ALAN WILSON
ATTORNEY GENERAL

June 17, 2013

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State of South Carolina v. Joseph Bradley Loftin**
Appellate Case No: 2012-209191

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

David Spencer
Assistant Deputy Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: John D. Delgado, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOSEPH BRADLEY LOFTIN,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENTS

I. The trial court did not err in admitting an instance of uncharged sexual misconduct by Appellant with Victim where it was part of the common scheme or plan to groom and establish a sexual relationship with Victim and where the testimony would otherwise be admissible as res gestae of the charged conduct; further, any error is harmless beyond a reasonable doubt. 7

II. The trial court did not err in excluding evidence that Victim met boys or that she became pregnant three months after Appellant stopped having sexual intercourse with Victim where there was no allegation Appellant impregnated Victim and where there was no evidence that Victim had sexual intercourse with other individuals before or during the time period Appellant was sexually abusing Victim. 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) 7

State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) 7-8

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) 8

State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) 8

State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) 8, 9

State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009) 8

State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) 8

State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 896 (2009) 8, 11, 12

State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) 8, 9

State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008) 9

State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911) 9

State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955) 9

State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) 9, 10

State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008) 10, 11

Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) 12

State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) 12

State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (2003) 13

State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) 13

State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000) 14

State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) 14

State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) 14, 15

State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) 15

State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) 15

State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) 15

State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) 15-16

State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006) 16

State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) 16

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) 16

Rock v. Arkansas, 483 U.S. 44, 55 (1987) 16

State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979) 18

Other Authorities:

Rule 403, SCRE 8, 16

Rule 404(b), SCRE 7, 8

S.C. Code §16-3-659.1 18

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in admitting an instance of uncharged sexual misconduct by Appellant with Victim where it was part of the common scheme or plan to groom and establish a sexual relationship with Victim and where the testimony would otherwise be admissible as res gestae of the charged conduct; further, any error is harmless beyond a reasonable doubt.

II.

The trial court did not err in excluding evidence that Victim met boys or that she became pregnant three months after Appellant stopped having sexual intercourse with Victim where there was no allegation Appellant impregnated Victim and where there was no evidence that Victim had sexual intercourse with other individuals before or during the time period Appellant was sexually abusing Victim.

STATEMENT OF THE CASE

Appellant Loftin was indicted for Criminal Sexual Conduct with a Minor in the Second Degree (CSC) and Lewd Act on a Child. Loftin was tried on February 14-16, 2012 and found guilty as charged. The Honorable Brooks P. Goldsmith sentenced Loftin to twelve years' imprisonment for CSC and ten years' imprisonment for Lewd Act. Following a motion to lower the sentence on February 22, 2012, Loftin filed a notice of appeal.

STATEMENT OF FACTS

Victim was repeatedly sexually assaulted from August to December 2007 by Appellant Loftin, who had assumed the role of her stepfather. The events came to light in January 2008, when Victim's friend, Shakesha, decided to tell the principal because she thought Victim needed help. Tr. pp. 59-60.

Victim testified Loftin lived with Victim and her mom since Victim was eight years old until he moved out in December 2007. She was twelve years old when a normal father/daughter relationship turned into a sexual relationship instead. The grooming process started when Loftin gave alcohol to Victim and her friend Abby. Loftin gave her some kind of fruity drink and she was sitting on his lap. That was the last thing Victim remembered that day. Another day, Loftin offered Victim twenty dollars to make out with him and he touched her private area. Tr. pp. 67-72.

This conduct escalated to intercourse for the first time in a deer stand in Fort Lawn, Chester County. Loftin showed Victim a condom and asked her if she knew what it was. Victim indicated she did. Then Loftin pulled down her pants. Victim was shocked and did not know what to do. Loftin had intercourse with her and told her not to tell her mom. She did not tell her mom because she did not know what would happen if she did. Tr. pp. 72-75.

After that, Loftin and Victim had intercourse every day. The sex would occur in Mother's house in Lancaster County in Mother's bed, Victim's bed, her brother's bed, the couch bed, Mother's car and also the deer stand. Loftin started sleeping with Victim on the couch bed every night where they had sex. At this time, Mother was having seizures,

was on a lot of medication, and slept a lot. Loftin also had sex with Victim in the brother's bedroom while Mother was at work. The brother was not present in the house when this occurred because he went to his grandmother's next door when he arrived home from school. Tr. pp. 75-79.

Loftin also performed oral sex on Victim. Additionally, one time Loftin used a vibrator ring with Victim. Loftin told Victim that he did not love Mother and when Victim turned eighteen years of age, they would run away together. Loftin also said bad things about Mother. Victim believed Loftin and Victim wanted to run away with him. The sexual conduct kept occurring until December 2007, when Loftin and Mother broke up. Tr. pp. 80-83.

Victim testified Loftin ejaculated during intercourse with the victim on her bed and her brother's bed. One time, Loftin bought her a pregnancy test and after she used it, Loftin made her throw it out in the woods. Loftin also told her he was getting a vasectomy. Loftin and Mother ended their relationship after Christmas in 2007 and Loftin moved out of the residence. Tr. pp. 84-86.

Later, after Mother and Loftin broke up, Mother and Loftin were on the phone together talking about getting back together when Victim became enraged and took the phone away from Mother. Victim had told Shakesha and Abby about the abuse. Victim was called to the principal's office at school and initially denied the abuse, but then admitted that it occurred. She would also recover the pregnancy test from the woods with Mother. Tr. pp. 86-89.

Abby testified at trial that Loftin gave her and Victim alcohol. Abby was eight

years old at the time. Abby also testified that Loftin asked Victim to make out for twenty dollars. Loftin and Victim went into Victim's bedroom and Abby heard kissing noises from Victim's room. Abby never told her mother about what happened. Tr. pp. 109-112.

Mother testified that Loftin and Mother started having a relationship when Victim was eight years old. Mother had a good relationship with Victim until late summer in 2007, when Victim became distant. "Then it was almost like she hated me." Tr. p. 129. In contrast, Loftin and Victim seemed to become closer. "She would talk to him, she wouldn't talk to me." Tr. p. 130, lines 18-25.

Mother verified that Loftin and Victim started sleeping on the couch together, which at the time did not concern her, but in retrospect she recognized it should have concerned her. Tr. p. 151, lines 20-25.

Mother testified she was speaking with Loftin on the telephone about getting back together when Victim snatched the phone from her and got upset. Then Victim calmed down after she spoke with Loftin. Tr. p. 139. Mother testified that Victim's bedding was never used on Mother's bed. Tr. p. 165.

A Target receipt from the Target store in Monroe was introduced into evidence. Tr. pp. 200-203. A receipt from the CVS pharmacy in Lancaster was also put into evidence, which showed the purchase of a pregnancy test. Tr. pp. 297-298. Evidence proved that the pregnancy test was purchased with a gift card given to Loftin at a company Christmas party. Tr. pp. 308-310; pp. 319-320.

Evidence was presented that Loftin had a vasectomy in December 2007. Tr. p. 136.

Semen detected on Victim's comforter was a one in forty-five quadrillion match with Loftin. Semen on an egg crate mattress from the couch was also a match. Additionally, semen on an egg crate mattress from the brother's bedroom was a match with Loftin's DNA. Tr. pp. 243-245.

Dr. Singleton testified she examined Victim on January 9, 2008, and Victim had a deep cleft at the six o'clock position of the hymen that was consistent with sexual abuse. Dr. Singleton also testified that Victim reported issues indicative of trauma: Victim had difficulty sleeping, was sad and crying frequently, was having difficulty making friends, was not doing well in school, and was cutting herself. She also had nausea and vomiting. Tr. pp. 277-281.

Loftin testified he had the vasectomy because Loftin already had four children. He denied any sexual activity with Victim. He denied he slept on the couch with Victim. He claimed he gave Mother the gift card after he purchased an item the same day the pregnancy test was purchased, but he denied purchasing the pregnancy test. Tr. pp. 336-349, p. 355.

ARGUMENT

I.

The trial court did not err in admitting an instance of uncharged sexual misconduct by Appellant with Victim where it was part of the common scheme or plan to groom and establish a sexual relationship with Victim and where the testimony would otherwise be admissible as res gestae of the charged conduct; further, any error is harmless beyond a reasonable doubt.

Loftin sexually assaulted Victim on a daily basis from sometime in August until December 2007, but the first time he had sexual intercourse with Victim was in a deer stand in Chester County, which was an integral moment in Loftin's grooming process of transforming his father/daughter type of relationship with Victim into a sexual relationship in which Victim was groomed for a dysfunctional relationship in which she became his regular sexual partner and underage girlfriend. Loftin complains it was error to admit evidence of the deer stand incident, but it clearly is proper common scheme or plan evidence and admissible as the *res gestae* of the crime as well. The trial court did not err. Further, any possible error is harmless beyond a reasonable doubt, especially in light of the fact that it was one of approximately a hundred sexual assaults.

Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also, State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). When there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the South Carolina Supreme Court have held prior bad acts are admissible to demonstrate a common scheme or plan. See e.g., State v. Gaines,

380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008). "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id.

The South Carolina Supreme Court further explained:

> [T]he trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

Id. at 433-34; 683 S.E.2d at 278 (citing State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984)). Evidence of prior bad acts must logically relate to the charged offense, and the probative value of the evidence must outweigh any danger of unfair prejudice. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 896 (2009) (citing Rule 403, SCRE; Gaines, 380 S.C. at 29, 667 S.E.2d at 731; State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)). "The

determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." Id. (citing State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008)).

In State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911), Richey was charged with carnal knowledge of a girl under fourteen years of age. The Supreme Court found evidence that he continued this relationship beyond the age of fourteen years of age admissible, holding: "acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties." Id., 88 S.C. at 242 70 S.E. at 730.

In State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955), our Supreme Court noted that the common plan or scheme exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties." Whitener, 228 S.C. at 265, 89 S.E.2d at 711. The Supreme Court quoted Whitener in McClellan and found the proseutrix's testimony regarding prior bad attacks admissible with no further analysis. McClellan, 283 S.C. at 392, 323 S.E.2d at 774.

In State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), the Court of Appeals addressed a case involving the admissibility of testimony regarding the prior sexual abuse of the victim. The victim, Doe, testified Weaverling, his uncle, began performing oral sex on him almost every time he saw him beginning around the time Doe was seven or eight years old. Id., 337 S.C. at 465, 523 S.E.2d at 789. This continued at a

variety of locations for approximately five to six years. Id. Additionally, Weaverling had Doe view pornographic magazines and movies and also showed him nude photographs of his wife. Id. In December of 1994, Weaverling performed oral sex on Doe in Doe's tree house. Id., 337 S.C. at 465, 523 S.E.2d at 790. One to two weeks later, Weaverling touched Doe inappropriately several times. Id., 337 S.C. at 466, 523 S.E.2d at 790. Approximately one and half years passed without any sexual abuse before the abuse resumed. Id. In July of 1996, Weaverling performed oral sex on Doe twice while he was asleep in Weaverling's house. Id. Following Doe's revelation of the abuse, Weaverling was charged for the December 1994 incident and the two July 1996 incidents. Id., 337 S.C. at 465, 523 S.E.2d at 789. The trial court admitted Doe's testimony regarding all of the prior abuse, and the Court of Appeals affirmed. Id., 337 S.C. at 471, 523 S.E.2d at 793. The Court found the prior bad acts showed the sexual abuse of the same victim under similar circumstances spread out over a period of several years. Id. The Court found the testimony to be "quintessential common scheme or plan evidence." Id., 337 S.C. at 469, 523 S.E.2d at 791.

In State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008), Kirton was convicted of criminal sexual conduct with a minor. Kirton was charged after his thirteen-year-old victim indicated Kirton took off her pants and inserted his penis into her crotch. Id., 359 S.C. at 15, 671 S.E.2d at 111. At trial, the victim was permitted to testify about incidents of sexual abuse that began when she was six or seven years old. Id., 359 S.C. at 13, 671 S.E.2d at 110. The Court of Appeals affirmed the admission of the prior bad act evidence, finding "a clear pattern of escalating sexual abuse" satisfying the requirements

of the common scheme or plan exception. Id., 359 S.C. at 36, 671 S.E.2d at 122. Specifically, the Court of Appeals found the following:

> All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity. Kirton began by rubbing the minor victim's breasts, proceeded to make her touch his penis, began touching her vagina as she got older, and finally culminated the sexual abuse by engaging in the intercourse for which he was charged. The prior sexual acts did not take place just once or twice, six or seven years ago. Victim indicated they happened several times a month for years. While the prior sexual acts are not the same as the exact crime for which Kirton was charged, Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents.

Id., 359 S.C. at 36, 671 S.E.2d at 121-22.

In State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 893 (2009), the Supreme Court considered the admissibility of prior bad acts in a case involving repeated acts directed at the same victim, Clasby's daughter. Clasby was indicted after her daughter alleged Clasby digitally-penetrated her vagina as they were lying on the floor of Clasby's sister's bedroom. Id., 385 S.C. at 153, 682 S.E.2d at 894. At trial, the victim was permitted to testify about several earlier occasions of sexual abuse suffered at Clasby's hands. Id. The victim detailed several incidents: (1) Clasby touched and rubbed the victim's vagina while they were in a bathtub together; (2) Clasby rubbed the victim's vagina inside of her underwear while they watched a movie together under a blanket; (3) Clasby inappropriately touched the victim while they slept together in the victim's father's bed; and (4) Clasby rubbed the victim's vagina and sucked on her breasts while at Clasby's father's home. Id., 385 S.C. at 152-153, 682 S.E.2d at 894. This Court

affirmed the admission of the prior bad acts, finding the prior incidents "established a pattern of escalating abuse which ultimately culminated in Clasby's digital penetrations of [Clasby's daughter]. The four prior incidents of sexual misconduct by Clasby reveal the same illicit conduct with [daughter] during periods of visitation prior to [the indicted offenses]." Id., 385 S.C. at 156, 682 S.E.2d at 896.

In the instant case, the deer stand incident represents the same illicit conduct between Loftin and his victim. It involved the same victim, during the same time period as the charged conduct, and involved sexual intercourse like the incidents which would occur afterwards at the house in Lancaster County. Accordingly, testimony about the deer stand incident is admissible under the common plan or scheme exception.

Further, the evidence would be properly admissible under the *res gestae* theory. "Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) (defendant's assault on defendant's former girlfriend and his threat to shoot her or the other man provides the context of subsequent shooting of the other man and is admissible as *res gestae*). A prior bad act may be admissible under the *res gestae* theory where it is "an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001). In the instant case, the deer stand incident is integral to establishing the context of the crime, it represents the step in the grooming process where the illicit relationship graduated to

regular sexual intercourse and set the precedent for more sexual intercourse as the relationship changed from a father/daughter relationship to an illicit emotional and sexual relationship manipulated by Loftin so that Loftin's confused victim was ready to cast away her relationship with her mother and run away with Loftin.

Further, it is difficult to articulate how Loftin might be prejudiced, given that following the deer stand incident, the sexual assaults occurred every day from August to December 2007. Accordingly, this incident would be only one of approximately a hundred instances of sexual assault. The possible incremental prejudice from this one incident with the same victim, in the same relationship, and the same time period, would be negligible. The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (2003). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). Accordingly, any possible error is harmless beyond a reasonable doubt.

II.

The trial court did not err in excluding evidence that Victim met boys or that she became pregnant three months after Appellant stopped having sexual intercourse with Victim where there was no allegation Appellant impregnated Victim and where there was no evidence that Victim had sexual intercourse with other individuals before or during the time period Appellant was sexually abusing Victim.

Loftin alleges the trial court erred in not allowing Loftin to inquire about an alleged instance where Victim left the house without permission and met a boyfriend. Loftin also alleges he should have been allowed to inquire about her being impregnated by this boyfriend in March 2008. Loftin, on appeal, but not to the trial court, claims he would have sought to inquire as to whether Victim was sexually active with this boy during August to December, 2007. However nothing in the record indicates that Victim was sexually active during this timeframe with anyone other than Loftin. The trial court properly excluded this evidence on the rape shield statute and as irrelevant.

Further, the trial court's ruling was preliminary, as discussed by Loftin's counsel and the trial court. Tr. p. 56. Loftin made no further effort to introduce the line of questioning at trial, although the trial court instructed Loftin to approach the bench if he would inquire on the matters outlined in his pre-trial motion. Tr. p. 56. A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary, and is

subject to change based on developments at trial. Id. Accordingly, a final ruling from the trial court during trial was necessary to preserve the issue for review. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999).

Additionally, this issue is not preserved for review because no *in camera* testimony was taken to determine what testimony would be elicited from this line of questioning. The reviewing court may not consider alleged error in excluding testimony unless the record show fairly what the rejected testimony would have been. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979).

Further, on the merits, the line of questioning was properly excluded, as the evidence was irrelevant. In Loftin's Motion to Allow Evidence, four items were proposed. The third item, evidence of semen from an unknown male found in the residence, was discussed at trial. Tr. p. 256. The first item, that Victim and friends may have had pornographic materials in a clubhouse, is not discussed in Loftin's brief. The two remaining items that are challenged on appeal are that (1) Loftin should have been allowed to examine Victim about her leaving the house without permission in November 2007 and (2) Loftin should have been allowed to examine Victim about becoming pregnant in March 2008. There was no relevance to either line of questioning.

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v.

Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006).

"If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) .

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. Hamilton.

First, the trial court did not err in excluding evidence that Victim left the house without permission and met a boy. Based on Appellant's motion, it does not even appear that Victim was alone with the boy. The motion states Vicitm "along with others without permission slipped out of her home to meet with some members of the opposite sex." (Mot. to Allow Evidence, R. at __.) Nothing in the record indicates Victim engaged in sexual activity at this time. Accordingly, evidence of Victim leaving the house had no relevance to the trial.

When asked the relevancy of the fact that Victim allegedly left the house without permission, Loftin's counsel had the following discussion with the trial court:

> Court: The fact that she slipped out of the home to meet somebody?
>
> Counsel: What I say, Your Honor, is except who she met.
>
> Court: What has that got to do with this case?
>
> Counsel: Well, the boy she met was the father of her child.
>
> Court: What has that got to do with the allegations in this case?
>
> Counsel: It has nothing to do with the allegations, Your Honor. It goes to the – my client's right to have a fair trial, it goes to her credibility and believability based on other acts that she committed. It's not to bring up her morality or anything even though she had a child at the age of 13, somebody should have been arrested for that but they weren't but I'm not questioning that, Your Honor, from a morality standpoint. It is simply being allowed to use these items – that I'm allowed to use for purposes of impeachability of her testimony, the credibility and believability.
>
> Court: How does that statement that she slipped out of the house affect her credibility?
>
> Counsel: I'll have to expand it, Your Honor, from the standpoint of what she was doing and who she was meeting and why. I can only give you a bare bones assertion in the motion but it is something I have got to get out of her if she will admit she did it.

Tr. p. 52, line 24 – p. 53, line 25.

Note Loftin now argues for the first time on appeal that Victim's rendezvous with another male provides an alternative explanation for the pregnancy scare. This argument for admission was not raised to the trial court. Accordingly, the argument is not preserved for review. The ground raised in support of a claim of error on appeal must be

the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999).

However, the trial court did not err as the evidence was completely irrelevant to the trial. The allegation of a rendezvous fails to establish a reasonable basis to inquire as to Victim's sexual activity prior and during the time she was being assaulted by Loftin. Nothing in the record suggests Victim was sexually active prior or during the period of time Loftin was having intercourse with Victim. The trial court did not abuse his discretion in excluding this irrelevant line of questioning which would be prejudicial to the state. See State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979) ("Merely asking a question that has no basis in fact may be prejudicial").

Further, Victim's subsequent pregnancy has no relevance to the case. While her pregnancy is proof that Victim was sexually active in March 2008, it does not indicate that she was sexually active at any time before the disclosure in the first week of January 2008 or her examination by Dr. Singleton on January 9, 2008. So contrary to Loftin's arguments, her pregnancy does not provide an alternative explanation for the purchase of the pregnancy test or for the results of Dr. Singleton's examination. Therefore, the trial court did not err in excluding testimony in this regard under the rape shield statute (S.C. Code §16-3-659.1) and on the grounds of relevancy.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Assistant Deputy Attorney General
Bar #68571

BY: _____
DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

June 17, 2013