

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Perry Buckner, Circuit Court Judge
Appellate Case No. 2012-212998

THE STATE,

Respondent,

vs.

GLENN EDWIN VANOVER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

Appellant failed to preserve the issue he asserts on appeal because Appellant never obtained a ruling by the trial judge regarding Appellant's objection. Further, Appellant's argument regarding Rule 404(a) & (b), SCRE is not preserved because Appellant never objected on that ground at trial. Regardless of preservation, Victim's testimony was properly admitted because it was relevant under Rules 401 and 402, SCRE, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE, and the testimony was not offered to prove that Appellant acted in conformity with the prior act under Rule 404, SCRE. Finally, even if the trial judge erred in admitting the testimony, any error was harmless because it could not have reasonably contributed to the verdict.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant on two counts of criminal sexual conduct with a minor in the first degree. On August 28, 2012, Appellant proceeded to trial. On August 29, 2012, a jury found Appellant guilty as charged. The Honorable Perry M. Buckner sentenced Appellant to concurrent terms of 26 years. On September 5, 2012, Appellant filed his notice of intent to appeal. This appeal follows.

STATEMENT OF FACTS

Appellant sexually assaulted his daughter ("Victim"), who was less than eleven years old, on multiple occasions. (Tr. pp. 107-108.) On one occasion, Appellant invited Victim to his room, pulled Victim's pants down, cradled on top of Victim, and put his penis inside Victim's private parts. (Tr. pp. 111-112.) Appellant told Victim not to tell anyone or else Victim would be in trouble. (Tr. p. 113.) On another occasion, Appellant forced Victim to perform oral sex on Appellant. (Tr. p. 114.) In addition, Appellant placed Victim's hand on Appellant's penis and moved her hand up and down. (Tr. p. 115.)

ARGUMENT

I.

Appellant failed to preserve the issue he asserts on appeal because Appellant never obtained a ruling by the trial judge regarding Appellant's objection. Further, Appellant's argument regarding Rule 404(a) & (b), SCRE is not preserved because Appellant never objected on that ground at trial. Regardless of preservation, Victim's testimony was properly admitted because it was relevant under Rules 401 and 402, SCRE, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE, and the testimony was not offered to prove that Appellant acted in conformity with the prior act under Rule 404, SCRE. Finally, even if the trial judge erred in admitting the testimony, any error was harmless because it could not have reasonably contributed to the verdict.

Appellant's argument on appeal fails for six fundamental reasons:

First, the trial judge never ruled on Appellant's relevancy and/or prejudicial objection. The trial judge's ruling was based only on hearsay, and Appellant never asked the trial judge for clarification in order to obtain a ruling on Appellant's actual objection (i.e. relevancy/prejudicial).

Second, Appellant's argument regarding Rule 404(a) & (b), SCRE is not preserved because Appellant never made that argument to the trial judge. Thus, the trial judge never had an opportunity to rule upon the issue.

Third, regardless of preservation, Victim's testimony was relevant and admissible under Rules 401 & 402, SCRE because the testimony helped the jury understand why Victim was afraid of Appellant and waited two years to report the sexual abuse.

Fourth, Victim's testimony was admissible under Rule 403, SCRE because the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice.

Fifth, the limitations set forth in Rule 404, SCRE were not applicable to the testimony in issue because the testimony was not offered to prove that Appellant acted in conformity with the prior act.

Sixth, even if the trial judge erred in admitting the testimony, any error was harmless because it could not have reasonably contributed to the verdict.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The decision to admit or exclude evidence rests in the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). If the trial court's decision lacks evidentiary support or is controlled by an error of law, the trial court has abused its discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Further, it is well settled that in ruling on the admissibility of evidence, the trial court has considerable latitude and its ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

A. Not Preserved

Appellant's entire argument on appeal is not preserved for review because the trial judge never ruled upon Appellant's objection. Further, Appellant's argument regarding Rule 404 (a) & (b), SCRE is not preserved because Appellant never made that argument at trial.

1. Appellant failed to obtain a ruling from the trial judge regarding Appellant's objection.

First, Appellant's argument on appeal fails because he never obtained a ruling on his relevancy/prejudicial objection.

In South Carolina, an issue must be raised and **ruled upon** in order for an appellate court to consider the issue on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

In the case at hand, although Appellant objected to Victim's testimony regarding Appellant hitting Victim's mother in the past, the trial judge did not rule on Appellant's actual objection. The following testimony and colloquy occurred:

Q. And when you told her, how much time had passed since the last time he had touched you?

A. Probably – probably about two years.

Q. So you held it in for two years before you finally told your mom?

A. Yes, ma'am.

Q. And why did you hold it in so long?

A. I see the way he treated my mom and how he hit her.

MR. WILLIAMS: Objection, Your Honor.

THE COURT: Grounds?

MR. WILLIAMS: It's prejudicial and it has nothing to do with the charge.

THE COURT: I believe she can testify to what she said, counsel.

MR. WILLIAMS: All right, sir.

THE COURT: Tell you just what you said and not what someone else said. Do you understand?

(Tr. pp. 117-118) (emphasis added).

When reading the trial judge's ruling and subsequent comments, it is clear that the trial judge's ruling was based on hearsay and not relevancy. Appellant never attempted to clarify the trial judge's hearsay ruling in order to obtain a ruling on Appellant's actual objection (i.e. relevancy/prejudicial). See State v. Covert, 368 S.C. 188, 200, 628 S.E.2d 482, 489 (Ct. App. 2006) (noting that it is the appellant's responsibility to make sure an issue is preserved for review on appeal).

Because Appellant failed to obtain a ruling on his relevancy/prejudicial objection, he cannot raise those issues on appeal.

2. *Appellant never objected on Rule 404(a) & (b), SCRE grounds.*

Second, Appellant's argument regarding Rule 404(a) & (b), SCRE is not preserved because he never objected on those grounds.

In order for an appellate court to consider an issue on appeal, the objecting party must make a specific objection to the admission of the evidence. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). The objection should be specific enough so that the trial judge can reasonably understand the alleged error. Id. Further, the objecting party must argue the same ground on appeal as he or she did at the trial level. Id. In other words, the objecting party cannot change his or her argument once he or she reaches the appellate level. Id.

In I'On, L.L.C. v. Town of Mt. Pleasant, our Supreme Court explained the rationale behind the preservation rule:

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

F'On, L.L.C. v. Town of Mt. Pleasant, 337 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)

(citations omitted).

Here, Appellant attempts to raise a basis for objection on appeal (i.e. Rule 404, SCRE) that he never raised to the trial judge. When the trial judge asked Appellant the grounds for his objection, defense counsel stated: “It’s prejudicial and it has nothing to do with the charge.” (Tr. p. 118.) At the most, Appellant’s objection can be construed as a relevancy objection and **potentially** a Rule 403, SCRE objection. But Appellant’s objection at trial definitely cannot be construed as an objection to prior bad act evidence under Rule 404, SCRE.

In summary, because Appellant never argued to the trial court that the testimony was inadmissible under Rule 404, SCRE, Appellant cannot assert that argument on appeal.

B. Admissible under Rules 401 & 402, SCRE

Third, Appellant’s argument on appeal fails because the testimony in issue was relevant and admissible under Rules 401 and 402, SCRE.

Generally, all relevant evidence is admissible under Rule 402, SCRE. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. But evidence does not have

to be “‘necessary’ to the State’s case in order to be admitted.” State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004).

Here, Victim testified that the reason she waited two years to tell anyone about the sexual abuse was because she was scared of Appellant. (Tr. p. 113; Tr. p. 149.) In an attempt to explain why she was afraid of Appellant and therefore waited two years to disclose the sexual abuse, Victim stated, “I seen the way he treated my mom and how he hit her.” (Tr. p. 118.) This testimony was relevant because it explained why Victim waited so long to disclose the sexual abuse and the basis of her fear. See e.g., State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (holding that the expert’s testimony regarding delayed disclosure was admissible and stating the following: “The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person’s credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser’s conduct. . . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child’s life tells the child that what seems wrong to the child is, in fact, all right. Because of the child’s confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.”); State v. Cook, 972 A.2d 1059, 1063 (N.H. 2009) (“The State may introduce evidence to explain a sexual assault victim’s behavior. ‘We have recognized in recent years that victims of sexual assaults may not immediately disclose them.’ ‘When children are victims, they may not be aware of the wrongful nature of the conduct; other victims may wish to forget the assault, or fear reprisals or disbelief if they report.’”) (internal citations omitted).

C. Admissible under Rule 403, SCRE

Fourth, Appellant's argument on appeal fails because the danger of unfair prejudice did not substantially outweigh the probative value.

Under South Carolina's Rules of Evidence, evidence that is relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Here, the probative value of admitting the testimony was high. The jury needed to know why Victim waited so long to disclose the sexual abuse. Although Victim testified that the reason she waited two years to disclose the sexual abuse was because she was afraid of Appellant, the testimony regarding Appellant's treatment towards Victim's mother explained the **basis** of Victim's fear. (Tr. p. 113; Tr. p. 149; Tr. p. 150.) Thus, the testimony was highly probative.

In arguing that the testimony was highly prejudicial, Appellant claims that there was a strong probability that the jury relied on the testimony as propensity evidence in order to find Appellant guilty. To the contrary, the testimony was not admitted as propensity evidence (see part D below). The fact that Appellant hit his wife in the past does not make him more likely to commit criminal sexual conduct with a minor. Further, Appellant points out that "[t]he entire case came down to whether the jury believed [Victim] or [Appellant]." (App. Br. p. 2.) But Victim's testimony that Appellant hit her mother in the past did not make Victim more credible. Notably, Victim was the only witness that testified regarding Appellant's treatment towards her mother, and Victim only mentioned Appellant's treatment towards her mother one time during trial. Even if

this single reference to Appellant's prior act of hitting Victim's mother was prejudicial to Appellant, it was not so prejudicial that it substantially outweighed the probative value.

D. Not Offered as Character Evidence under Rule 404, SCRE

Fifth, Appellant's argument on appeal fails because the State did not offer the testimony for the purpose of proving Appellant acted in conformity with his treatment of Victim's mother. Rather, the testimony was offered for the purpose of explaining to the jury the reason why Victim waited so long to disclose the sexual abuse. Simply put, the testimony was not admitted as character evidence under Rule 404, SCRE.

Rule 404, SCRE provides the following:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible *for the purpose of proving action in conformity* therewith on a particular occasion[.]

(b) Other Crimes, Wrongs, or Acts. 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 to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Rule 404, SCRE (emphasizes added).

Here, Victim's testimony was not admitted to suggest Appellant was a bad person or committed the sexual assault because he had hit his wife in the past. Rather, the testimony was offered in order to inform the jury the reason why the victim waited two years to disclose the sexual abuse.

E. Harmless Error

Finally, even if the trial judge erred in admitting the testimony, any error was harmless because it could not have reasonably contributed to the verdict.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is considered harmless beyond a reasonable doubt if it did not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). Further, “[w]hen guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, Victim was the only witness that testified regarding Appellant’s treatment towards Victim’s mother. Notably, Victim only mentioned Appellant’s treatment towards Victim’s mother one time during trial. Victim’s single reference to Appellant hitting Victim’s mother in the past did not constitute sufficient prejudice to justify a new trial. See e.g., State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (finding that the police officer’s single reference to the defendant’s arrest warrants did not constitute sufficient prejudice to justify a mistrial). As Appellant pointed out, the main issue in the case was Victim’s credibility. Victim’s testimony regarding the fact that Appellant hit Victim’s mother in the past does not have any bearing on Victim’s credibility. Rather, the testimony gave the jury an explanation of why Victim waited so long to disclose the abuse.

Thus, even if the trial judge erred in admitting the testimony, any error was insubstantial and did not affect the result.

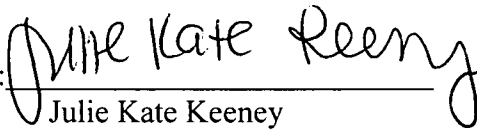
CONCLUSION

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

Respectfully submitted,

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