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Court Rules

Statement of Issues on Appeal

Did the trial court improperly admit the testimony of Lachandra Brown as to an alleged act of criminal sexual conduct with a minor under the common scheme or plan exception of Rule 404(b) of the South Carolina Rules of Evidence?

Statement of the case

On June 11, 2001 Karl Wallace was arrested and charged with criminal sexual conduct with a minor in the second degree. He was indicted on January 7, 2002 for the same charge. He was tried before the Honorable J. Michael Baxley and a Jury on July 9-11, 2003. He was convicted and sentenced to eight years in prison. A notice of intent to appeal was filed on July 18, 2003.

Statement of the Facts

Karl Wallace was accused of criminal sexual conduct involving acts against his step daughter Bianka Brown. At the time of the trial, Mr. Wallace had been married to the mother of Bianka for about 10 years. The acts allegedly occurred over a period of years. The only specific date involved an alleged act on May 8, 2001.

In an effort to prove the case against Mr. Wallace, the state also presented evidence of an alleged sexual assault against the Lachandra Brown, the sister of Bianka. The state introduced this evidence on the ground that it was part of a common scheme or plan. Rec. on App. at 38, ll 12-15. At a pre-trial hearing the trial judge ruled the evidence was admissible. The court ruled "In this case what I have before me are significant similarities in the alleged conduct." Rec. on App. at 42, ll 12-13. The trial judge, however, limited the testimony of

Lachandra Brown so that she was not permitted to testify to her alleged abuse that was different from the abuse described by Bianka Brown. Rec. on App. at 43, ll 20-25.

Mr. Wallace testified and denied the acts of both step daughters. Also testifying for Mr. Wallace was his father, William Wallace, a minister who had counseled Lachandra Brown after she made the allegation. He testified that Lachandra never told him the allegation was true. Also testifying for Karl Wallace was Sharon Wallace, the mother of the two children. She stated that while they were in Louisiana, a family member had been molested by another individual. As a result of that accusation, she asked both daughters on more than one occasion if anyone had ever molested them. Both daughters denied that they had been improperly touched. Rec. on App. at 140, 10-21. Lachandra later made one accusation against Karl Wallace, but would not make the same accusation to Rev. William Wallace. Rec. on App. at 166, ll 1-11.

Argument

Question I

Did the trial court improperly admit the testimony of Lachandra Brown as to an alleged act of criminal sexual conduct with a minor under the common scheme or plan exception of Rule 404(b) of the South Carolina Rules of Evidence?

Summary of Argument

The common scheme or plan exception does not involve the committing of a similar act. The trial court admitted the testimony of Lachandra Brown solely on the basis that the prior act has a "close degree of similarity" to the crime charged. The trial court, therefore, improperly admitted the testimony of Lachandra Brown to prove the case against Karl Wallace.

Discussion

Over the years since *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) was decided, the most confusion and conflict has arisen over the use of the common scheme or plan exception.[1] The courts of our state have decided cases with rulings that are confusing to both the bench and bar. For example, on June 23, 1994 in *State v. Blanton*, 316 S.C.31, 446 S.E.2d 438 (Ct. App. 1994) this court said concerning the admissibility of another bad act, "This evidence is admissible if it tends to show common scheme or plan and its *close similarity* to the charged offense enhances its probative value so as to outweigh its prejudicial effect." *Id.* at 32, 446

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[1] In *Lyle* the exception is stated as "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." *Id.* at 416, 118 S.E. at 807. Rule 404(b) shortens the definition to "the existence of a common scheme or plan." The reporter's comments state that Rule 404(b) is intended to have the same application as *Lyle*. Therefore, no significance should be given to the fact that the definition has been shortened.

S.E.2d at 439 (emphasis added). Just six month later, this court in *State v. Campbell*, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994) said "When the prior bad acts are *strikingly similar* to the one for which the appellant is being tried, the danger of prejudice is enhanced." *Id*. at 451, 454 S.E.2d at 901. (Emphasis added). Surely this court did not intend for the bench and bar to differentiate between the phrases "close similarity" and "strikingly similar."

And the Supreme Court of our state has likewise added to the confusion. For example, on December 28, 1994 in *Campbell*, this court said "Here the testimony is of prior drug sales utilizing a similar sales technique. However, this is not enough to satisfy *Lyle*." *Id*. at 451, 454 S.E.2d at 901. About three months later, without making any reference to *Campbell,* the South Carolina Supreme Court said "Here, the record shows that the method of marijuana dealing between Raffaldt and Burchett was quite similar to the cocaine conspiracy. We find the evidence of prior drug dealing between Raffaldt and Burchettt, which gave rise to the cocaine transactions, was admissible as a common scheme or plan." *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995). Then, on July 26, 1995 the South Carolina Supreme Court denied certiorari in the seemingly contradictory *Campbell* opinion. *Campbell* and *Raffaldt* simply cannot be reconciled.

Other cases also illustrate the confusion about *Lyle.* In *State v. Kennedy*, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000), *aff'd* 348 S.C. 32, 558 S.E.2d 527 (2002) this court said "The common scheme or plan and identity exceptions are interrelated, as evidence of a common scheme or plan essentially goes to prove the identity of the perpetrator." *Id.* at 247, 528 S.E.2d at 702. But the *Kennedy* case fails to recognize that in *Lyle* the court specifically rejected this principle. The *Lyle* court found the Georgia forgeries to be substantially similar, but still did not admit them under the identity exception. The *Lyle* court said "The mere fact that the Georgia crimes were similar in nature and parallel as to methods and technique employed in their execution does not serve to identify the defendant as the person who uttered the forged check in Aiken as charged unless his guilt of the latter may be inferred from its similarity to the former." *Id*. at 420, 118 S.E. at 808. While the common scheme or plan exception may be used to prove identity, it is not based upon any similarity between the two crimes. For example, if a stolen automobile is used to commit a robbery, then the evidence as to the identity of the person who stole the car may be used to help establish the identity of the person who committed the robbery. *See*, *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App 1986).

Kennedy was affirmed by the South Carolina Supreme Court on January 14, 2002. One would have a great deal of difficulty reconciling that opinion with *State v. Timmons*, 327 S.C. 48, 488 S.E.2d 323 (1997). In *Timmons* evidence of similar crimes was held not admissible. The court in *Timmons* did go to great length so show why it believed that the other crimes were not similar enough. The opinion illustrates the extremes to which advocates will go to show a similarity of crimes. The admissibility of other bad acts under *Lyle*, should not depend upon how creative a prosecutor can be in finding similarities. To further add to the confusion in this area, the South Carolina Supreme Court in *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979) said "For admission under either theory, our cases have required that the relationship between the acts must have established such a connection between them as would logically exclude or tend to exclude the possibility that the present crime could not have been committed by another person." *Id*. at 78, 254 S.E.2d at 300. Even *Lyle* did not make that statement as to proving a common scheme or plan. The case simply again illustrates the manner in which the courts have confused the *Lyle* exceptions.

The problem with the contradictory opinions is the fact that since *Lyle*, no court has undertaken a serious analysis of the meaning of the common scheme or plan exception. To fully understand the meaning of the exception, one must not only analyze the *Lyle* decision, but also the two New York opinions upon which it relies.

A complete review of the facts of *Lyle*, the benchmark case,[2] and the cases upon which it relies, is necessary to help unravel the confusion. The defendant in *Lyle* was accused of issuing a forged check in Aiken, SC on January 12, 1922. The state introduced evidence that the defendant had committed similar crimes in Aiken on January 12, 1922 and similar crimes in Griffin, Georgia on January 3, 1922, Athens, Georgia on December 30, 1921, and LaGrange, Georgia on November 23, 1921. In all the crimes, the allegation was that the defendant entered the bank, opened an account with a forged check and received cash back from his deposit. In the Athens case the forgery involved a cotton broker as did the Aiken case. The court held the Aiken forgeries on the same day were admissible but excluded the evidence as to the Georgia forgeries. The basis for admitting the Aiken forgeries was that they tended to refute the alibi defense offered by the defendant. The court said "The connection for the purpose of establishing the identity of the accused under the issue raised as to the alibi we think is clear. The testimony of Pardue and Schroeder [two Aiken bankers] was therefore properly admitted upon that ground." *State v. Lyle*, 125 S.C. at 418, 118 S.E. at 808.

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[2] While *Lyle* is the most often cited case, the earliest cases citing the five exceptions to the rule that other crimes are not admissible is *State v. Richey*, 88 S.C. 239, 70 S.E. 729 (1911). *Richey* held that other acts that would today be criminal sexual conduct with a minor are admissible if they show a continuous course of conduct between the same parties.

In holding that the evidence of the similar Georgia crimes was not admissible, the court relied upon two New York cases. These cases shed light upon the meaning of all of the *Lyle* exceptions.

In *People v. Romano*, 84 App. Div. 318, 82 N.Y.S.749 (1903) the state accused the defendant of robbery. The means used to accomplish the robbery was to throw snuff in the face of the victim and then rob him. The sole defense was alibi. The state sought to introduce evidence that the defendant committed another robbery at the same location upon another person by the use of the same means. The trial court admitted the evidence "as showing a similar offense, done in a similar manner, within a reasonable time." *Id.* at 319, 82 N.Y.S. at 749. The New York court held the evidence was not admissible. In reversing the court said "There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other." *Id*. at 320, 82 N.Y.S. at 750.

People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901) is a treatise on the issue of the exceptions to the general rule that evidence of other crimes is not admissible. In *Molineux* the state accused the defendant of murder by sending cyanide of mercury, a rare and deadly poison, through the mail to Harry S. Cornish, the athletic director of the Knickerbocker Athletic Club. The poison was contained in a bottle of Bromo Seltzer. Mr. Cornish was not killed, but his secretary, Katharine J. Adams, was when she took the Bromo Seltzer instead of Mr. Cornish. The crime occurred on December 24, 1898. *Id*. at 273, 61 N.E. at 287. The state, in an effort to prove the guilt of the defendant, introduced evidence that the defendant had committed a similar crime. They sought to prove that the defendant had killed Henry C. Barnet, a resident of the Knickerbocker Athletic Club. The murder was accomplished by sending cyanide of mercury through the mail to Mr. Barnet at the Knickerbocker Athletic Club on November 10, 1898. The poison was contained in Kutnow powder, a medicine. *Id.* at 283, 61 N.E. at 289.

This treatise opinion discusses all the exceptions to the general rule that evidence of prior crimes is not admissible. The court held the evidence as to the defendant's involvement in the Barnet murder was not admissible under any of the exceptions to the general rule that other crimes are not admissible. As to the exception for common scheme or plan the court said "To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced." *Id*. at 305, 61 N.E. at 299. The New York case gives many illustrations to show exactly what "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" means. The court said that common scheme or plan did not mean just two very similar crimes. The court held "Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received." *Id*. at 306, 61 N.E. at 299.

Recently, our Supreme Court seems to be recognizing these principles. For example, in *State v. Brooks*, 341 S.C. 57, 533 S.E.2d 325 (2000) Ivadella Brooks was charged with forgery on November 11, 1996. The government contended that she forged a check she attempted to pass at a Winn-Dixie. Her defense was that she did not know the check was a forgery. To prove its case against her, the state sought to introduce evidence that Brooks had committed another forgery on September 25, 1995. In holding the September forgery was not admissible, the Supreme Court said "We do not see how evidence of Brooks's prior conviction has any logical relevance to the forgery charge in this case. Brooks's defense at trial was that Thomas had given her mother the check and that she had attempted to cash it. The introduction of the facts of the prior conviction does not disprove that Thomas gave Brooks's mother the check or that Brooks forged this check or knew it was forged. . . . We find the State introduced the prior act to demonstrate that Brooks's acted in conformity with her propensity to commit crimes which is in direct contradiction of *Lyle*." *Id*. at 62, 533 S.E.2d at 328.

No decision has ever held that when an accused is charged with a sex crime a different analysis is required. Based upon the above analysis, the question is not whether the defendant has committed a similar or even substantially similar crime to the one for which the defendant is charged. If the state were only required to prove that a defendant has committed a substantially similar crime, then the prior forgeries in *Lyle* would have been admissible. The court in *Lyle* found that the Georgia forgeries were committed "under substantially similar circumstances." *Id*. at 420, 118 S.E. at 808. The Georgia forgeries were held not admissible. In *Molineux* and *Romano,* the two New York cases relied upon by *Lyle,* the court excluded evidence of crimes that could hardly be more similar than the one the defendant in each case was accused. But again, the New York courts held the evidence not to be admissible. So, if common scheme or plan does not mean two crimes that are substantially similar, what then does it mean?

"Common scheme or plan" means crimes that are so connected in facts and purpose, that the state cannot prove the crime for which the defendant is being tried without making reference to the other crimes. South Carolina has several cases that illustrate this definition. *see, e.g.*, *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986); *State v. Brooks*, 111 S.E.2d 686, 235 S.C. 344 (1959); *State v. Blanden*, 177 S.C. 1, 180 S.E. 681 (1935). Proof of the other crime is necessary in the proof of the crime charged or as stated in *Lyle*, proof of the other crime is "essential" for the state to prove its case. Before the state can introduce other bad acts, it should be required to inform the court why the evidence is essential for its case.

In *State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959) the South Carolina Supreme Court properly applied the "common scheme or plan" exception of *Lyle*. In *Brooks* the state tried the defendant for raping one woman. The facts established that two women were raped at the same time. The defense was consent as to both women. The state, over the objection of the defendant, introduced evidence as to the rape of the other woman. The South Carolina Supreme Court properly held that evidence of the rape of the other woman was proper. In allowing the evidence to be admitted under the "common scheme or plan" exception, the court said, "Where the similar offense as to which proof was offered took place on the same occasion as the sexual offense for which conviction was sought and was so connected therewith as to constitute a part of the transaction, or, as commonly said, to be a part of the res gestae, evidence of the other offense is admissible upon the trial. . . . Where it forms part of the res gestae, evidence is admissible to show that the defendant ravished or attempted to ravish, another female, on the occasion of the alleged rape of the prosecutrix." *Id*. at 351, 111 S.E.2d at 690. The court further stated that "Appellant's own account of his conduct, as contained in his statement to the officers and his testimony, was so inextricably interwoven with respect to both women that it was practically impossible to segregate the evidence as to each. As said in some of the cases, it was in effect all one transaction." *Id*. at 350, 111 S.E.2d at 690.

A more recent case also illustrates a proper application of "common scheme or plan." In *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986) the state charged the defendant with armed robbery, kidnaping, and first degree criminal sexual conduct. Part of the proof against the defendants was the fact that shortly before the armed robbery, the same defendants had stolen the automobile of Thomas Donald. The defendants contended that this other bad act should not have been admitted. The evidence established that the automobile belonging to Mr. Donald had been used in the armed robbery, kidnaping and first degree criminal sexual conduct. This court, in holding the evidence was properly admitted, said "The car theft and the attendant circumstances are so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes; they are so related to each other that the car theft is evidence of the armed robbery, kidnaping and rape. Without a get-away car, the robbery would have been unlikely; and even less likely would have been the ensuing kidnaping and rape. The relevancy of the car theft to the crimes charged is patent - easily perceived." *Id*. at 496, 343 S.E.2d at 629. The admission under the common scheme or plan exception did not depend upon the similarity of the two crimes.

While not citing *Lyle*, the South Carolina Supreme Court in *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955) also properly applied the "common scheme or plan" exception to the general rule against the admissibility of other bad acts. The defendant objected to testimony of "unnatural sexual act committed upon the prosecutrix some hours after the original offense." *Id*. at 265, 89 S.E.2d at 711. The court allowed the testimony holding the testimony admissible "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." *Id.* at 265, 89 S.E.2d at 711.

In that case, the subsequent sexual acts were necessary to prove the entire case. The common scheme or plan in that case involved the taking of an under age girl to his motel and having sex with her. He later picked up two young boys, took them back to the same motel room and had sex with the young girl again. The testimony of the boys, used to corroborate the testimony of the prosecutrix, would have been virtually meaningless without reference to the other sexual conduct. The two crimes were related as to place, time and parties.

In the present case, the trial judge did not attempt to find any connection between the two crimes to determine if the allegations by Lachandra Brown were admissible. He instead ruled "[I]t goes to a common scheme or plan because of the close degree of similarity between the conduct, with regards to these two victims." Rec. on App. at 46, ll 11-13. In this case, as in *Lyle*, "A plan or system common to other crimes was not an essential ingredient of the crime charged." *Id.* at 427, 118 S.E. at 811. When the state sought to admit the testimony of Lachandra, the attorney for Mr. Wallace asked the court to explain why the testimony was essential to the state's case. The court first stated that it was not required to place that finding on the record. Rec. on App. at 44, ll 13-25 to 45, ll 1-3. The trial judge did not answer the question but instead asked the assistant solicitor to respond. The solicitor's response was "This is technically a credibility case, that's what it is. It's one witness's word against potentially 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 to disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to, again, prove the victim's allegations." Rec. on App. at 45, ll 7-15. But how does the evidence prove the case for the state?

That exact same argument could be used to make admissible any prior crime when a defendant is accused of committing a similar crime. If a defendant is accused of armed robbery, a drug sale, a burglary, a simple driving under the influence or any other crime, the exact same argument can be made. No doubt the same argument was made by the state but rejected in *Lyle, Molineux,* and *Romano.* As in *Lyle*, a common scheme or plan was not essential in this case. Neither the court nor the assistant solicitor could explain why it was essential.

The court in *Lyle* admitted that the admissibility of other crimes is sometimes a difficult task. The court said "Whether the evidence of other crimes properly falls within any of the recognized exceptions noted is often a difficult task. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidently proves the defendant guilty of another crime." *Id*. at 417, 118 S.E. at 807. How is the evidence in this case logically relevant to any of the five *Lyle* exceptions? And, what material fact in issue does the evidence tend to prove? Neither the trial judge nor the assistant solicitor answered these two questions.

The court in *Lyle* firmly rejected admitting similar crimes because of their prejudice to the defendant. As the *Lyle* court said "True such evidence tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he is guilty of the later; but that is the precise inference the general rule was wisely designed to exclude." *Id*, at 420, 118 S.E. at 808.

The trial judge in this case sought to exclude the facts of this case from the holding in *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (2003). He noted that the testimony of Lachandra Brown was more egrecious than the testimony of her sister. Therefore, to avoid the *Tutton* problem, he limited the testimony of Lachandra Brown. He stated "I find it appropriate under *State versus Tutton*, to limit the testimony of the *Lyle* witness only to the extent and only to the acts which occurred to the victim in this prosecution, and not to go beyond that, which will limit the prejudicial effect of this testimony coming in.." Rec. on App. at 43, ll 20-25. The problem with the court's position is that once you include the elements of the crime in determining if the other crime is similar and eliminate the factual differences, all criminal sexual conduct crimes become similar. This again, is the precise point that *Lyle* had rejected. Quoting from the *Romano* decision, the *Lyle* court said "There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are common to one are found in the other, and yet it has never been supposed that, where there was separation as to time and no connection established, beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other." *Id*. at 421-422, 118 S.E. at 808.

The testimony of Lachandra Brown was not essential to any element of the charges against Karl Wallace. It certainly was not part of a common scheme or plan as the term is properly understood. The state at the trial below was not able to articulate as to how it was part of a common scheme or plan other than to say the crimes were similar. They were never able to articulate why proving a common scheme or plan was essential to their case, other than to bolster the testimony and credibility of Banika Brown. Such a use of evidence under 404(b) is not proper.

The court in *Lyle* gave the best explanation against the admission of other crimes.. The court said "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectively to strip him of the presumption of innocence." *Id*. at 416, 118 S.E. at 807. If those statements are true of the crime of forgery, how much more are they true for the crime of criminal sexual conduct with a minor.

Cases in this area of the law are divergent. No case since *Lyle* has ever given a critical examination of the question of what does a common scheme or plan mean. As a result, reconciling the cases is a futile exercise. This court should now take the opportunity to explain to the bench and bar what the concept means. The court should point out that it does not simply mean that a defendant has committed or been accused of committing two or more crimes that are similar. Granted as a result of such a ruling a defendant will be acquitted. But if the only basis by which the state can convict a defendant is to prove that he has been accused of a similar crime, then that defendant deserves to be acquitted.

The state in its response has to answer only one simple question. If common scheme or plan means that a defendant has committed two or more substantially similar crimes, then why did the court in *Lyle* exclude the forgeries in Georgia that the court found to be substantially similar? Unless the state argues that there is a sex crime exception to *Lyle*, the question cannot be answered favorably to the state. If there is a sex crime exception to *Lyle*, no court in this state has ever recognized it. Of all the cases in which the introduction of other bad acts is most prejudicial, it is in the sex crime field. No exception should be made to the clear holding of *Lyle*.

CONCLUSION

For the foregoing reasons, this matter should be reversed and remanded for a new trial with instructions to exclude the testimony of Lachandra Brown

May 3, 2004

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