

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Petitioner,

v.

Karl Wallace,

Respondent.

ON WRITE OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Greenville County
J. Michael Baxley, Circuit Court Judge

Opinion № 26703
Heard March 18, 2008 - Filed August 17, 2009

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Karl Wallace hereby Petitions this Court to Rehear this matter based upon the following grounds:

In *State v. Wallace*, S.C.Sup.Ct. Order dated August 17, 2009 (Shearhouse Adv.Sh. № 37) this Court did not overrule, modify or limit the prior decision of this court in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).¹ Nor did this Court limit or modify Rule 404(b) SCRE as it applies to the general rule that evidence of other crimes is not admissible. Karl Wallace contends that this Court misinterpreted both the *Lyle* decision and Rule 404(b) and

¹ The opinion inadvertently cites *Lyle* as being in 11 S.E. 803 instead of 118 S.E. 803.

therefore misapplied them to the facts of this case. The contention of Mr. Wallace is based upon the following:

In Lyle, the Aiken Crimes Only Admitted to Prove Identity

This Court erred in concluding in footnote 3 of the *Wallace* decision that *Lyle* excluded the evidence of the Georgia crimes simply because they were not similar enough and admitted the crimes in Aiken because they were similar. This Court in *Lyle* did not so hold. The testimony of the two Aiken bankers was admitted because it proved that Milton A. Lyle was in Aiken on the day and approximate time in question and therefore the other similar crimes were admitted to identify him. This Court said in *Lyle* “The connection for the purpose of establishing the *identity* of the accused under the issue raised as to alibi we think is clear. The testimony of Pardue and Schroeder [the two Aiken bankers] was therefore properly admitted on that ground.” *Lyle* at 418, 118 S.C. 808. (emphasis added) To further illustrate how the testimony of the Aiken bankers helped refute the alibi, this Court in *Lyle* further stated “That evidence is clearly susceptible of the inference that the two extraneous crimes were committed within a few blocks as to distance, and within a few minutes as to time, of the crime charged and they were practically a part of the *res gestae*, each a part of one general scheme of a single expedition.” *Id.*

Furthermore, this Court in *Lyle* found the Georgia crimes not to be substantially different from the Aiken crime but substantially similar. As this Court said in *Lyle*:

Assuming that the evidence conclusively proved what the State was undertaking to establish - that on these prior dates this identical defendant under *substantially similar circumstances* had uttered other forged checks - what *connection*, other than the similarity in character of crime and method of execution, is there between the Georgia crimes and the crime charged in the indictment?

Id. at 420, 118 S.E. 808 (emphasis added).

As applied to the facts of this case, a court could just as easily say:

Assuming that the evidence conclusively proved what the State was undertaking to establish - that on these prior dates this identical defendant under *substantially similar circumstances* had committed a lewd act upon a minor child - what *connection*, other than the similarity in character of crime and method of execution, is there between the other crime and the crime charged in the indictment?

This Court in *Lyle* further made extensive references to *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). The opinion was cited with approval numerous times by this Court in *Lyle*. To explain their ruling, the Court of Appeals took the lead from this Court in *Lyle* and performed an extensive analysis of *Molineux*. A reading of *Molineux* establishes that mere similarity, even striking similarity, is not talisman upon which evidence is admissible under a common scheme or plan exception to the rule that evidence of other crimes is not admissible. Thus, under the principles set forth in *Lyle* and the case this Court in *Lyle* cited the most, *Molineux*, the Court of Appeals did not err in determining there must be some connection between the two similar crimes for the other crime to be admissible. This Court further cited *Molineux* with approval in *State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939).

This Court in *Lyle* said “True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude.” *Lyle*, at 420, 118 S.E. at 808. If that statement is true concerning the crime of forgery, how much more is the principle true as to the crime of lewd act on a minor child. If the state believed that it had a strong enough case to win without the evidence of the other unproven alleged bad act, it

would have done so. What the state did, and this Court by reversing the Court of Appeals has approved, is to use two doubtful cases to make one strong case. Each case, if valid, should be able to stand on its own merits.

Admissibility Under Lyle and 404b Not Determined by Similarity

This Court erred in concluding evidence of other crimes or bad acts is admissible simply because the number of similarities outweigh the number of differences. As noted above the number of similarities verses the number of differences is not the criteria for admissibility under *Lyle*. The prior decisions of this court and the court of appeals are confusing and contradictory on this issue. The decision of this Court in *Wallace* does little to clarify the issue.

As a general principle, when a trial court starts looking at similarities to determine whether evidence is admissible, the admissibility of evidence is not guided by established principles of law but upon the imagination of the prosecutor. A creative prosecutor can scour the facts of both cases to find the most minute facts that would make the two crimes similar. The decision in this case does nothing to limit the imagination of the prosecutor. Indeed, it encourages such actions. And by the same token, an imaginative defense attorney could scour the facts of both cases to come up with difference so that he would have more differences than similarities and therefore argue that the evidence is not admissible. This Court gives little guidance as to how a trial court is to weigh the differences and similarities that are created by imaginative scouring of the facts by both attorneys. To say “ We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing similarities and the dissimilarities between the crime charged and the bad act evidence” (*Wallace*, at 22) is to fail to provide any meaningful test by which trial courts are to determine the admissibility of

evidence.

The opinion in this case is also contrary to other decisions of this Court which were not overruled in the *Wallace* opinion. In *State v. Brooks*, 341 S.C. 57, 533 S.E.2d 325 (2000) this Court reversed the forgery conviction of the defendant when the state had introduced evidence of another forgery committed by the defendant. In *Brooks* this Court required that a connection exist between the other alleged crime and the one for which the defendant is being tried. This Court said “If the court does not clearly perceive the *connection* between the extraneous transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.” *Id.* at 61, 533 S.E.2d at 327-328. (emphasis added). In *State v. Kennedy*, 348 S.C. 32, 558 S.E.2d 527 (2002) this Court summarily affirmed a decision of the court of appeals that said “The common scheme or plan and identity exceptions are interrelated, as evidence of a common scheme or plan goes to prove identity of the perpetrator.” *State v. Kennedy*, 339 S.C. 243, 247 S.E.2d 700, 702 Ct. App. 2000)² In the present case identity was not a disputed issue. Recently in *State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008) Justice Waller, speaking for this Court said “prior acts must be so intimately *connected* to the crimes charges that their introduction is appropriate to complete the story of the crime charged.” *Id.* at ___, 664 S.E.2d at 484 n.3 (emphasis added). This statement is contrary to the position of this Court in *Wallace* where this Court said “A close degree of similarity establishes the required connection between the two acts and no further

² The Court of Appeals, in the opinion of this writer, improperly admitted the other burglary on the identity issue as applied through the common scheme or plan exception, but at least the Court in *Kennedy* stated what contested issue the other burglaries was being admitted to prove.

‘connection’ must be shown for Admissibility.” *Wallace*, at 22-23.

This Court also failed to consider numerous precedents of this Court that requires that the other bad act must be more than similar but must be connected in some manner to the crime charged. *See, e.g. State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)(“To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.”)(Justice Burnett); *State v. Dickeson*, 341 S.C. 391, 397, 535 S.E.2d 119, 122 (2000)(“The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused.”)(Justice Toal); *State v. Timmons*, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997)(“A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary.”); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993)(noting that “a general similarity . . . [is] insufficient to support the common scheme or plan exception”); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987)(Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged.”); *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983)(“The ‘common scheme or plan’ exception requires more than mere commission of two similar crimes by the same person. There must be some *connection* between the crimes. If there is any doubt as to the *connection* between the acts, the evidence should not be admitted.”) (emphasis added). The effect of the decision of this Court in *Wallace* is to overturn these precedents without specifically saying so. A trial court, or a trial attorney, reading those cases and reading *Wallace* is at a loss as to how to reconcile those cases with the *Wallace* opinion.

This Court in *Wallace* failed to state what element of the offense the other alleged similar crime was introduced to prove. The mere fact that a defendant has committed a similar

crime is not an element of the crime which the state must prove. At oral argument in this case the Court suggested that the other bad act could be introduced “to prove the crime occurred.” No case in South Carolina has ever introduced another bad act for the purpose of proving a crime occurred. This Court should state what contested element in this case the other bad act was admitted to prove. Simply saying that similar crimes are admissible does not aid either the trial court or the fact finder in determining what contested element of the crime the other evidence is being admitted to prove. How should a fact finder use the evidence of this other crime to arrive at its decision that this defendant committed this particular crime? It is not admissible to prove identity for that was not contested. Nor was it used to prove intent or motive. Again, what contested issue was the other crime in this case admitted to prove? If the fact finder uses it to find propensity, that is an improper purpose under established South Carolina law. *See, e.g. State v. Brooks*, 341 S.C. 57, 533 S.E.2d 325 (2000) and *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979)

This Court in *Wallace* did not limit this interpretation of *Lyle* and Rule 404b to sex crimes or crimes involving child abuse. As an appellate court, this Court is not, in keeping with the generally accepted role of an appellate court, permitted to paint with a fine brush and carve out a specific exception to Rule 404(b). The legislature may, if it elects, pass a law that permits the introduction of evidence of other sex crimes in sex cases to prove a propensity to commit the crime charged. If they did, the sole function of this Court would be to determine if such a law is constitutional. The legislature has not passed such a law. And this Court is not permitted to write such a law.

The effect of the ruling of this Court in *Wallace* is to open the admissibility of

other similar crimes to every criminal case tried in this state. Similar criminal domestic violence crimes would be admissible to prove a criminal domestic violence case. Similar burglaries would be admissible to prove a burglary, similar robberies would be admissible to prove a robbery, similar drug sales would be admissible to prove a drug sale. Even, as is now the law in Georgia, similar driving under the influence cases would be admissible to prove a driving under the influence case. *See, Kirkland v. State*, 206 Ga. App. 27, 424 S.E.2d 638 (1992).

Or has the law already been established that other robberies are admissible to prove a robbery? In *State v. Aiken*, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996) the Court of Appeals held the evidence of three other robberies was admissible to show a common scheme or plan without discussing why a common scheme or plan was necessary to prove the robbery in question. In holding the evidence of the other robberies to be admissible the court said:

Here, Govan's testimony concerning Aiken's other bad acts was probative on the issue of whether all the robberies were part of a common scheme or plan. The evidence showed all the robberies took place in the same month in the same part of Orangeburg, all either on or near Highway Twenty-One bypass. Additionally, each robbery was perpetrated by a young, black gunman with his face concealed."

Id. at 181, 470 S.E.2d at 406.

A crime spree is not a common scheme or plan.

With the holding in this case that mere similarity provides the connection to admit other crimes, a trial court could now use the *Aiken* case together with the *Wallace* case to permit the introduction of similar crimes in the most garden variety of crimes. And if that occurs, then this Court has in fact overturned *Lyle* which clearly excluded crimes that were substantially similar as not admissible to prove a common scheme or plan. *See, also, State v. Martin*, 347 S.C.

522, 556 S.E.2d 706 (Ct. App. 2001)(holding evidence of defendant's marijuana use was logically relevant and admissible, not to impugn his character, but rather to establish his motive, as well as his intent for possession of marijuana.)

Probative versus Prejudicial Not Explained

This Court erred in failing to state what element of the case against Karl Wallace the evidence of other alleged assault was admissible to prove. Without either this Court or the lower court stating what element the evidence is admissible to prove, trial counsel will never be able to effectively argue that the evidence was more prejudicial than probative and the appellate courts will not be able to determine when the trial courts have abused their discretion. The trial counsel for the state in this case should have been more aware than anyone as to why the other alleged sexual abuse would be admissible. When asked this simple question at the trial below, she responded:

“Your Honor, this is technically a credibility case, that’s what it is. It’s one witness’s word against another witness’s word. This evidence would be relevant and would be essential to the state’s case because it is a piece of evidence, just like any other piece of relevant evidence, that goes to prove or disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to again prove the victim’s allegation.”
Rec. on App. at 45, ll 7-15

That is simply no answer to the question of why is the evidence relevant. Against that theory of admissibility, no defense counsel will ever be able to argue why the evidence is more prejudicial than probative and no evidence could ever be excluded. In prior cases when this Court has held similar crimes are admissible, this Court has stated the reason for admitting the similar crimes. *See, e.g State v. Cheeseboro*, 356 S.C. 526, 552 S.E.2d 300 (2001)(other murder

admitted into evidence to establish identity). But here this Court has failed to state what contested element of the crime the other alleged bad act was admissible to prove.

This Court has held that “Unfair prejudice means an undue tendency to suggest decision on an improper basis.” *Dickerson*, 341 S.C. at 400, 535 S.E.2d at 123. When the evidence is not admitted to prove an element of the crime charged against Mr. Wallace, the jury would have an “undue tendency” to convict Mr. Wallace because they believed he had committed another similar act.

As is present in this case and as said by this Court in *Lyle* “A plan or system common to other crimes was not an essential ingredient of the crime charged.” *Id.* 125 S.C. at 427, 118 S.E. at 811. In the opinion in *Wallace* this Court has not stated that the other alleged sexual assault was an essential ingredient to the crime charged. For in fact this Court could not so conclude for the other alleged sexual assault is not an essential ingredient. The lower courts of this state are left to only guess as to what element of the crime the other alleged sexual assault was admitted to prove. Therefore, the opinion provides scant guidance to trial courts as to why they are to admit other similar crimes and how they are to weigh the probative versus prejudicial effects of the other similar crimes.

The other alleged sexual abuse was not admitted to establish identity, motive, intent or to refute an accident. The acts were admitted solely because they were allegedly similar. When the sole basis for admitting the other alleged act is because it was similar, prejudice and confusion will ensue. Under those circumstances, a prior bad act which does not establish any essential element of the crime charged is admitted because it is similar and the more similar the more prejudicial is the evidence. The evidence is prejudicial not because it

tends to prove an essential elements of the crime charged. The evidence is prejudicial because a jury will use it to conclude the defendant is a bad person. This will always be true when the trial judge does not establish, and the jury is not told, what essential element the evidence is being admitted to prove.

CONCLUSION

There is no question that the opinion of this Court in this case will permit the state to have an easier time in convicting a person of a crime. But what must be remembered is that the easier we make it to convict the guilty, the easier we make it to convict the innocent. As the other alleged assault was not relevant to any element of the crime charged and the effect of the decision as written is to overturn the opinion of this Court in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), this Court should rehear this matter and issue an opinion affirming the decision of the South Carolina Court of Appeals.

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