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Question Presented

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?

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?

In discussing the issue in his main brief, Mr. Wallace asked the state to simply answer this one 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? The state simply has either refused to answer the question or is unable to answer the question. The state makes no attempt to explain why the *Lyle* court excluded the substantially similar forgeries in Georgia.

The state in arguing that a common scheme or plan has been proven points to some alleged similarities between the two alleged crimes. Br. of Resp. at 4-5. But the state has never explained how these similarities are probative of the crime for which Mr. Wallace is charged. The state simply asserts “That testimony showed Appellant’s common scheme or plan embraced crimes so related to each other that proof of one tended to establish the other, and the close similarity of the bad acts to the charged offense enhanced its probative value to outweigh its prejudicial effect.” Br. of Resp. at 5. But again, the state has not explained how the proof of one crime “tended to establish” the other. What was the relevant issue that the other crime tended to establish? It cannot be the mere fact that Mr. Wallace is accused of committing a substantially similar crime. *Lyle* clearly holds that such a use of a prior bad act is not permissible.

Nor has the state attempted to explain why virtually identical crimes were excluded, even under the common scheme or plan exception, in *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901) and *People v. Romano*, 84 App. Div. 318, 82 N.Y.S. 749 (1903), two cases which the South Carolina Supreme Court relied upon in deciding *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

The state has cited, without discussion two cases¹ - *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989) and *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984). Neither *Hallman* nor *McClellan* contain a discussion of exactly what common scheme or plan means as it relates to the *Lyle* decision. Without any legal analysis, the court in *Hallman* concluded “We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect.” *Id.* at 175, 379 S.E.2d at 117. The court in *Hallman* never discussed the meaning of the phrase “common scheme or plan.” It never explained nor distinguished the fact that the court in *Lyle* excluded the Georgia crime which the court found to be substantially similar. And the court never explained why the proving of a similar crime was relevant or necessary to prove the case.

Two of the cases cited by the *Hallman* court do not support the proposition for which they are cited. In *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987) the court found that the evidence was not admissible under *Lyle*. Again, the court in *Rogers* did not discuss in any detail the meaning of common or plan. As the court held the alleged act were not part of a

¹ The third case, *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993) held that the testimony of another fight was not properly admitted under *Lyle* and therefore actually supports the position of Mr. Wallace. The court merely held that the evidence was harmless error, a position the state has not asserted in this case.

common scheme or plan, there was no need to discuss the concept in any detail.

The court in *McClellan*, likewise did not discuss the concept of the phrase “common scheme or plan.” Again, without explaining why the substantially similar Georgia forgeries were excluded in *Lyle*, the court in *McClellan* simply stated “It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence.” *Id.* at 391, 323 S.E.2d at 774. If the *McClellan* court had read *Romano and Molineux*, the two cases cited by the *Lyle* court, they would have found two cases which cited other crimes that “it would be difficult to conceive of a common scheme or plan more within the meaning of the exception” than those presented in the two cases. But in each case the virtually identical crime was excluded as not being admissible under the common scheme or plan exception. The *McClellan* court relied upon *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979) to support its position. But the court in *Rivers*, held the other crime not to be admissible under the common scheme or plan exception. The fact that the court in *Rivers* found the other alleged sexual act not to be similar is hardly support for the blanket proposition that other substantially similar sexual acts in all other cases would be admissible. Again, the court failed to engaged in a full analysis of the common scheme or plan exception to *Lyle*.

This court in *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (2003) recently attempted to discuss at length the concept of common scheme or plan. In *Tutton*, this court said “In this case, as with many criminal sexual conduct cases, the question before the jury is not whether the State has charged the correct person with the crime; instead, the question is whether the charged crime actually occurred. The purpose of admitting the evidence of other instances of sexual misconduct under the common scheme or plan exception is to bolster the probability that

the acts occurred.” *Id.* at 322, 580 S.E.2d at 188. The problem with that proposition is that *Lyle* prohibits the use of a prior conviction for that purpose. As the 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 later; but that is the precise inference the general rules was wisely designed to exclude.” *Id.* at 420, 118 S.E. at 808.

This court in *Tutton*, leaving aside the question of whether the analysis is proper, concluded that there were sufficient differences to exclude the testimony of the other alleged sexual act and reverse the conviction. As noted in the opening brief, the trial judge in this case eliminated the differences in order to make the testimony of Lachandra admissible. If the full testimony of Lachandra was sufficiently different to require the trial judge to exclude a portion of the testimony, then the testimony as redacted is not admissible. The reason is simple - the two incidents are substantially different. The law should not permit a trial judge to make similar that which is different by redacting a part of the testimony.

As the state properly stated in its brief, “Evidence of other crimes is never admissible unless relevant to establish a *material fact* or *element of the crime charged*.” Br. of Resp. at 5 (emphasis added). The state has not, however, articulated to what fact or element of the crime charged is the other alleged conduct relevant. Failing in this basic assertion, the state has failed to show the other alleged conduct was admissible.

Karl Wallace again urges this court to use this case to fully explain to the bench and bar the proper meaning of the common scheme or plan exception to the general rule that evidence of other crimes is not admissible. Only when this court definitively rules, can the bench and bar know when evidence of other criminal conduct is admissible.

CONCLUSION

For the reasons stated above and in his opening brief, Karl Wallace urges the court to reverse the conviction in this case and remand for a new trial.

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