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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2013-2014**

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**1120562**

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**Ex parte State of Alabama**

**PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CRIMINAL APPEALS**

**(In re: R.C.W.**

**v.**

**State of Alabama)**

**(Mobile Circuit Court, CC-10-445, CC-10-446, CC-10-447,  
CC-10-448, and CC-10-449;  
Court of Criminal Appeals, CR-11-0387)**

BOLIN, Justice.

R.C.W. was convicted of first-degree rape, see § 13A-6-61, Ala. Code 1975; incest, see § 13A-13-3; Ala. Code 1975; first-degree sexual abuse, see § 13A-6-66, Ala. Code 1975; and two counts of first-degree sodomy, see § 13A-6-63, Ala. Code 1975. The trial court sentenced R.C.W., pursuant to the Habitual Felony Offender Act, to life imprisonment on the incest and first-degree-sexual-abuse convictions and to life imprisonment without the possibility of parole on the first-degree-rape and both first-degree-sodomy convictions. The Court of Criminal Appeals reversed R.C.W.'s convictions in a 3 to 2 decision. R.C.W. v. State, [Ms. CR-11-0387, November 2, 2012] \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2012). The State of Alabama petitioned this Court for a writ of certiorari, which we granted. We now reverse and remand.

Facts and Procedural History

\_\_\_\_ The Court of Criminal Appeals set forth the following relevant facts:

"At trial, T.W., R.C.W.'s biological daughter, testified that her earliest memory of sexual abuse involving her father occurred when she was 9 years old and in the fourth grade; T.W. stated that she was then 18 years old. T.W. stated that she was forced to perform oral sex on R.C.W. on several occasions. T.W. testified that on one occasion when she was 10 years old, R.C.W. forced her to have

sexual intercourse with him. T.W. stated that on another occasion when she was 11 years old, R.C.W. performed oral sex on T.W. and had sexual intercourse with her. T.W. stated that when she was 13 years old, she informed her mother about the instances of sexual abuse, after which the sexual abuse stopped. Lastly, T.W. testified that she did not report any of these events to authorities but agreed to 'all just be a family for my little brother and act like nothing ever happened.'

"Pa.W., T.W.'s mother, testified that she was married to R.C.W. at the time of trial, although divorce proceedings were pending. Pa.W. stated that she had a conversation with T.W. when T.W. was 12 or 13 years old regarding T.W.'s conduct; specifically, Pa.W. stated that T.W. had started acting distant and started locking her bedroom door. Pa.W. stated that after T.W. told her about the sexual abuse, she took T.W. to the gynecologist. Pa.W. stated that she thereafter confronted R.C.W. regarding the sexual abuse, at which time R.C.W. stated that he had 'made some mistakes' and that '[h]e was sorry' and swore to her that 'it would never happen again.' Pa.W. testified that at a later date during a recorded telephone conversation, she asked R.C.W. whether anything had happened between him and T.W. since Pa.W. had initially confronted him about the sexual abuse; Pa.W. testified that R.C.W. stated '[n]o, not one fucking thing.' Lastly, Pa.W. stated that a family conflict had begun after allegations had been made that T.W. was having a relationship with an older man when she was 15 years old.

"C.F., a former wife of R.C.W.'s, testified that while she was married to R.C.W., he was indicted and convicted for several sex offenses against her daughter M.W.T., R.C.W.'s biological daughter.

"P.W., who was 27 years old at the time she testified, stated that on one occasion when she was

10 years old, R.C.W., her biological father, came into her room after everyone in the house was asleep and touched her '[o]n my vagina and my butt.' P.W. stated that on several occasions, R.C.W. 'touched [her vagina] with his penis as well [as] his mouth' and would force her to perform oral sex on him.

"M.W.T., who was 34 years old at the time of trial, testified that at a young age she was inappropriately touched by R.C.W. and that R.C.W. forced her to perform oral sex on him.

"Alex Bassinger, Susie Bassinger, Rhonda Gaineay, Britney Booker, R.W., R.C.W.'s biological son, and G.S., R.C.W.'s brother, all testified that T.W. had a poor reputation for truthfulness. Susie Bassinger, Gaineay, Booker, R.W., and G.S. all testified that T.W. appeared to have a good relationship with R.C.W.

"....

"Before trial, the State filed notice of its intent to introduce Rule 404(b), Ala. R. Evid., evidence regarding the prior incidents of sexual abuse discussed above. R.C.W. argued that the evidence was too remote and was not necessary to the State's case because, he said, motive, intent, and identity would not be contested at trial. Further, he argued that the prejudicial effect of the evidence outweighed its probative value. The State argued that the evidence was admissible pursuant to Rule 404(b), Ala. R. Evid., for the purposes of showing motive, opportunity, intent, or plan. The trial court denied R.C.W.'s motion in limine. Later, at the close of all the evidence, the following colloquy regarding jury charges ensued:

"'[The court]: Okay. Let's try this one. I did borrow some of yours and some of

this is original. But I guess nothing is ever really original.

"' You have heard testimony and evidence regarding other crimes--regarding crimes, wrongs, or bad acts regarding the defendant. The defendant is only on trial for the charges that I have read to you in the indictments, not for anything else. Evidence of crimes, wrongs, or bad acts was allowed in evidence not to prove the defendant is a bad person or a person of bad character because that would be wrong and impermissible or that it made him more likely to commit the crimes charged in these indictments because that would also be impermissible. The evidence of other acts, wrongs, or crimes was allowed into evidence for one narrow purpose only. That is, it may be considered by you only for the limited purpose as regarding the defendant's motive, opportunity, intent or plan.

"' [Prosecutor]: Perfect.

"' [The court]: I know you don't agree with the whole line. But is that about as good as you think we can get it? I'm not asking you to agree with any of it but if you think of any other way to tweak it to make it any less--

"' [Defense counsel]: Judge, the main question I would have, what was the purposes you said again?

"' [The court]: Motive, opportunity, intent or plan. And one of the reasons I had let it in all along is there's one of the cases, and I thought I had it and maybe had it up here, is maybe it's--and

obviously don't want to get into this, that--maybe the one you gave me, Nicki, that the Court then let it in, I think it was intent in order to show the jury that a defendant could in fact have a plan--intent or plan to have sex with girls of this age which a normal person would [find] unbelievable. I think it was intent. This may be it. Of course, it takes us back to another case, Ex parte Hatcher[, 646 So. 2d 676 (Ala. 1994)]. But the Alabama Supreme Court stated in Ex parte Hatcher, 646 So. 2d 676, testimony concerning the rape was relevant to the question of Hatcher's motive which was a--which a reasonable person could find was an unnatural sexual desire for small children. And in this case, which was Worthy v. State, [724 So. 2d 55 (Ala. Crim. App. 1998)], the incidents testified [to] by appellant's daughters were sufficiently similar to the present offense as they include evidence from which the jury could reasonably--the jury reasonably could conclude that the appellant was motivated by an unnatural desire for all three of his young female victims. So that's kind of the kitchen sink on [Rule] 404(b)[, Ala. R. Evid.]. I think when I get my grammar cleaned up I think that will kind of do it. We've got to take into account testimony related to the prior convictions. So I'll get that cleaned up a bit.

"'Let's get to the rest of--Your sixteen, I think, is covered now ....'

"The trial court thereafter charged the jury as follows, in pertinent part:

"'You have heard testimony and evidence regarding crimes, wrongs or bad acts

regarding the Defendant. The Defendant is on trial only for the criminal charges that I have read to you in the indictments, not for anything else. Evidence of other crimes, wrongs, or bad acts was allowed into evidence not to prove that the Defendant may or may not be a bad person or may or may not be a person of bad character or that it made him more likely to commit the crimes charged in these indictments, because that would be wrong and legally impermissible. The evidence of other crimes, wrongs or bad acts was allowed into evidence for one narrow purpose only. That is, it may be considered by you for the limited purpose as regarding the Defendant's motive, opportunity, intent, or plan.'

"Before the case was submitted to the jury, defense counsel objected to the charge and stated:

"'Judge, with regard to the charge on [Rule] 404(b) evidence. The portion where you said that it's for the limited purpose of motive, opportunity, or plan, I would submit that those are not matters in controversy and by having it go--I believe that that is different than what the State had said originally, was their purpose for offering that evidence. We except and object to the Court giving it with that broad of reason for it coming in.'"

R.C.W., \_\_ So. 3d at \_\_ (references to record omitted).

R.C.W. argued on appeal that the trial court's admission of the State's evidence of the collateral bad acts was reversible error because, he said, the purposes for which the

State offered the collateral-bad-acts evidence "were never placed in issue by [R.C.W.] at trial." See Draper v. State, 886 So. 2d 105, 117 (Ala. Crim. App. 2002) (noting that, for collateral-bad-acts evidence to be admissible for one of the "other purposes" in Rule 404(b), Ala. R. Evid., there must be a "real and open issue as to one or more of those 'other purposes.'" (some internal quotation marks omitted)).

The State argued that the collateral evidence of sexual misconduct involving T.W.'s half sisters was admissible for the purpose of showing motive. The State further argued that "'[t]he fact that the prosecutor gave an erroneous reason in arguing for the admissibility of the evidence is unimportant when there is, in fact, a valid reason for admissibility.'" R.C.W., \_\_ So. 3d at \_\_ (quoting the State's brief, quoting in turn Ex parte Register, 680 So. 2d 225, 226 (Ala. 1994)).

The Court of Criminal Appeals concluded that the collateral evidence of R.C.W.'s sexual misconduct involving T.W.'s half sisters was admissible to establish motive, i.e., "in order to establish R.C.W.'s 'unnatural sexual desire for the small children living in his household' as a motive for the present offense" with which he had been charged. R.C.W.,

\_\_\_ So. 3d at \_\_\_ (quoting Hatcher v. State, 646 So. 2d 676, 679 (Ala. 1994)). However, the Court of Criminal Appeals also concluded that "it was reversible error for the trial court to allow the jury to consider the evidence of collateral sexual misconduct involving T.W.'s half sisters for the improper purposes of intent, opportunity, and plan," where intent, opportunity, or plan was not at issue in R.C.W.'s trial, R.C.W., \_\_\_ So. 3d at \_\_\_, because a "jury may not consider evidence of collateral sexual misconduct for an implausible purpose." R.C.W., \_\_\_ So. 3d at \_\_\_\_\_. Specifically, the Court of Criminal Appeals stated:

"In Marks [v. State, 94 So. 3d 409 (Ala. Crim. App. 2012)], we held:

"'The circuit court's instructions in this case permitted the jury to consider the collateral-act evidence for the purposes of showing motive, opportunity, plan, knowledge, and modus operandi. On appeal, the State argues that opportunity and plan were at issue and that, therefore, the circuit court properly instructed the jury as to those purposes. The State also argues that the evidence was admissible to prove identity and preparation--purposes for which the jury was not instructed regarding the collateral-act evidence. The State does not address the additional purposes--motive, knowledge, or modus operandi--on which the jury was instructed

it could consider the collateral-act evidence in this case.

"'Although not as broad as the instructions at issue in Ex parte Billups, [86 So. 3d 1079 (Ala. 2010),] the instruction in this case regarding the permissible use of the collateral-act evidence was too general and authorized the jury to consider the evidence for "implausible purposes," such as identity. For example, I.C. identified Marks, and Marks admitted that he knew I.C.; he denied, however, that he had had sex with I.C. or that he had raped her. Thus, I.C.'s and Marks's credibility, not Marks's identity, were at issue. Compare Gibson v. State, 677 So. 2d 238, 240 (Ala. Crim. App. 1995) (identity was at issue where the accused contended that someone else committed the sexual offenses with which he was charged), with Mothershed v. State, 596 So. 2d 47 (Ala. Crim. App. 1991) (evidence of collateral sexual acts of the accused against the alleged victims was inadmissible to prove identity where the accused denied committing the offenses with which he was charged and he did not allege that the crimes were committed by someone else). Thus, the circuit court's instructions were erroneous because they permitted the jury, over Marks's objection, to consider the collateral-act evidence for purposes not at issue in the case. Given the graphic nature of the collateral-act evidence at issue here, the "confusion of the jury and the probable prejudice to [Marks,]" as a result of the erroneous instruction "is obvious." Ex parte Billups, 86 So. 3d at 1086 (quoting Billups v. State, 86 So. 3d 1032, 1079 (Ala. Crim. App. 2009) (Welch, J., dissenting)). Thus,

in accordance with the Supreme Court's decision in Billups, the jury instructions in this case constituted reversible error.

"'For the above-stated reasons, Marks's conviction for rape in the first degree is hereby reversed and this case is remanded to the Mobile Circuit Court for proceedings consistent with this opinion.'

"94 So. 3d at 413-14.

"Here, as in Marks, the trial court's instructions permitted the jury to consider the collateral-act evidence for purposes not at issue in this case. The trial court instructed the jury as to the purposes of motive, opportunity, intent, and plan. Although the State addresses motive, the State does not address the additional purposes--intent, opportunity, and plan--for which the jury was instructed it could consider the evidence of collateral sexual misconduct.

"'Thus, the circuit court's instructions were erroneous because they permitted the jury, over [R.C.W.]'s objection, to consider the collateral-act evidence for purposes not at issue in the case. Given the graphic nature of the collateral-act evidence at issue here, the "confusion of the jury and the probable prejudice to [R.C.W.,]" as a result of the erroneous instruction "is obvious." Ex parte Billups, 86 So. 3d at 1086 (quoting Billups v. State, 86 So. 3d 1032, 1079 (Ala. Crim. App. 2009) (Welch, J., dissenting)). Thus, in accordance with the Supreme Court's decision in Billups, the jury instructions in this case constituted reversible error.'

"Marks, 94 So. 3d at 413-14."

R.C.W., \_\_ So. 3d at \_\_ (footnote omitted).

Presiding Judge Windom, in her dissenting opinion, agreed with the holding of the main opinion that evidence of R.C.W.'s prior sexual abuse of his other daughters was admissible to establish a motive for raping, sodomizing, and sexually abusing T.W. R.C.W., \_\_ So. 3d at \_\_. Presiding Judge Windom also agreed with the conclusion in the main opinion that the trial court's limiting instruction to the jury erroneously allowed the jury to consider evidence of R.C.W.'s sexual abuse of his other daughters for purposes other than to show motive, i.e., for "'the improper purposes of intent, opportunity, and plan.'" R.C.W., \_\_ So. 3d at \_\_ (Windom, P.J., dissenting). However, Presiding Judge Windom concluded that R.C.W. suffered no harm as the result of the trial court's erroneous jury instruction, which allowed the jury to consider evidence of R.C.W.'s sexual abuse of his other daughters for purposes of intent, opportunity, and plan. Specifically, Presiding Judge Windom explained:

"In Ex parte Billups, 86 So. 3d [1079] at 1084-85 [(Ala. 2010)], the Alabama Supreme Court held that when evidence of collateral bad acts is admitted for one or more purposes other than to show bad character, the circuit court's failure to give an instruction that limits the jury's consideration

of that evidence to only the purpose for which it was admitted constitutes error. Specifically, the Court held that the circuit court's limiting instruction relating to Rule 404(b) evidence that 'simply recit[ed] the complete "laundry list" of permissible theories under Rule 404(b) [for the admission of collateral-bad-act evidence], ... gave the jury inadequate guidance [and constituted error].' Billups, 86 So. 3d at 1086.

"The Supreme Court did not, however, create a per se rule requiring reversal every time a circuit court's limiting instruction relating to collateral bad acts includes purposes listed in Rule 404(b) for which the evidence was not admitted. To the contrary, the Supreme Court has repeatedly held that the failure to give a limiting instruction and/or the giving of an erroneous limiting instruction must be reviewed on a case-by-case basis. Snyder v. State, 893 So. 2d 482, 485 (Ala. 2001) (explaining that 'each inquiry regarding the propriety of an instruction on the use of evidence of prior convictions ... must be determined on a case-by-case basis'); Ex parte Martin, 931 So. 2d 759, 768 (Ala. 2004) (same); Johnson v. State, 120 So. 3d 1119, 1128 (Ala. 2006) (same).

"....

"Although evidence of R.C.W.'s collateral bad acts was properly admitted as substantive evidence to show his motive and although the circuit court correctly prohibited the jury from considering R.C.W.'s collateral bad acts as evidence of his bad character, the majority finds reversible error in the circuit court's limiting instruction because it allowed the jury to consider that evidence for the 'improper purposes of [establishing] intent, opportunity, and plan[, points that were] not at issue in this case.' \_\_ So. 3d \_\_, \_\_. I, however, disagree. Because it was not plausible for evidence of R.C.W.'s collateral bad acts to establish his

intent, opportunity, or plan, any error in allowing the jury to consider the evidence for those purposes was harmless. In United States v. Levy-Cordero, 67 F.3d 1002, 1011 (1st Cir. 1995), the government offered evidence of the appellant's collateral bad acts to establish his consciousness of guilt. The trial court, however, gave a limiting instruction that directed the jury to consider the collateral-bad-act evidence for the purpose of establishing the appellant's intent and knowledge. Id. The United States Court of Appeals for the First Circuit held that a trial court's limiting instruction relating to the Rule 404(b) evidence improperly allowed the jury to consider the appellant's collateral bad acts as evidence of his intent and knowledge because those were not reasons that the evidence was admitted. Although the trial court improperly instructed the jury that it could consider the appellant's collateral bad acts for intent and knowledge, the First Circuit held that the error was harmless. Id. The Court explained that the erroneous instruction was harmless because there was 'no logical reason why [the collateral bad acts] would demonstrate appellant's intent or knowledge with respect to [charged] offenses....' Id. Thus, the circuit court's instruction was harmless because it 'instructed the jury that it could draw an inference that the evidence could not logically support.' Id.

"In this case, the circuit court's instruction that allowed the jury to consider R.C.W.'s sexual misconduct for 'improper purposes of [establishing] intent, opportunity, and plan,' \_\_ So. 3d at \_\_, was harmless because there was 'no logical reason why [the collateral bad acts] would demonstrate appellant's intent[, plan, or opportunity] with respect to [charged] offenses....' Levy-Cordero, 67 F.3d at 1011. Stated differently, R.C.W.'s collateral sexual misconduct did not establish his specific intent to commit, his opportunity to commit, or a plan to commit the charged offenses.

Therefore, the circuit court's erroneous limiting instruction was harmless because it merely allowed the jury to 'draw an inference that the evidence could not logically support.' Id.

"Additionally, as the majority explains, R.C.W.'s intent, opportunity, and plan were not at issue at trial. R.C.W. was T.W.'s father, and they lived together at the time of the offenses. From this evidence, the jury must have drawn the conclusion that R.C.W., who was living with his daughter, had the opportunity to rape, sodomize, and sexually abuse her. Because R.C.W.'s opportunity to commit the charged offenses was clearly established at trial, the circuit court's instruction that allowed the jury to consider R.C.W.'s collateral bad acts for the purpose of establishing opportunity was harmless. Cf. Dawson v. State, 675 So. 2d 897, 900 (Ala. Crim. App. 1995) ('The erroneous admission of evidence that is merely cumulative is harmless.' (citing Reese v. City of Dothan, 642 So. 2d 511, 515 (Ala. Crim. App. 1993))); Woods v. State, 13 So. 3d 1, 23 (Ala. Crim. App. 2007). Likewise, as the majority states, '[t]he intent necessary to these types of crimes may be inferred by the jury from the acts themselves.' \_\_\_ So. 3d at \_\_\_. Because R.C.W.'s general intent was established by the acts themselves, the circuit court's instruction allowing the jury to consider additional evidence of intent was harmless. Cf. Dawson, 675 So. 2d at 900; Woods, 13 So. 3d at 23. Finally, as the majority states, R.C.W.'s identity was not at issue in this case because R.C.W. did not allege that someone else committed the crime. Because R.C.W. did not place his identity at issue, the jury had two choices: believe that R.C.W. committed the acts or believe that no acts occurred. Because R.C.W.'s identity was not at issue and the jury was left to decide only whether the acts occurred, allowing the jury to consider evidence to show a plan and thus R.C.W.'s identity was not harmful. Id.

"This is not a case in which evidence of collateral bad acts was improperly admitted or in which the circuit court erroneously allowed the jury to consider that evidence to show bad character. Instead, evidence of R.C.W.'s collateral sexual acts was properly admitted and considered as substantive evidence of his motive, and the circuit court correctly prevented the jury from considering that evidence for the sole purpose for which it is not allowed--bad character and action in conformity therewith. Because evidence of R.C.W.'s collateral sexual misconduct was properly considered by the jury as substantive evidence of motive and because the circuit court prevented the jury from considering the evidence to prove bad character, the circuit court's limiting instruction that allowed the jury to also consider that evidence for additional implausible and/or irrelevant purposes was harmless. Therefore, I respectfully dissent."

R.C.W., \_\_ So. 3d at \_\_ (Windom, P.J., dissenting).

We granted the State's petition for a writ of certiorari to determine, as a matter of first impression, whether an erroneous limiting instruction, as to otherwise properly admitted Rule 404(b) collateral-acts evidence, is subject to a harmless-error analysis.

#### Standard of Review

\_\_\_\_ "This Court reviews pure questions of law in criminal cases de novo." Ex parte Morrow, 915 So. 2d 539, 541 (Ala. 2004) (quoting Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)).

Discussion

The State argues to this Court that the collateral evidence of R.C.W.'s sexual misconduct involving T.W.'s half sisters was properly admitted and considered as substantive evidence of his motive. The State concedes that the trial court's limiting instruction to the jury was broader than necessary because it erroneously allowed the jury to consider evidence of R.C.W.'s sexual abuse of his other daughters for purposes other than to show motive, i.e., for the improper purposes of showing intent, opportunity, and plan. However, the State argues that the trial court's erroneous limiting instruction was harmless because, it says, although the erroneous limiting instruction was overly broad, it did in fact properly limit the jury's consideration of the collateral sexual-misconduct evidence to the permissible purpose of showing motive and properly prevented the jury from considering the evidence for the impermissible purpose of showing the defendant's bad character.

R.C.W. argues that the decision of the Court of Criminal Appeals properly followed this Court's decision in Ex parte

Billups, 86 So. 3d 1079 (Ala. 2010), a decision he says is "on point" with the case presently before this Court.

Rule 404(b), Ala. R. Evid., provides:

"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 for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...."

Rule 404(b) has been explained as follows:

"'The Alabama Supreme Court has "held that the exclusionary rule prevents the State from using evidence of a defendant's prior bad acts to prove the defendant's bad character and, thereby, protects the defendant's right to a fair trial." Ex parte Drinkard, 777 So. 2d 295, 302 (Ala. 2000) (citing Ex parte Cofer, 440 So. 2d 1121, 1123 (Ala. 1983)). This court has explained that "[o]n the trial for the alleged commission of a particular crime, evidence of the accused's having committed another act or crime is not admissible if the only probative function of such evidence is to prove bad character and the accused's conformity therewith." Lewis v. State, 889 So. 2d 623, 661 (Ala. Crim. App. 2003) (quoting C. Gamble, McElroy's Alabama Evidence § 69.01(1) (5th ed. 1996)).

"''"This exclusionary rule is simply an application of the character rule which forbids the State to prove the accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that

might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors."'"

"'Ex parte Jackson, 33 So. 3d 1279, 1284-85 (Ala. 2009) (quoting Ex parte Arthur, 472 So. 2d 665, 668 (Ala. 1985), quoting in turn C. Gamble, McElroy's supra, § 69.01(1)).'

"[Moore v. State,] 49 So. 3d [228] at 232 [(Ala. Crim. App. 2009)] (emphasis added)."

Ex parte Billups, 86 So. 3d at 1084. Further,

"'Rule 404(b) is a principle of limited admissibility. This means that the offered evidence is inadmissible for one broad, impermissible purpose, but is admissible for one or more other limited purposes....'" Taylor v. State, 808 So. 2d 1148, 1165 (Ala. Crim. App. 2000) (quoting C. Gamble, McElroy's Alabama Evidence § 69.01(1) (5th ed. 1996) (emphasis added)).

"....

"In Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L. Ed.2d 771 (1988), the United States Supreme Court stated that, when evidence of a defendant's other crimes, wrongs, or acts is introduced under Rule 404(b), Fed. R. Evid., 'the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.' 485 U.S. at 691-92, 108 S.Ct. 1496 (citing United States v. Ingraham, 832 F.2d 229, 235 (1st Cir. 1987) (emphasis added)). ...

"....

"'[A]n instruction should advise the jury on the purposes for which prior acts are admitted, meaning uses that are plausible in the case at hand, and should not include a laundry list of every conceivable use.' 1 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 4:30 at 789 (3d ed. 2007)."

Ex parte Billups, 86 So. 3d at 1084-86.

In Ex parte Billups, the defendant was indicted in October 2004 on 13 counts of capital murder in relation to the killing of 4 men at the Avanti East Apartments in Birmingham. In June 2005, the defendant was indicted for the murder of Stevon Lockett. In November 2005, the defendant was convicted of 13 counts of capital murder in connection with the Avanti East killings. The trial court sentenced the defendant to death.

In December 2005, before the defendant was tried for Lockett's murder, the State gave the defense notice of its intent to present evidence regarding the defendant's involvement in the Avanti East killings during his trial for the murder of Lockett. The trial court, over the defendant's objection, determined that the evidence regarding the defendant's involvement in the Avanti East killings was admissible "based upon the close proximity, the fact that the

same weapon was used, and the fact that [the offenses] [were] very similar.'" Ex parte Billups, 86 So. 3d at 1081.

At trial, the State presented an overwhelming amount of evidence relating to the defendant's involvement in the Avanti East killings. The evidence presented by the State consisted of eyewitness testimony of the Avanti East killings by two witnesses; testimony of forensic experts, a firearms expert, and a detective; and photographic evidence demonstrating the victims' wounds. The State first mentioned evidence relating to the defendant's involvement in the Avanti East killings in its opening statement, during which the State provided the jury with a detailed account of those killings and displayed postmortem photographs of the four victims of the Avanti East killings. During its case-in-chief, the State called seven witnesses who testified regarding the Avanti East killings. During its cross-examination of the defendant, the State asked several questions regarding his involvement in the Avanti East killings. The State also introduced during its cross-examination of the defendant the postmortem photographs of the victims of the Avanti East killings that it had displayed during the opening statement. Finally, the State made numerous

references to the Avanti East killings in its closing argument. The defendant objected on several occasions to the introduction of the evidence relating to his involvement in the Avanti East killings, arguing, among other things, that the evidence was inadmissible because it was unnecessary and prejudicial.

The trial court instructed the jury as follows regarding its consideration of the evidence of the defendant's involvement in the Avanti East killings:

"'Ladies and gentlemen, let me tell you one thing about this testimony. You're hearing testimony today about another incident that allegedly occurred, not the same one that [the defendant] is actually charged with in this case.

"'The law is clear that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. In other words, evidence of other crimes allegedly committed by the defendant cannot be used to show bad character.

"'The evidence being presented regarding other acts allegedly committed by the defendant can be considered by you only for the purpose of determining either motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"'I'm going to repeat those for you. But if you think the evidence from the other case is relevant to the issues of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence

of mistake or accident in Stevon Lockett's death, then you can consider this evidence.

"'But it cannot be used by you for any other purpose; all right?'"

Ex parte Billups, 86 So. 3d at 1082. Further, the trial court stated the following in its final instructions to the jury:

"'Now, as I instructed you during the trial, there's been some testimony regarding an allegation of other crimes. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith. In other words, evidence of the other crimes allegedly committed by the defendant cannot be used to show bad character. It cannot be used to show bad character. The evidence being presented regarding other acts allegedly committed by the defendant can be considered by you only for the purpose of determining motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, as I have instructed you. If you think the evidence from the other case is relevant to the issues of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in Stevon Lockett's death, then you can consider it. But it cannot be used by you for any other purpose.'"

Ex parte Billups, 86 So. 3d at 1082.

The Court of Criminal Appeals concluded that the trial court did not err in admitting the collateral-acts evidence regarding the defendant's involvement in the Avanti East killings, stating, in relevant part, that that evidence "was relevant to establish [the defendant's] identity, intent,

pattern or plan." Billups v. State, 86 So. 3d 1032, 1053 (Ala. Crim. App. 2009). As to the trial court's limiting instruction regarding the collateral-acts evidence, the Court of Criminal Appeals noted that "the trial court repeatedly instructed the jury as to the limited purpose for which evidence about the [Avanti East] killings . . . was being admitted" and that the trial court "specifically instructed the jury that it could not use the collateral bad act evidence to show [the defendant's] bad character or to show that he acted in conformity therewith." Billups, 86 So. 3d at 1053.

Judge Welch authored a vigorous dissent, concluding that, although the collateral-acts evidence relating to the Avanti East killings might have been admissible to show motive, it was not reasonably necessary to prove motive and that the prejudicial impact of the substantial evidence and argument relating to the Avanti East killings so outweighed its probative value that the motive exception did not justify its admission into evidence. Billups, 86 So. 3d at 1073. Specifically, Judge Welch stated:

"The record in this case presents a textbook example of the reason the exclusionary rule prohibiting collateral-act evidence was created; the extensive evidence of collateral acts in [the defendant's]

trial for the murder of Lockett permitted this trial to become, for all intents and purposes, a trial for murders of the four Hispanic men as well. The inadmissible collateral evidence diverted the jurors' minds from the main issue of [the defendant's] criminal responsibility for Lockett's death and had an irreversible impact on the jury's decision-making process in this case. ...

"....

"In addition to the fact that the evidence about the quadruple murders was unnecessary to the State's case, the evidence was overwhelmingly and unduly prejudicial to [the defendant]. The State presented such substantial evidence and argument about the quadruple-murder case, beginning in its opening argument to the jury when it displayed photographs of the four victims, that the record reads almost as if [the defendant] were being tried for both crimes in this trial. There was no way the jury could have excluded consideration of the significant and detailed collateral evidence as impermissible character evidence and there was a substantial danger that the jury would have made an impermissible inference, based on the collateral evidence, that [the defendant] was a depraved massacring killer so he probably killed Lockett, too. Allowing the jury to hear the collateral evidence was far more prejudicial than probative of the issues the majority contends it was admissible to prove."

Billups, 86 So. 3d at 1072-77. Additionally, Judge Welch concluded that the trial court did not properly instruct the jury as to the purposes for which it could consider the collateral-acts evidence of the defendant's involvement in the Avanti East killings and that the erroneous limiting

instruction actually served to exacerbate the error caused by admitting the collateral-acts evidence. Judge Welch stated:

"[A]lthough the majority has correctly stated that the trial court did issue 'limiting' instructions, those instructions were wrong as a matter of law. The trial court accepted the State's invitation at trial to instruct the jury that it could use the collateral-act evidence for any of the reasons listed in Rule 404(b), [Ala. R. Evid.,] even though the State never argued that the evidence was admissible for most of those purposes. The State never argued that evidence about the [Avanti East killings] fell within the exceptions in the exclusionary rule for evidence related to opportunity, preparation, knowledge, or absence of mistake or accident. Thus, the trial court, by issuing its erroneous instructions, greatly enhanced the prejudice caused when evidence about the [Avanti East killings] was admitted because the erroneous instructions permitted the jury to consider the illegal evidence for many issues other than those for which it was purportedly admitted.

"This Court considered a similar issue in McAdory v. State, 895 So. 2d 1029 (Ala. Crim. App. 2004), when the trial court incorrectly instructed the jury about the issues relative to which evidence of the defendant's prior crimes could be considered. The Court stated: 'A limiting curative instruction only mitigates the prejudicial admission of illegal evidence if the instruction is legally sound. The jury could not have considered the prior convictions for knowledge and intent because neither was at issue.' 895 So. 2d at 1036. Thus, not only was substantial, prejudicial evidence about the quadruple murders erroneously admitted, but the jury also received misleading instructions that permitted it to consider that prejudicial evidence for issues far beyond those for which the evidence was initially admitted. The confusion of the jury and

the probable prejudice to [the defendant] is obvious and exacerbated the devastating harm that resulted from the erroneous admission of the testimony. Although defense counsel did not object to the instructions, based on the record as a whole, I believe that the error affected [the defendant's] substantial rights and that it seriously affected the fairness and integrity of the proceeding against him. . . ."

Billups, 86 So. 3d at 1078-79.

The defendant argued to this Court that the trial court committed reversible error in instructing the jury as to the purposes for which it could consider the collateral-acts evidence because the trial court's limiting instruction allowed the jury to consider the collateral-acts evidence for issues or purposes not in dispute. In reversing the decision of the Court of Criminal Appeals, this Court stated:

"Assuming, without deciding, that the evidence regarding [the defendant's] involvement in the Avanti East killings was, as the State contends, relevant to show plan, identity, motive, and intent, the jury, pursuant to the trial court's broad instruction, nonetheless remained free to consider that evidence for numerous other purposes (including opportunity, preparation, knowledge, or absence of mistake or accident) that were indisputably not at issue in this case. See McAdory v. State, 895 So. 2d 1029, 1036 (Ala. Crim. App. 2004) (plurality opinion) (concluding that the jury could not have properly considered the defendant's prior convictions to show knowledge and intent because neither was at issue). Presenting the jury with such a far-reaching 'limiting' instruction carries with

it the same problems as providing the jury with no specific purpose for considering the other crimes, wrongs, or acts evidence.

"'[A]n instruction should advise the jury on the purposes for which prior acts are admitted, meaning uses that are plausible in the case at hand, and should not include a laundry list of every conceivable use.' 1 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 4:30 at 789 (3d ed. 2007) (emphasis added). In this case, however, the jury was allowed to consider the evidence regarding [the defendant's] involvement in the Avanti East killings for several implausible purposes, including, among others, opportunity and absence of mistake or accident. For example, [the defendant] made no argument at trial that Lockett's killing was the result of an accident or that he lacked the opportunity to kill Lockett; rather, [the defendant's] defense was that another person, Charles Cooper, was responsible for Lockett's murder.

"By simply reciting the complete 'laundry list' of permissible theories under Rule 404(b), the trial court's instruction in this case gave the jury inadequate guidance. See Ex parte Belisle, 11 So. 3d 323, 333 (Ala. 2008) ('[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary.'" (quoting Cochran v. Ward, 935 So. 2d 1169, 1176 (Ala. 2006))). The trial court's instruction also failed to limit the State to the purposes--as nonspecific as they were--that it advanced in support of admission of the evidence regarding [the defendant's] involvement in the Avanti East killings. Thus, we conclude that the trial court erred by failing to limit the jury's consideration of that evidence to only those purposes for which the evidence was purportedly offered by the State (plan, identity, motive, and intent). See Huddleston [v. United States, 485 U.S.

681 (1988)]; cf. United States v. Tse, 375 F.3d 148, 158 (1st Cir. 2004) (finding that the district court 'adequately limited the jury's consideration of [certain Rule 404(b)] evidence' when the court instructed the jury that it could not use that evidence 'to make a propensity inference' and that the jury could use that evidence to determine only the defendant's 'knowledge and intent').

"With regard to the erroneous jury instruction, we agree with Judge Welch's conclusions that '[t]he confusion of the jury and the probable prejudice to [the defendant] is obvious' and that 'the error affected [the defendant's] substantial rights and ... seriously affected the fairness and integrity of the proceeding against him.' Billups, 86 So. 3d at 1079 (Welch, J., dissenting). Accordingly, we conclude that, under the particular circumstances of this case, the trial court's failure to properly instruct the jury regarding the purposes for which it could consider the evidence of [the defendant's] involvement in the Avanti East killings constituted plain error."

Ex parte Billups, 86 So. 3d at 1085-86.

Although not expressly stated in this Court's main opinion in Ex parte Billups, Judge Welch's dissent in Billups, with which this Court expressly agreed, was based on two independent conclusions. First and foremost, Judge Welch determined that a substantial amount of prejudicial evidence relating to the defendant's involvement in the Avanti East killings had been erroneously admitted at trial. As Judge Welch stated in Billups: "The record in this case presents a

textbook example of the reason the exclusionary rule prohibiting collateral-act evidence was created; the extensive evidence of collateral acts in [the defendant's] trial for the murder of Lockett permitted this trial to become, for all intents and purposes, a trial for murders of the four Hispanic men as well." 86 So. 3d at 1072 (emphasis added). Second, Judge Welch determined that the overly broad limiting instruction that permitted the jury to consider the collateral-acts evidence for issues beyond those for which the evidence was initially admitted resulted in obvious confusion to the jury and probable prejudice that only exacerbated the already prejudicial effect of the erroneously admitted collateral-acts evidence. Billups, supra. In other words, Judge Welch determined that the already overwhelming amount of prejudicial evidence admitted became even more prejudicial when considered in context with the overly broad limiting instruction, which allowed the jury to consider the prejudicial evidence for many purposes other than those for which it was purportedly admitted. Given the sheer volume of prejudicial evidence admitted in Billups, the overly broad instruction given to the jury in that case regarding the

purposes for which that evidence could be considered, including matters beyond those for which the evidence was initially admitted, certainly was prejudicial because the limiting instruction gave the jury little guidance and no limitations as to the proper purposes for which the jury could consider the collateral-acts evidence. See Ex parte Billups, 86 So. 3d at 1086 (stating that "[p]resenting the jury with such a far-reaching 'limiting' instruction carries with it the same problems as providing the jury with no specific purpose for considering the other crimes, wrongs, or acts evidence" and that, "[b]y simply reciting the complete 'laundry list' of permissible theories under Rule 404(b), the trial court's instruction in this case gave the jury inadequate guidance"). Thus, Ex parte Billups can be read as standing for the proposition that an improper limiting instruction is prejudicial if, in effect, it offers little guidance or no limitations to the jury as to the proper purpose or purposes for which the collateral-act evidence could be considered.

To be sure, the factual scenario present in Ex parte Billups is extreme, given the voluminous amount of prejudicial collateral-acts evidence admitted at trial coupled with an

overly broad limiting instruction in which the trial court simply listed each possible exception to Rule 404(b). For that reason, the holding in Ex parte Billups is limited to a similar factual scenario and does not "create a per se rule requiring reversal every time a circuit court's limiting instruction relating to collateral bad acts includes purposes listed in Rule 404(b) for which the evidence was not admitted." R.C.W., \_\_\_ So. 3d at \_\_\_ (Windom, P.J., dissenting).

In the present case, the State presented the limited testimony of R.C.W.'s two other biological daughters regarding similar acts of sexual abuse perpetrated upon them by R.C.W. This evidence was necessary to the State's case to establish motive, i.e., "to establish R.C.W.'s 'unnatural sexual desire for the small children living in his household' as a motive for the present offense." R.C.W., \_\_\_ So. 3d at \_\_\_. Additionally, this evidence, although obviously prejudicial to R.C.W., was not so potentially prejudicial as to outweigh its probative value. See Irvin v. State, 940 So. 2d 331, 346 (Ala. Crim. App. 2005). Thus, we agree with the Court of Criminal

Appeals' conclusion that the collateral-acts evidence in this case was properly admitted to show motive.

We further agree with the Court of Criminal Appeals' conclusion that the trial court's limiting instruction in this case was erroneous because it permitted the jury to consider the collateral-acts evidence for purposes not at issue in this particular case, i.e., to show "opportunity, intent, or plan." See Ex parte Billups, supra. However, for the reasons explained below, we conclude that the erroneous limiting instruction was harmless error.

Initially, we note that, unlike the situation in Ex parte Billups, the potential prejudicial effect resulting in this case from the admission of the evidence of R.C.W.'s prior sexual misconduct with his other daughters, coupled with the erroneous limiting instruction given by the trial court, was muted because of the limited amount of collateral-acts evidence admitted at trial. Here, the collateral-acts evidence was properly admissible to show motive and was limited to the testimony of R.C.W.'s other two biological daughters, who testified to specific instances of similar sexual misconduct as alleged in this case. Furthermore,

although the limiting instruction in this case erroneously allowed the jury to consider the collateral-acts evidence for issues not in dispute, the limiting instruction properly instructed the jury that it could consider the collateral-acts evidence for the purpose of motive and that it could not consider the evidence to show R.C.W.'s bad character and that he acted in conformity with that character. To the extent the trial court's limiting instruction allowed the jury to consider the collateral-acts evidence for issues not in dispute, we agree with Presiding Judge Windom's conclusion that "[b]ecause it was not plausible for evidence of R.C.W.'s collateral bad acts to establish his intent, opportunity, or plan, any error in allowing the jury to consider the evidence for those purposes was harmless." R.C.W., \_\_ So. 3d at \_\_ (Windom, P.J., dissenting). As set forth earlier, Presiding Judge Windom aptly explained:

"In this case, the circuit court's instruction that allowed the jury to consider R.C.W.'s sexual misconduct for 'improper purposes of [establishing] intent, opportunity, and plan,' \_\_ So. 3d at \_\_, was harmless because there was 'no logical reason why [the collateral bad acts] would demonstrate appellant's intent[, plan, or opportunity] with respect to [charged] offenses....' Levy-Cordero, 67 F. 3d at 1011. Stated differently, R.C.W.'s collateral sexual misconduct did not establish his

specific intent to commit, his opportunity to commit, or a plan to commit the charged offenses. Therefore, the circuit court's erroneous limiting instruction was harmless because it merely allowed the jury to 'draw an inference that the evidence could not logically support.' Id.

"Additionally, as the majority explains, R.C.W.'s intent, opportunity, and plan were not at issue at trial. R.C.W. was T.W.'s father, and they lived together at the time of the offenses. From this evidence, the jury must have drawn the conclusion that R.C.W., who was living with his daughter, had the opportunity to rape, sodomize, and sexually abuse her. Because R.C.W.'s opportunity to commit the charged offenses was clearly established at trial, the circuit court's instruction that allowed the jury to consider R.C.W.'s collateral bad acts for the purpose of establishing opportunity was harmless. Cf. Dawson v. State, 675 So. 2d 897, 900 (Ala. Crim. App. 1995) ('The erroneous admission of evidence that is merely cumulative is harmless.' (citing Reese v. City of Dothan, 642 So. 2d 511, 515 (Ala. Crim. App. 1993))); Woods v. State, 13 So. 3d 1, 23 (Ala. Crim. App. 2007). Likewise, as the majority states, '[t]he intent necessary to these types of crimes may be inferred by the jury from the acts themselves.' \_\_\_ So. 3d at \_\_\_. Because R.C.W.'s general intent was established by the acts themselves, the circuit court's instruction allowing the jury to consider additional evidence of intent was harmless. Cf. Dawson, 675 So. 2d at 900; Woods, 13 So. 3d at 23. Finally, as the majority states, R.C.W.'s identity was not at issue in this case because R.C.W. did not allege that someone else committed the crime. Because R.C.W. did not place his identity at issue, the jury had two choices: believe that R.C.W. committed the acts or believe that no acts occurred. Because R.C.W.'s identity was not at issue and the jury was left to decide only whether the acts occurred, allowing the jury to

consider evidence to show a plan and thus R.C.W.'s identity was not harmful. Id."

R.C.W., \_\_ So. 3d at \_\_ (Windom, P.J., dissenting).

Instructing the jury that it could consider the collateral-acts evidence for purposes for which it ultimately would not actually consider it did not prejudice R.C.W., because the trial court properly instructed the jury that it could consider the collateral-acts evidence for the proper purpose of motive. The instruction here, although overly broad, was not so broad that it essentially gave no guidance or no limitation to the jury as to the proper purpose for which the evidence could be considered. See Ex parte Billups, supra. Because the collateral-acts evidence was appropriately before the jury for the purpose of proving motive, and because the limiting instruction did not rise to the level of prejudicial ambiguity found in Ex parte Billups, any error arising from the trial court's limiting instruction was harmless.

#### Conclusion

\_\_\_\_ This Court did not establish with its decision in Ex parte Billups a per se rule requiring the reversal of a conviction when the trial court gives an overly broad limiting

instruction as to the purposes for which collateral-act evidence admitted pursuant to Rule 404(b) may be considered. In fact, this Court expressly limited the holding in that case to the "particular circumstances of [that] case." Ex parte Billups, 86 So. 3d at 1086. In this matter, we agree with the Court of Criminal Appeals that the evidence relating to R.C.W.'s prior sexual misconduct with his daughters was admissible to show motive. We further agree that the trial court's limiting instruction was erroneous because it permitted the jury to consider the collateral-acts evidence for issues not in dispute. However, because of the distinctions shown above this case is unlike Billups, and we apply a harmless-error analysis and conclude that any error arising from the trial court's limiting instruction was harmless and was not prejudicial to R.C.W. Accordingly, the judgment of the Court of Criminal Appeals is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

Stuart, Parker, Main, Wise, and Bryan, JJ., concur.

Moore, C.J., and Shaw, J., concur in the result.

Murdock, J., dissents.

SHAW, Justice (concurring in the result).

I concur in the result. Under Rule 404(b), Ala. R. Evid., evidence regarding a defendant's other misdeeds or bad acts (hereinafter referred to as "collateral acts") is not admissible "to prove the character of a person in order to show" that the person acted in conformity with that character as to the current offense. This Court has noted that such evidence "may divert the minds of the jury from the main issue"; thus, collateral-act evidence is "presumptively prejudicial," and its improper admission into evidence constitutes reversible error. Ex parte Cofer, 440 So. 2d 1121, 1124 (Ala. 1983). That stated, collateral-act evidence can be admitted into evidence for other purposes, including to show a person's motive, opportunity, intent, or plan. See Rule 404(b) (listing the permissible purposes). These other purposes, however, must be "real and open issue[s]," i.e., "the evidence offered must be relevant to some issue that is material to the case." Anonymous v. State, 507 So. 2d 972, 974 (Ala. 1987). In Anonymous, this Court rejected the argument that certain collateral-act evidence was admissible, stating that "[t]here [wa]s simply no imaginable reason for

the admission of this testimony other than to prove the defendant's bad character. This is, of course, not an acceptable purpose." 507 So. 2d at 974.

As the main opinion and the Court of Criminal Appeals note, the testimony regarding R.C.W.'s collateral acts--here, prior sexual misconduct involving his other biological daughters--was properly admissible in this case to show his "motive" for committing the charged offenses. Because this collateral-acts evidence was properly admitted, no prejudice is presumed. Cofer, supra.

When collateral-act evidence is admitted, a party can request the trial court to provide an instruction to the jury describing the limited nature of the evidence's use. See Rule 105, Ala. R. Evid. Such a limiting instruction "has the effect of lessening any prejudice that may have been caused by the evidence admitted under Rule 404(b); and Alabama courts have long urged judges to give such a limiting instruction when evidence of a collateral act or uncharged misconduct is admitted for a limited purpose." Taylor v. State, 808 So. 2d 1148, 1166 (Ala. Crim. App. 2000).

Here, the trial court gave an instruction to the jury that the collateral-acts evidence could not be considered for the purpose of showing R.C.W.'s "bad character" or that that character made it more likely that he committed the charged offenses. However, the trial court instructed the jury that it "may be considered ... only for the limited purpose ... regarding the defendant's motive, opportunity, intent, or plan."

The Court of Criminal Appeals concluded that, although R.C.W.'s collateral acts were admissible to show R.C.W.'s motive, there was no "real or open" or material issue regarding opportunity, intent, or plan. Thus, although the trial court correctly instructed the jury that it "may" consider the collateral-acts evidence to show R.C.W.'s motive, the instruction that it "may" also consider the evidence for the purposes of proving opportunity, intent, or plan was improper.

In Ex parte Billups, 86 So. 3d 1079 (Ala. 2010), the trial court, in instructing the jury on how it was to consider evidence regarding collateral acts of the defendant, stated that it could consider that evidence for purposes that were

"indisputably" not at issue. The instruction "simply recit[ed] the complete 'laundry list' of permissible theories" under which collateral-act evidence is permissible under Rule 404(b). 86 So. 3d at 1086. Such a "far-reaching" instruction, we held, "carries with it the same problems as providing the jury with no specific purpose for considering the other crimes, wrongs, or acts" and "gave the jury inadequate guidance."<sup>1</sup> 86 So. 3d at 1086.

As noted in the main opinion, the factual scenario in Ex parte Billups was extreme: the trial court simply listed all the permissible purposes for which the voluminous collateral-acts evidence could be used, even purposes not advanced by the State. Thus, the language in that decision is broad. However, consistent with the main opinion, I read Ex parte Billups to stand for the proposition that an improper limiting instruction is prejudicial if it, in effect, offers little

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<sup>1</sup>Ex parte Billups also faulted the trial court's instruction because it "failed to limit the State to the purposes ... it advanced in support of the admission of the evidence," 86 So. 3d at 1086; thus, this Court concluded that the trial court had erred "by failing to limit the jury's consideration of that evidence to only the purposes for which the evidence was purportedly offered by the State." 86 So. 3d at 1086. In the instant case, it appears that the State actually offered the evidence of R.C.W.'s collateral acts for the purposes described in the trial court's instruction.

guidance or no limitation to the jury's consideration of the collateral-act evidence. I would limit the holding of Ex parte Billups to such a scenario; it thus does not "create a per se rule requiring reversal every time a circuit court's limiting instruction relating to collateral bad acts includes purposes listed in Rule 404(b) for which the evidence was not admitted." R.C.W. v. State, [Ms. CR-11-0387, November 2, 2012] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2012) (Windom, P.J., dissenting).

Here, the jury was instructed that it "may" consider the collateral acts for purposes of showing motive, intent, plan, and opportunity. According to the Court of Criminal Appeals, the purposes of intent, plan, and opportunity were not material. But the jury could consider the evidence for the purpose of determining motive. I see nothing indicating that instructing the jury that it could use the collateral-acts evidence for three purposes for which it would, ultimately, not use that evidence -- i.e., it would not use the evidence to determine if R.C.W. possessed an intent, plan, and opportunity -- necessarily prejudiced R.C.W. Telling the jury that it could consider the evidence for something it would not

consider it for anyway, on its face, does not prejudice the defendant when the evidence was otherwise properly before it for another purpose. Ex parte Billups holds that reversible error exists--and I believe prejudice is shown--when the instruction is so broad that it essentially gives no guidance or no limitation to the jury. I do not believe that the instruction in the instant case rises to that level; I see no error under Ex parte Billups. Because the collateral-acts evidence was properly before the jury for another purpose, and because the instruction does not rise to the level of ambiguity found in Billups, I agree with the conclusion reached in the main opinion that any error in the instruction was harmless, i.e., it has not probably injuriously affected R.C.W.'s substantial rights.

MURDOCK, Justice (dissenting).

Like the majority of the Alabama Court of Criminal Appeals, I must conclude that the instructions given by the trial court with regard to the jury's use of certain evidence of "prior bad acts" by R.C.W. was confusing and potentially prejudicial. I therefore would affirm the judgment of the Court of Criminal Appeals in this case. Accordingly, I respectfully dissent.

Rule 404(b), Ala. R. Evid., prohibits the admission of evidence of prior bad acts by a criminal defendant to demonstrate the defendant's "propensity" to act in a given manner, i.e., to show "action in conformity therewith."

"The rule regarding admissibility of prior misconduct by a criminal defendant has been well stated in C. Gamble, McElroy's Alabama Evidence § 69.01(1) (3rd ed. 1977):

"'This is a general exclusionary rule which prevents the introduction of [collateral] criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question. ...

"'This exclusionary rule is simply an application of the character rule which forbids the state to prove the accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of [collateral] crimes will far outweigh any probative

value that might be gained from them. Most agree that such evidence of [collateral] crimes has almost an irreversible impact upon the minds of the jurors."

Ex parte Cofer, 440 So. 2d 1121, 1123 (Ala. 1983). See also Rule 403, Ala. R. Evid ("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 ....").

If it is true that evidence of other types of prior criminal acts (e.g., burglary, theft, and drug possession) can leave an "irreversible impact upon the minds of the jurors," how much more so is this true as to the type of acts alleged here? As this Court explained in Ex parte Billups, 86 So. 3d 1079 (Ala. 2010), given the graphic nature of the collateral-acts evidence at issue, the risk of "'confusion of the jury and the probable prejudice to [the defendant,]'" as a result of the erroneous instruction "'is obvious,'" and even constitutes "plain error." 86 So. 3d at 1086 (quoting Billups v. State, 86 So. 3d 1032, 1079 (Ala. Crim. App. 2009) (Welch, J., dissenting)).

I can find no meaningful distinction between the present case and Ex parte Billups -- and certainly not one that has

been explained using a clear standard by which future cases can be judged. In both Ex parte Billups and this case, the jury was "overcharged." In both cases, the jury was told it could consider "prior-bad-acts" evidence as to multiple purposes for which there was no "plausible" need for the evidence.

In Ex parte Billups, this Court concluded that the fact that it was not plausible for the jury to use the evidence of Billups's prior bad acts for some of the uses as to which it was instructed rendered the trial court's instruction prejudicial. Today, we use the same lack of "plausibility" rationale to conclude that the overcharging of the jury here was harmless. I cannot reconcile these two different perspectives.

It is true that, in Ex parte Billups, the jury was charged as to four purposes Billups contended were not at issue ("opportunity, preparation, knowledge, [and] absence of mistake," 86 So. 3d at 1085), whereas here the jury was charged as to three impermissible uses of such collateral-bad-act evidence (intent, plan, and opportunity). I see no distinction -- and no articulated rule of decision explaining

any distinction -- between the risk of prejudice when the jury is instructed as to four improper uses versus three improper uses.<sup>2</sup>

Nor do I believe we can take comfort in the notion that jurors will be able to, and actually will, parse the different reasons for which the trial judge tells them they may consider problematic evidence and discern which purposes are appropriate for their consideration under our rules and which are not.<sup>3</sup> Most jurors, of course, are not lawyers. They are

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<sup>2</sup>Likewise, there is no distinction between this case and Ex parte Marks, 94 So. 3d 409 (Ala. Crim. App. 2012), in which, as in this case, the jury was erroneously instructed that it could consider evidence of prior bad acts for three purposes that did not correspond to real and open issues:

"The State does not address the additional purposes -- motive, knowledge, or modus operandi -- on which the jury was instructed it could consider the collateral-act evidence in this case.

"Although not as broad as the instructions at issue in Ex parte Billups, [86 So. 3d 1079 (Ala. 2010),] the instruction in this case regarding the permissible use of the collateral-act evidence was too general and authorized the jury to consider the evidence for 'implausible purposes'...."

94 So. 3d at 413 (emphasis added).

<sup>3</sup>Justice Shaw states in his special writing that he sees "nothing indicating that instructing the jury that it could use the collateral-acts evidence for three purposes for which it would, ultimately, not use the evidence -- i.e., it would

instructed by the judge, the authority figure in the courtroom upon whom the jurors depend for their understanding of the law and the task they are to perform, that they in fact may use this evidence for any of and all the purposes the judge lists for them. It would only be natural for the jurors to attempt to "plug in" this evidence to some of or all these purposes. In this case, for example, it is not difficult to imagine one or more jurors, after hearing from the judge that they may consider the defendant's prior acts in relation to the defendant's "intent" and "plan," reasoning that the defendant probably "intended" and "planned" to abuse the victims because, after all, he had committed similar acts on similar victims in the past.<sup>4</sup>

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not use the evidence to determine if R.C.W. possessed an intent, plan, and opportunity -- necessarily prejudiced R.C.W.," \_\_ So. 3d at \_\_ (emphasis added), and that "[t]elling the jury that it could consider the evidence for something it would not consider it for anyway, on its face, does not prejudice the defendant when the evidence was otherwise properly before it for another purpose." \_\_ So. 3d at \_\_ (first emphasis added).

<sup>4</sup>Because these were not real and open issues in this case, the trial court did not explain to the jurors what Rule 404(b) contemplates by the terms "intent" and "plan." Although the omission of such instructions therefore was understandable, it left the jurors to apply their common, "everyday" understanding of these terms. The meaning of these terms within the contemplation of Rule 404(b), however, is of course

different. As the majority of the Court of Criminal Appeals recognized:

"In the present case, R.C.W. was charged with crimes -- first-degree rape, incest, first-degree sexual abuse, and sodomy -- that do not require any specific criminal intent. The intent necessary to these types of crimes may be inferred by the jury from the acts themselves. See Anonymous [v. State, 507 So.2d 972, 975 (Ala. 1987)]. Accordingly, the testimony regarding the prior sexual mistreatment of R.C.W.'s daughters was inadmissible under Rule 404(b), Ala. R. Evid., to prove intent.

"Additionally, there was no real and open issue as to the other purpose, i.e., showing a common plan, for which the jury was instructed it could consider the evidence. This Court has held that the common plan, scheme, or design exception applies only when identity is actually at issue. See Campbell v. State, 718 So. 2d 123, 128-29 (Ala. Crim. App. 1997) (quoting Register v. State, 640 So. 2d 3 (Ala. Crim. App. 1993), aff'd, 680 So. 2d 225 (Ala. 1994)). The Alabama Supreme Court has also held that the identity exception is coextensive with the exception for plan, scheme, or system. See Ex parte Darby, 516 So. 2d 786, 789 (Ala. 1987); 1 Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 69.01(6) (6th ed. 2009) ('Indeed, there is some judicial language that these two exceptions -- plan and identity -- are co-extensive in the sense of rendering plan or scheme unavailable unless identity is clearly at issue in the case.'). Here, there was nothing in the record that indicates that R.C.W.'s identity was in issue. R.C.W. never alleged that someone else was the perpetrator of the crimes. See Mothershed v. State, 596 So. 2d 47, 48 (Ala. Crim. App. 1991). Thus, the evidence of the collateral sexual misconduct was inadmissible to prove plan."

In short, by inviting jurors to consider the use of such collateral-acts evidence for purposes that are not at issue and that are not further explained to the jurors, the trial court invites confusion and attempts by jurors to find uses for the evidence of "prior bad acts" that correspond in the jurors' minds in some way to the trial court's instructions. We are warned by courts and commentators alike that, "[w]hen prior bad act evidence is offered to prove a motive for the crime, 'courts must be on guard to prevent the motive label from being used to smuggle forbidden evidence of propensity to the jury.'" United States v. Varoudakis, 233 F.3d 113, 120 (1st Cir. 2000) (quoting 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5240 (1978)). The type of instructions we accept today makes it more likely, not less, that jurors will in effect end up considering the evidence of the defendant's prior bad acts as evidence indicating a propensity to have acted that way again, the very thing Rule 404(b) was designed to guard against. As the current version of the above-referenced treatise also warns, experience with efforts to admit prior-bad-act evidence in

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R.C.W. v. State, [Ms. CR-11-0387, Nov. 2, 2012] \_\_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2012).

sex-offense cases "suggests that in practice they often degenerate into some version of the outlawed use of other crimes evidence to show propensity to engage in [the] crime."

22A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence, Other Crimes, Wrongs, or Acts – Other Exceptions § 5248 (2012).

At the end of the day, I believe we have left ourselves and the trial courts without a rationale -- and without a standard -- that provides meaningful guidance going forward. Moreover, I believe we have accepted an approach that, as a practical matter, will have the effect in many cases of negating the core prohibition intended by Rule 404(b).<sup>5</sup>

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<sup>5</sup>This in the context of concerns that persist among some courts and commentators, notwithstanding contrary holdings by this and other courts, that, if the defendant did the act, the intent and motive can readily be inferred from the act itself and that so-called "motive" evidence amounts to nothing more than prohibited "propensity" evidence." See, e.g., 22A Federal Practice and Procedure: Evidence § 5248 (discussed in the text, *supra*); State v. Wells, 289 Kan. 1219, 1229, 221 P.3d 561, 569 (2009) ("Conviction for mere 'propensity' -- defined by The American Heritage Dictionary of the English Language 1048 (1971), as an innate inclination, a tendency or bent -- would be the almost certain result of admitting this evidence for motive."); State v. Kirsch, 139 N.H. 647, 654, 662 A.2d 937, 942 (1995) ("The crux of the State's argument appears to be that the other incidents show the defendant's desire for sexual activity with a certain type of victim. This, however, 'is proof of propensity, not motive.'"). See generally, e.g., 1 Kenneth S. Broun, McCormick on Evidence §

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190 (7th ed. 2013) (explaining that "[t]he motive theory should not apply ... when 'motive' or 'intent' is just another word for propensity" (footnotes omitted)); 22A Federal Practice and Procedure: Evidence, Other Crimes, Wrongs, or Acts – Exceptions; Motive § 5240 (2012) (earlier edition cited in the text, *supra*).