

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2013-000814

RECEIVED

JUL 07 2015

THE STATE OF SOUTH CAROLINA,

SC Court of Appeals
RESPONDENT,

v.

ROBERT WILSON WOODS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	14

AUTHORITIES CITED

Cases

<u>Abram v. Gerry</u> , 672 F.3d 45 (1st Cir. 2012).....	12
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	9
<u>Redmond v. Kingston</u> , 240 F.3d 590 (7th Cir. 2001)	12
<u>State v. Boiter</u> , 302 S.C. 381, 396 S.E.2d 364 (1990)	<i>passim</i>
<u>State v. Dunbar</u> , 356 S.C. 138, 587 S.E.2d 691 (2003)	9
<u>State v. Freiburger</u> , 366 S.C. 125, 620 S.E.2d 737 (2005).....	9, 10
<u>State v. Johnson</u> , 363 S.C. 53–59, 609 S.E.2d 520, (2005)	9, 10
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2013)	11
<u>State v. McWee</u> , 322 S.C. 387, 472 S.E.2d 235 (1996).....	10
<u>State v. Passmore</u> , 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005)	10
<u>State v. Quinn</u> , 200 W.Va. 432, 490 S.E.2d 34 (1997).....	13
<u>State v. Sprouse</u> , 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996).....	5
<u>U.S. v. Bartlett</u> , 856 F.2d 1071 (8th Cir. 1988)	12
<u>U.S. v. Crow Eagle</u> , 705 F.3d 325 (8 th Cir. 2013)	13
<u>White v. Coplan</u> , 399 F.3d 18 (1st Cir. 2005).....	12

Statutes

S.C. Code § 16-3-659.1.....	5
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STATEMENT OF ISSUE ON APPEAL

Appellant's argument that the victim's prior allegations were false "because she accused two people" of the same offense is not preserved where defense counsel did not make this argument below. Likewise, Appellant's argument that the trial judge violated the Confrontation Clause is not preserved for review since defense counsel did not argue this issue below. Regardless, the trial judge did not err by excluding evidence of a purportedly false prior allegation of sexual abuse made by the victim against another individual where Appellant established that law enforcement failed to further investigate the prior allegations but his showing was wholly insufficient to establish that the prior allegations were actually false.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County for criminal sexual conduct with a minor in the first degree and lewd act upon a minor. On April 8, 2013, he proceeded to trial before the Honorable Robert E. Hood and a jury. The jury found Appellant guilty of both offenses, and Judge Hood sentenced him to twenty-five years for criminal sexual conduct with a minor and ten years, suspended to five years of probation, for lewd act upon a minor. The lewd act sentence was to be a consecutive sentence. A timely notice of appeal was served and filed.

ARGUMENT

Appellant's argument that the victim's prior allegations were false "because she accused two people" of the same offense is not preserved where defense counsel did not make this argument below. Likewise, Appellant's argument that the trial judge violated the Confrontation Clause is not preserved for review since defense counsel did not argue this issue below. Regardless, the trial judge did not err by excluding evidence of a purportedly false prior allegation of sexual abuse made by the victim against another individual where Appellant established that law enforcement failed to further investigate the prior allegations but his showing was wholly insufficient to establish that the prior allegations were actually false.

Background Facts

The victim, age ten at the time of trial, was raised in a very unstable home environment. The victim's mother "walked off and left her oldest child," and when the victim was born, "it seemed like everybody was raising her." (R. p. 156, lines 6-10). The victim's younger brother was raised by the victim's aunt. (R. p. 156, lines 6-11). The Department of Social Services ("DSS") became a part of the victim's life at an early age. (See R. p. 125-26; p. 235). The victim stayed with her mother some of the time but her father had little contact with her and did not assist her financially. (R. p. 26, lines 8-10; p. 129, lines 11-14). The victim's mother had different boyfriends from time to time and she would allow them to live with her. Appellant became one of these boyfriends after the victim's mother met Appellant "over the phone at work" while she was working in housekeeping at a Holiday Inn. (R. p. 120, lines 1-16). The victim's mother invited Appellant over to the house a couple of days later and after "about a week or so" she moved Appellant into the house. (R. p. 120, lines 10-24).

When the victim started third grade in 2011, her teacher noticed she was emotional, cried a lot, and did not always complete her work. (R. p. 73-75). Near the beginning of the school year, the victim disclosed to her teacher that she had been

sexually abused recently in her mother's bedroom. (R. p. 74; p. 78-79). The teacher immediately sent the victim to the guidance counselor pursuant to protocol. (R. p. 74-75). After speaking with the victim, the guidance counselor reported the sexual abuse to DSS. (R. p. 77-78). The victim was referred for a medical exam with Dr. Nancy Henderson, and the victim, then age nine, disclosed the sexual abuse to Dr. Henderson. (R. p. 90-91).

At trial, the victim testified that she was staying with her mother in Greenville before starting third grade. (R. p. 101). She testified that she lived with her mom, Appellant, and her brother. (R. p. 101, lines 23-25). The victim liked Appellant initially and liked his dog "Buttercup." (R. p. 102). However, one day, when the victim's mother was at work, Appellant called the victim into her mother's bedroom and "put his private in [the victim's] butt." (R. p. 103, lines 2-14). The victim's little brother was in another room at the time. (R. p. 103, lines 4-8). When Appellant penetrated her, he told the victim that what he was doing would help her "stop scratching." (R. p. 103, lines 16-24). Note that the victim had a condition called scabies, which caused her to have an itchy rash. (R. p. 93, lines 14-24). When Appellant penetrated her, the victim was laying on her mother's bed and Appellant was standing behind her. (R. p. 104). When he was finished, Appellant told the victim not to tell her mother about what he had just done. (R. p. 106). The victim did not tell her mother because she was afraid her mother would believe Appellant over her. (See R. p. 106, lines 11-12).

Appellant did not testify at trial and he presented no defense witnesses. The jury convicted Appellant and the trial judge sentenced him to twenty-five years for criminal

sexual conduct with a minor and ten years, consecutive but suspended to five years of probation, for lewd act upon a minor.

Pretrial Motion to Exclude

Prior to the commencement of trial, the State moved to exclude evidence of a prior allegation of sexual abuse made by the victim pursuant to the so-called rape shield statute, S.C. Code § 16-3-659.1. (R. p. 13). The solicitor argued that the prior allegation was not in fact false in spite of the fact that law enforcement failed to pursue charges regarding the allegation. (R. p. 13, lines 20-24). In response, defense counsel presented the court with copies of State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990), and State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996), and argued that the Boiter case was “more in line with what this case is about.”¹ (R. p. 14, lines 6-11). The State then called Investigator Cheryl Cromartie of the Greenville County Sheriff’s Office to testify about the prior allegation. (R. p. 16-17). Investigator Cromartie testified that she was assigned to investigate an allegation of sexual abuse involving the victim in 2009. (R. p. 17, lines 5-16). The initial report of the alleged abuse was made by Deborah Sanders, who was apparently a friend of the victim’s family. (R. p. 17, lines 12-23). Ms. Sanders reported that the victim disclosed she was sexually abused by her mother’s new boyfriend.² (R. p. 18, lines 2-5; p. 20, lines 3-8; p. 26, lines 11-20). Ms. Sanders told police that the perpetrator performed oral sex on the victim and touched her on her vaginal area and on her buttock area. (R. p. 18, lines 4-8). Investigator Cromartie noted

¹ As Appellant explains in his Brief, despite the fact that the trial transcript is riddled with errors, it is clear defense counsel was referring to the Boiter case. (See Brief of Appellant, p. 6, footnote 1).

² The transcript reports the mother’s boyfriend’s name as “Kevin,” “Kelvin,” and “Calvin” at different points. (See R. p. 18, line 3; p. 20, lines 3-8; p. 26, lines 13-20; see also p. 129, line 11-12). However, the record is clear that both the victim and Ms. Sanders, the family friend who initially reported the allegations to law enforcement, stated that the perpetrator was the victim’s mother’s new boyfriend. (R. p. 23, line 22 – p. 24, line 12; p. 26, line 11- p. 27, line 16; p. 235-42).

that it is not unusual that when third parties make reports of sexual abuse, those reports are not entirely accurate. (R. p. 18, lines 16-19).

Investigator Cromartie spoke with the victim, who was then age seven, in person on December 1, 2009. (R. p. 18-19). During her interview with the victim, the victim disclosed that someone named “Kevin” or “Kelvin” touched her on her “pa pa” (her vaginal area) and “titties” (her breast area). (R. p. 19, lines 8-17; p. 20, lines 3-8). At one point in the interview, the victim explained that the perpetrator was her “mom’s boyfriend” and that the abuse occurred at his house on Rosenfield Road. (R. p. 23, lines 19-24; p. 24, lines 1-10). The victim also told Investigator Cromartie that her father’s name was “Kevin Brown.” (R. p. 23, lines 14-18). She never stated that her father was the one who abused her. (See R. p. 23, lines 23-24). Investigator Cromartie was told by the victim’s guardian that the victim’s father was not really a part of the victim’s life. (R. p. 26, lines 8-10).

Following this interview, Dr. Croswell performed a medical examination of the victim. (R. p. 19, lines 18-22). During the medical exam, the victim disclosed that someone named “Calvin” touched her “pa pa” (her vaginal area) with his hands and touched her feet. (R. p. 20, lines 12-19). Subsequently, the victim had two forensic interviews. (R. p. 20-21; p. 235-42). In the first forensic interview, the victim reported “Kevin” touched her on her “leg and body part” and on her buttocks. (R. p. 21, lines 10-15). At the end of the interview the victim reported that “Kevin” touched her on her leg and arm and denied being touched on her buttocks. (R. p. 21, lines 17-19). Also, during the first interview, the victim reported that she had witnessed the perpetrator having sexual relations with other girls; however, at the second interview she denied this until

she was questioned further and she then stated she had observed this but did not know details. (R. p. 21, lines 21-25). In the conclusion section of the forensic interview report, the interviewer stated that “[i]t is not clear if she can distinguish between Kevin and Calvin and her relationship to both of them.” (R. p. 242). However, the interviewer made clear that the victim had never accused her father of any sexual abuse. (See R. p. 235-42). In the “recommendations” section, the forensic interviewer recommended that the victim have no contact with “Kevin/Calvin,” that the victim participate in therapy, and that the victim be supervised around other children. (R. p. 242).

Ultimately, based on the “totality of the circumstances,” Investigator Cromartie chose not to seek criminal charges regarding the 2009 allegations. (R. p. 22, lines 5-14). She stated she “could not prove who the actual subject would have been” and “just didn’t have enough information or details to pursue criminal charges.” (R. p. 22, lines 11-14). She stated that law enforcement never made a determination that the victim lied or recanted her allegations. (R. p. 22, lines 15-20). She also testified that she did not believe the victim was fabricating the allegations. (R. p. 22, lines 21-24).

At the conclusion of Investigator Cromartie’s testimony, the judge asked defense counsel to explain how he had shown that the victim’s prior allegations were false.³ (R. p. 28, lines 13-14). Defense counsel responded that, although the perpetrator’s name got confused, since Kevin and Calvin “sound[] alike,” the police had the specifics regarding the perpetrator’s name and relationship to the victim – the mother’s boyfriend – yet failed to follow up on the allegations. (R. p. 28, lines 15-19; p. 29, line 17 – p. 30, line 7). He argued “the only inference that I can get from that” is that “nobody believed her and they

³ The defense did not present any witnesses at the pretrial hearing.

didn't go talk to the perpetrator." (R. p. 29, lines 3-6). He further stated: "I have no other way to show it. I can't get up here and hold her down and say you lied. That's the only thing I can do." (R. p. 29, lines 9-11).

The judge ultimately ruled that "nothing from the 2009 case is coming in." (R. p. 36, lines 11-12). The judge explained that based upon the way he read the Boiter case from the South Carolina Supreme Court, he had to make a threshold determination that the prior allegations were false, and based on the evidence before him, "I do not believe the defendant has proven to my satisfaction that the prior accusation made in 2009 was false." (R. p. 36, lines 14-25). Defense counsel objected to that ruling, stating "I believe I've presented enough with her direct statements and the police not following up, that it must have been false and that's all I know how to do." (R. p. 37, lines 15-19). Later in trial, the trial judge stated that the defendant renewed his objection on this basis during the cross-examination of the victim and that the issue was preserved. (See R. p. 152, line 13 – p. 153, line 8; see also p. 115, lines 10-11).

Issue Preservation

In support of his argument that the trial judge erred in excluding evidence of the victim's 2009 allegations, Appellant argues the prior allegations had to be false because the victim accused two different people of the same offense and both could not have been true. (See Brief of Appellant, p. 8; p. 11). However, defense counsel never made this argument below and in fact made **the exact opposite argument**: that the police had the perpetrator's name and relationship to the victim – the mother's new boyfriend – and yet failed to follow up on the allegations. (See R. p. 28, lines 15-19; p. 29, line 17 – p. 30, line 7; see also p. 232-33). Defense counsel also specifically pointed out that the

perpetrator's name got confused because "Kevin" and "Calvin" sound alike. (R. p. 28, line 17). Because Appellant made a completely different argument to the trial judge below, the new argument made on appeal regarding two different perpetrators is not preserved for review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an issue not properly preserved for appeal where one ground is raised below and another ground is raised on appeal); State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (holding to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court with the objection addressed to the trial court in a sufficiently specific manner that brings attention to the exact error, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."). Accordingly, this particular argument should be disregarded.

Also in support of his argument that the trial judge improperly excluded the victim's 2009 allegations, Appellant argues that the trial judge erred in interpreting State v. Boiter and required "a burden that was too high" under the Confrontation Clause. (See Brief of Appellant, p. 8; see p. 8-11). However, once again, this argument was not made to the trial judge below. Defense counsel did not argue that the judge was misinterpreting

Boiter, applying a burden that was too high, or violating the Confrontation Clause in making his ruling. (See R. p. 28-31; p. 36-37). Contrary to Appellant's assertion on page 8 of his Brief, defense counsel's statement that he knew of no other way to show the victim's prior allegations were false was not the equivalent of a Confrontation Clause argument. For these reasons, Appellant's Confrontation Clause argument should also be disregarded by this Court. See Freiburger, 366 S.C. at 134, 620 S.E.2d at 741 (issue not properly preserved where one ground raised below and another ground raised on appeal); Johnson, 363 S.C. at 58–59, 609 S.E.2d at 523 (to preserve an issue for review there must be a contemporaneous objection ruled upon by the trial court, and the objection must be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); State v. McWee, 322 S.C. 387, 391-92, 472 S.E.2d 235, 238 (1996) (constitutional issue not preserved for appeal because at trial appellant never cited any constitutional basis for his request); State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) (“The issue preservation requirement applies to assertions of constitutional violations as well.”).

Discussion

Evidence of prior false accusations by a victim of sexual abuse may be probative on the issue of credibility. State v. Boiter, 302 S.C. 381, 383, 396 S.E.2d 364, 365 (1990). However, although the Confrontation Clause generally tips the scales in favor of allowing cross-examination if it could reasonably be expected to have an effect on the jury, a court may prohibit cross-examination for impeachment purposes when the probative value of the evidence that the defendant seeks to elicit is substantially outweighed by the risk of prejudice. Id. In deciding the admissibility of evidence of a

victim's prior accusation, the trial judge should first determine whether such accusation was false. Id. If the trial judge determines the prior allegation was false, the judge should then consider remoteness in time of the prior allegation. Id. Finally, the trial court should consider the factual similarity between prior and present allegations to determine relevancy. Id. at 383-84, 396 S.E.2d at 365. Admission or exclusion of testimony of this nature is “largely discretionary with the trial court, and its rulings will not be disturbed on appeal unless an abuse of discretion is shown.” Id.

In Appellant’s case, the trial judge did not abuse his discretion by excluding evidence of the victim’s 2009 allegations because Appellant failed to convince the trial judge of a threshold requirement – that the prior allegations were false. First, as defense counsel acknowledged and argued below, regardless of the fact that the perpetrator’s name got confused, the victim made the prior accusations against only one individual – her mother’s boyfriend. (See R. p. 28, lines 15-20). Appellant’s argument on appeal that the victim’s allegations were false because she accused two different people of the same offense is wholly without merit. Second, as held in the Boiter case itself, the fact that a previous accusation was not further investigated is not alone evidence establishing its falsity. Boiter at 384, 396 S.E.2d at 365 (“Based upon the record in this case, the previous accusation was not investigated. The defense presented no evidence to establish its falsity.”). In that vein, whether or not the police subjectively believed the prior allegations is likewise not conclusive. (See R. p. 28-31; p. 37, lines 15-19). Cf. State v. Kromah, 401 S.C. 340, 356, 737 S.E.2d 490, 498 n4 (2013) (pointing out that people who interview children regarding abuse are not automatically “human truth detectors”). Even under the “reasonable probability” standard urged by Appellant (see Brief of Appellant,

p. 10-11), the falsity of the victim's prior allegations in this case was "inconclusive at best" because Appellant's showing "neither proved nor disproved" falsity. Abram v. Gerry, 672 F.3d 45, 50-51 (1st Cir. 2012).

Unlike in the cases cited by Appellant in his Brief, the victim in this case – who was only six or seven years old at the time her caretaker reported the allegations to law enforcement – did not ever specifically recant the prior allegations or admit she had a specific motive for fabricating them. See Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001); White v. Coplan, 399 F.3d 18 (1st Cir. 2005). Furthermore, Appellant's contention that "he had no other way to prove the falsity" of the victim's prior allegations is simply not correct. (See Brief of Appellant, p. 8). In fact, in the pretrial hearing, Appellant could have called as witnesses the victim, the victim's mother, the victim's father, the victim's caretaker, or anyone else involved in the victim's life at the time the prior allegations were made. Had Appellant at least called the victim as a witness in the pretrial hearing, the trial judge *might* have had some basis upon which to determine the prior allegations were false. However, as it stands, the showing made in the pretrial hearing was wholly insufficient to demonstrate that the victim's prior allegations were false and that they were admissible as impeachment evidence in Appellant's trial.⁴ Cf. U.S. v. Crow Eagle, 705 F.3d 325, 328-29 (8th Cir. 2013) (upholding the district court's exclusion of the victims' prior sexual-assault allegations where, despite delayed

⁴ Even assuming the allegations were false, the prior allegations - involving oral sex and touching - were not relevant where they were not similar to the allegations against Appellant - involving anal rape - and therefore did not demonstrate a motive to lie or a pattern of fabricating similar incidents of abuse. Boiter at 383-84, 396 S.E.2d at 365 (in determining the admissibility of prior allegations, the trial court should consider the factual similarity between the prior and present allegations to determine relevancy; a court may prohibit cross-examination regarding the prior allegations when the probative value of such evidence is substantially outweighed by the risk of prejudice); see also U.S. v. Bartlett, 856 F.2d 1071, 1089 (8th Cir. 1988) (it was not error to exclude evidence of a prior allegedly false allegation of rape in light of the minimal probative value of this evidence).

disclosure of the prior allegations and despite the fact that the prior allegations were not prosecuted, the evidence of falsity was “weak” and a conclusion that the prior allegations were untrue would have required the jury to rely on sheer speculation; furthermore, admission of this evidence would have triggered mini-trials concerning the allegations wholly unrelated to the case being tried and would have therefore increased the danger of jury confusion); State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997) (concluding the trial judge did not abuse his discretion by finding that proffered evidence of the child victim’s prior allegations of abuse against other individuals was within the scope of the rape shield law where the defendant failed to meet the threshold requirement to show “based on substantial proof” that the prior allegations were false). Therefore, the trial judge did not err by excluding this evidence.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **David Alexander**, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this 7th day of **July, 2015**.


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July 7, 2015

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RE: State of South Carolina v. Robert Wilson Woods
Appellate Case No. 2013-000814

Dear Ms. Kitchings:

Enclosed please find the original and nine copies of the **Final Brief of Respondent**, along with **Certificate of Counsel** and **Proof of Service**, in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

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