digital penetration of B.C." State v. Clasby, 385 S.C. 148, 156, 682 S.E.2d 892, 896 (2009).

The current case follows closely with the facts in Clasby and Weaverling. The trial judge did not abuse his discretion by admitting the testimony of Victim that she "played naked" with Appellant because the evidence was not introduced to show the propensity of Appellant to commit the crime, but to show a common scheme or plan by Appellant. The State introduced the testimony to provide the jury with information that this sexual behavior by Appellant was not something new, but that it had escalated. Just like in Weaverling, the testimony showed the same illicit conduct with the same Victim under the same circumstances over a period of years.

Appellant relies heavily on State v. Perry[1], which overturned State v. Wallace by holding that a logical connection did not exist between defendant's abuse of his stepdaughter more than 20 years prior and his current charges for sexual abuse of his biological daughters. State v. Perry,

[1] At the time of the trial in this case, State v. Perry had not been decided. State v. Perry, 430, S.C. 24, 842 S.E.2d 654 (2020).

430, S.C. 24, 842 S.E.2d 654 (2020). This case can be distinguished from Perry because the common scheme or plan exception was not invoked based on similarities between multiple victims. Instead it was used to admit continuous illicit conduct between the same parties which demonstrates a level of ongoing abuse and grooming which occurred between Appellant and Victim and can be seen as part of the explanation for a delay in disclosure. Further, even if Perry's logical connection standard was required, it is certainly demonstrated in this case where Victim detailed prior abuse by the same abuser. The abuse described amounted to quintessential grooming by having Victim "play naked" to make her more comfortable with what was going to happen to her in the abuse that was ultimately the basis for the charges.

The testimony by the Victim that her an Appellant "played naked" showed a pattern of escalating abuse and continuous illicit conduct and therefore falls under the common scheme or plan exception of Rule 404(b). This testimony was probative in showing this pattern and was not substantially outweighed by the risk of unfair prejudice to Appellant. Therefore, the trial judge did not abuse his in admitting testimony that Appellant previously "played naked" with Victim.

## II.

**The trial judge did not abuse his discretion in admitting four journal entries written by Appellant because they were relevant to his consciousness of guilt related to the charges against him.**

Appellant contends that the trial judge erred in admitting journal entries written by Appellant because they were irrelevant to the charges against Appellant. Appellant further contends that the journal entries were more prejudicial than probative because the jury could be influenced to convict after hearing Appellant refer to himself in such a degrading manner. Appellant's argument lacks merit because the journal entries are relevant to Appellant's charges

by showing a consciousness of guilt. Further, the probative value of the journal entries was not substantially outweighed by the risk of unfair prejudice to Appellant.

"To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011)(quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Four journal entries were introduced by the State. The entries are written by Appellant to Mother. Throughout the entries Appellant is apologizing for being a horrible person, father, and husband.The first journal entry is relevant because it lays a foundation of the purpose of the journal entries. (State's Exhibit 4). In the second journal entry Appellant makes the statements, "I am a horrible man, father, and husband. I deserve nothing less than Hell and Hell's wrath from you in eternity." This entry is relevant because it shows a consciousness of guilt. There was no evidence provided that Appellant had done anything other than the charges against him that deserved "Hell's wrath." (State's Exhibit 5). Appellant asserts that the third journal entry was irrelevant because it is primarily Appellant apologizing to Mother for his mistreatment of her. In

the third journal entry he does not refer at all to his mistreatment of her but makes statements such as, "I have done some horrible and awful things, but I want you to know from the depths of me, from the sobs, I cry my sorrow." and "I long for a simple hug. I don't deserve it, but I know the things I've done, and that is inexcusable. I deserve nothing less than Hell here on earth and for eternity." (State's Exhibit 6). Finally, the fourth entry makes the statements, "I am scared, scared and afraid of so many things. I should be. I did them, right? I'm already ashamed and humbled before you and everyone else that knows or doesn't know. **I'm scared that you or someone will turn me in and I will go to jail or even be arrested or charged.**" (State's Exhibit 7). (Emphasis added).

These journals allude to some action by Appellant so terrible that he is scared to go to jail and deserves Hell's wrath. These journal entries are probative in showing Appellant's consciousness of guilt. "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." State v. McDowell 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976). Defense counsel had the opportunity to cross examine Peterson on whether there were other actions that Appellant may have done that would have deserved such punishment. Finally, probative value of the journal entries was not substantially outweighed by the risk of unfair prejudice to Appellant because there was no specificity to the statements so it could not be prejudicial.

## III.

**The trial judge did not abuse his discretion in denying Appellant's motion for a mistrial.**

Appellant contends the trial court erred in denying Appellant's motion for a mistrial when a witness stated that the letter written by Victim was placed into "a different victim's case file" because it suggested there was another case against Appellant by a different victim.

Appellant's argument lacks merit because the trial judge removed any prejudicial effect the improper statement may have made by striking the statement made by witness and witness then stating that the letter was placed in a wrong case file totally unrelated to the case before the court. (Tr. 107).

"The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." State v. Wilson, 389 S.C. 579, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010).

"Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." State v. White, 371 S.C. 439, 447-448, 639 S.E.2d 160, 164 (Ct. App. 2006). "The granting of a motion for mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009).

The jury hearing the solicitor ask whether Victim's letter was placed into "another victim's case file" does not inherently suggest that there was another case against Appellant. Every other case is going to have a victim or complaining witness of some sort. The word "Victim" in the sentence does not rise to the level of sufficient unfair prejudice justifying the granting of a mistrial. Further the State asked to strike the question not defense counsel and the trial judge instructed the jury to disregard the question. "Generally a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122,

129 (Ct. App. 2005). "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." Id. at 658, 130. Any prejudicial effect that the word "victim" may have had was removed when the trial judge struck the question and instructed the jury to disregard the witness's answer to the stricken question. The following exchange occurred:

> Ms.Sustakovich: Yes, Sir. Your Honor, the State moves to strike the last question, please.
> The Court: Okay. The jury's to disregard that. You may proceed.
> Ms. Sustakovich: Yes. Investigator Perry, finally, so that letter that we were talking about, was this letter put in the wrong case file totally unrelated to the case before the Court?
> Perry: It was.

(Tr. 107). Further, by rephrasing the question in front of the jury any possible prejudice was eliminated when the question was re-asked and answered in a way that completely removed the prejudice and clarified for the jury that the case file into which the letter was placed did not involve Appellant and/or another victim of Appellant.

The use of the word "victim" in the original question did not suggest that there was another case against Appellant and even if it had, it did not rise to the level of unfair prejudice that justified granting of a mistrial. Further, the rephrasing of the question stating that it was placed in a wrong file unrelated to the current case counteracted and clarified any suggestion that the word "victim" may have given to the jury. Therefore, the trial judge did not abuse his discretion in refusing to grant Appellant's motion for mistrial.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

W. WALTER WILIKINS, III
Solicitor, Fifteenth Judicial Circuit

305 E. North Street
Greenville, SC 29601

BY: _____
for AMBREE M. MULLER
Bar # 104213

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

ATTORNEYS FOR RESPONDENT

January 8, 2020

RECEIVED
Jan 08 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY COURT OF GENERAL SESSIONS
The Honorable Donald B. Hocker, Circuit Court Judge

---

Appellate Case No. 2019-002097

---

THE STATE — Respondent,

v.

ERIC CHARLES PETERSON, — Appellant

---

**PROOF OF SERVICE**

---

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Adam Sinclair Ruffin, counsel of record for Appellant, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 8th day of January, 2020.

Anne Mueller

Anne Mueller
Legal Assistant

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