

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
George C. James, Jr., Circuit Court Judge

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Appellate Case No. 2014-001666

SC Court of Appeals

THE STATE,RESPONDENT

v.

WILLIE MARION BROWN,APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court properly admitted the testimony of another victim of Appellant's sexual abuse when the evidence was proper to prove a common scheme or plan and when Appellant failed to establish that the probative value of the evidence was substantially outweighed by the danger or unfair prejudice?

II.

Whether the testimony of Gaye Allen-Cook was improper bolstering of the victim, where Ms. Cook did not testify as to any details of her interviews with the victim except to say that she met with the victim and when her testimony did not include anything, express or implied, relating to the victim's veracity?

STATEMENT OF THE CASE

Appellant was indicted on October 25, 2012 by the grand jury for Williamsburg County for two counts of first degree criminal sexual conduct with a minor and one count of committing a lewd act on a minor. He was represented by G. Wells Dickson, Jr., Esquire, Lionel S. Lofton, Esquire, and William H. Waring, III, Esquire. On May 19, 2014, Appellant proceeded to trial by jury. Appellant was found guilty of all charges. He was sentenced by the Honorable George C. James, Jr. to 35 years imprisonment on the two charges of criminal sexual conduct with a minor and 15 years imprisonment on the charge of committing a lewd act on a minor, all to run concurrently. It appears Appellant was later resentenced to twenty-eight and fifteen years, concurrent. Appellant timely filed a notice of appeal and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

The evidence presented at trial indicated that Appellant began dating the victim's mother in February of 2001, when Appellant and her twin sister were six years old. R. 149-150. Victim's mother and Appellant dated for over a year and were married in April of 2002 when Victim was seven years old. R. 150; 212; 227. Prior to the marriage, Victim, her mother and her sister lived in Florence, South Carolina. R. 150. After the marriage, Victim's family moved into Appellant's farmhouse on McCutcheon Road in Cades, South Carolina and lived there for a year-and-a-half to two years. R. 150-151; 215; 227.

After the family moved in with Appellant, Victim and her mother noticed he began favoring her over her twin sister. R. 150-151; 216. She testified that during "instances where we'd go to the farmhouse or the pond house, typically they will split us up. I would go with [Appellant] and then [Victim's sister] would go with my mom." R. 154. During one of the times where Appellant isolated the Victim at his pond house in Nesmith, South Carolina, he took her into one of the bedrooms and "took it upon himself to teach [Victim] sex ed." R. 155. Victim was eight or nine years old at the time, when Appellant pulled out a cucumber and a condom to show the Victim how to put a condom on. R. 155-156; 220; 225-226. He also had Victim sit on the bed, and he proceeded to "guide [Victim] into different positions with our clothes still on" and explained and had her display and explained "doggy style" and "missionary." R. 156.

Victim also testified that in the beginning of 2004 when she was eight or nine years old, the family moved to Appellant's home on Clearview Street in Kingtree, South Carolina. R. 151-154. However, when Victim was nine or ten years old, Appellant took

her back to the farmhouse alone, during which he sexually abused her again. R. 157.

While at the farmhouse, Appellant took Victim back to her mother's old bedroom and "[h]e had me sit on the bed and took my pants off, had me spread my legs, and then he put his mouth on my vagina." R. 157. He then put his hands around her vagina, but did not penetrate her at this time. R. 157.

Victim also testified that while the family lived on Clearview Street, Appellant took her back to the farmhouse, alone, and took pictures of her while she was in the tanning bed naked. R. 158-159. She could hear the sound of the camera and a flash. Either during this instance or another instance, Appellant took a "close-up picture of [Victim's] vagina for educational purposes, to show me what it looked like, you know, point out like the lips and you know, like there's your hymen and when you have sex the first time it will break." R. 159. Victim was between eight and ten years old when these events occurred. R. 160.

While Victim's family lived with Appellant at the home in Kingstree, Victim recounted a time when she told Appellant that she "was not feeling well in [her] private area." R. 160. Appellant took her into an upstairs bathroom and sat her on the counter of the bathroom and proceeded to look around "[o]n her vaginal area and insert[ed] his fingers" into her vagina. R. 161. Victim testified that it hurt. R. 161. Victim was ten years old at the time. R. 160.

Victim also recounted that Appellant had a habit of entering the bathroom while she was either in the shower or on the toilet. R. 161-163. Victim stated that while the family lived in Kingstree, there were always "in the bathroom clear shower curtains, in

which case sometimes [Appellant] would come in to the bathroom and . . . push the shower curtain aside and just basically pop in and say hey” while she was in the shower. R. 161-162. She testified that it was Appellant’s decision to place a clear shower curtain in the bathroom and that he installed a clear shower door in the bathroom at the farmhouse during renovations. R. 162; 195-196. Appellant also repeatedly walked in on Victim when she used the downstairs toilet and his actions eventually caused Victim to begin turning off the lights and locking the doors when she used the toilet in the bathroom, for fear that Appellant would come in. R. 163.

Victim further recounted an incident when Appellant left a vibrator on her bed upstairs in the Kingstree home. R. 163-164. Victim wrote on the bag containing the vibrator that she did not want it, and left the vibrator on Appellant’s bed. R. 164. Victim testified that Appellant asked her “if I was using it.” R. 164. Victim said no, and Appellant did not discuss the vibrator with the Victim again. R. 164. Victim was ten years old at the time of this incident. R. 165.

When the Victim was ten or eleven years old and living on Clearview Street, she found a locket that that she wanted for Christmas. R. 165-167. Victim told Appellant that she wanted the locket and he asked her “how bad do you want this locket?” R. 166. He then told her if he got her the locket that “whenever you get out the shower just come in my room and I want to see you naked.” R. 166. She agreed that if he got her the locket she would let him see her naked. R. 167. After getting the locket she felt that “[s]ince I already had the locket that it was expected of me to do that, like almost like a debt.” R. 167. Victim showed Appellant her entire body once, but then became uncomfortable, and refused to do it again. R. 167.

Victim also testified that when she was ten, Appellant took her riding on a four wheeler. R. 168. During the ride, while Victim was sitting in front of Appellant, he reached up and grabbed the Victim's breasts. R. 168. She was alone with Appellant at the time. No other adults were around that time or at the time of the other incidents described above. R. 168-169.

Finally, Victim described an incident where her mother was present in the home and Victim was stopped behind a refrigerator in the house in Kingstree, out of view of her mother, and Appellant kissed her on the mouth. R. 182. She testified that "it was more than a peck, and it was uncomfortable." R. 182.

Victim did not notify anyone of the abuse she suffered because, at first, she did not know that what was happening was wrong. However, she ultimately confided in her youth group leader at the church she joined during her sophomore year in high school, in 2011. R. 169; 183-184; 204-207. She still refused to tell her mother because she felt ashamed and embarrassed and wanted to protect her mother. R. 169; 184; 197. DSS was notified after Victim spoke with her youth group leader. R. 184; 210.

Similar acts perpetrated by Appellant as will be discussed herein were testified to by Appellant's stepdaughter from an earlier marriage.

ARGUMENTS

I.

The trial court properly admitted the testimony of another victim of Appellant's sexual abuse when the evidence was proper to prove a common scheme or plan and when Appellant failed to establish that the probative value of the evidence was substantially outweighed by the danger or unfair prejudice?

Appellant argues the trial court impermissibly allowed a prior victim to testify as to the abuse she suffered at the hands of Appellant under Rule 404(b), SCRE, contending her testimony was not sufficiently similar to Victim's testimony to establish a common pattern or plan. He also complains the trial court erred in admitting the testimony because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The State disagrees and submits Appellant's argument is without merit.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000). In reviewing findings on admissibility of evidence, appellate courts are limited to determining whether the trial judge abused his or her discretion, and whether that abuse of discretion has prejudiced the defendant. State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) ("appellate courts recognize that the trial judge has considerable latitude [in the admissibility of evidence] and will not disturb such rulings absent a prejudicial abuse of discretion"). In criminal cases, appellate courts do not reevaluate the facts based on their view of the evidence, but

merely determine whether the trial judge's ruling is supported by any evidence. Wilson, at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." State v. Mathis, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004) *citing* State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Taylor, 396 S.C. 193, 720 S.E.2d 522 (Ct. App. 2011); State v. Kirton, 381 S.C. 7, 23, 671 S.E.2d 107, 114 (Ct. App. 2008). Abuse occurs when the determination of the trial court lacks factual support or is controlled by an error of law. Id. Evidence is deemed relevant and admissible if "it logically or reasonably tends to prove or disprove a crime charged or any fact material to the issue." State v. Tillman, 304 S.C. 512, 405 S.E.2d 607, 611 (1991). Evidence which is logically relevant to a material element of the offense will not be excluded because it may also show guilt of another crime. Id. If the proffered evidence is determined to be relevant pursuant to Rule 401, SCRE, then the trial court must then consider whether the bad act evidence falls within an exception of Rule 404(b), SCRE. State v. Wallace, 384 S.C. at 428, 683 S.E.2d at 275.

"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." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013); *see also* State v. Weaverling, 337 S.C. 460, 467, 523 S.E.2d 787, 791 (Ct. App. 1999) *citing* State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923) ("Generally, South Carolina law precludes evidence of a defendant's

prior crimes or other bad acts to prove the defendant's guilt of the crime charged."); Rule 404(b), SCRE (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).

However, evidence of other crimes or misconduct is admissible to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other; or (5) identity. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923); See also State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Atkins, 309 S.C. 542, 424 S.E.2d 554 (1992); State v. Weaverling, at 468-69, 523 S.E.2d at 791; State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009); State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Clasby, 385 S.C. at 154, 682 S.E.2d at 895, citing State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Where there is either clear and convincing evidence of an uncharged prior bad act or where the act is the subject of conviction, the trial court thereafter must determine whether the acts fall within the common scheme or plan exception.

When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarity between the bad act and the crime charged. State v. Wallace, 384 S.C. at 428, 683 S.E.2d at 275. Where there is a close degree of similarity between the crime charged and the prior bad act, our appellate courts have held the evidence admissible to show a common scheme or plan. Id.; see also State v. Taylor, 396 S.C. at 193, 720 S.E.2d at 522; State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013). Factors for consideration include but are not limited to: (1) age of the victims when the abuse occurred; (2) relationship between the accused and victim; (3) location where the abuse occurred; (4) use of coercion or threats; and (5) the manner of the occurrence. State v. Wallace, 384 S.C. at 428, 683 S.E.2d at 275. “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Id.

In order to determine whether a witness’ testimony falls within the exception to Rule 404(b), the trial court must determine that the evidence is (1) relevant, (2) whether the similarities between the witness’ testimony and the charged offense outweigh the dissimilarities, and (3) whether the evidence passes a Rule 403 balancing test. State v. Wallace, 384 S.C. 428, 433-35, 683 S.E.2d 275, 277-79 (2009).¹

A. The Similarities Between the 404(b) Witness’ Testimony and the Victim’s Testimony Outweighed the Dissimilarities.

“In the context of a sexual abuse case, the following factors are pertinent: (1) the age of the victim at the time of abuse; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats;

¹ Appellant does not allege that the 404(b) witness’ testimony was irrelevant in this case.

and (5) the manner of the occurrence.” Scott, 405 S.C. at 500, 748 S.E.2d at 242 (citing Wallace, 384 S.C. at 433-34, 683 S.E.2d at 278).

The trial court properly weighed the similarities between the 404(b) witness’ testimony and Victim’s testimony, and made a finding of fact that the similarities outweighed the dissimilarities: R. 144 (“I’ve gone through it quite painfully as I believe that there is a close degree of similarity or connection between the two of, the two sets of occurrences and that supports the admissibility under the common scheme or plan exception”). Appellant admits that the first two Wallace factors, the age of the victims and the relationship between Appellant and the victims, weigh in favor of admissibility. In actuality, there are very few ways in which the two cases could be any more similar in this case. Both victims were between seven and ten years old when the abuse began and both victims were the daughters of the Appellant’s divorced girlfriend who then became his wife after about a one year courtship. Appellant argues, however, that the third and fifth Wallace factors were insufficient to support admissibility.² Respondent submits that the factors about which Appellant complains were, in fact, sufficiently similar. The focus of this Court when reviewing the trial court’s ruling that there were more similarities than dissimilarities must be on the totality of all facts considered, including age and relationship in addition to the location where the abuse occurred and the pattern and manner of occurrence.

i. Third Wallace Factor: Similarity of Location

With regard to the third Wallace factor, Appellant argues that the locations of the abuse were different, and therefore this factor should weigh against admissibility.

² The State notes that Appellant’s claim that there was no coercive or threatening activity related to this abuse can be viewed as a similarity between the two girls.

Appellant asserts that because some of the acts occurred at a different physical location, they are not similar. The State, however, asserts that because the acts occurred at the home Appellant shared with the victim and her family and when Appellant was the only adult present in isolated areas under his control and with both girls under his physical custody and control, the locations are actually very similar.

The 404(b) witness testified that while Appellant began dating her mother in 1997, Appellant would babysit while her mother was taking nursing classes. R. 252 -254. The witness was living with her mother on Gilland Avenue in Kingstree, and she was seven years old. R. 254. She indicated that her mother and Appellant dated for one year and were married in May of 1998 when she was eight years old. R. 254. She stated that Appellant would engage in tickling that became inappropriate and the touching escalated. R. 255. She also said Appellant would sit in the bathroom while she bathed, and would add dish washing soap to the bath to make bubbles. R. 255. She stated that Appellant began helping to bathe her, even though his assistance was not requested or necessary and even though she had been taking showers prior to his interaction. R. 255 -256. Appellant then began touching her while she showered or bathed, including “playful” “toweling” or use of a washcloth which led to the clothes and towels falling away resulting in skin-to skin contact when Appellant reached the areas of her vagina and buttocks. R. 256; 264-265. The witness stated that the Appellant touched her private parts at least twenty times during the bathing incidents. R. 266. The witness then testified that Appellant would make her go into her room “and he would want me to lay down on the bed and check out my privates to see if there were any bubbles or if I was getting an infection from the Dawn that he was putting in the tub.” R. 256. Again, this incident

occurred in the witness' home on Gilland Avenue, on her own bed and while her mother was at school. R. 256-257. The witness was an only child and lived with her mother. R. 257.

The witness then testified that after her mother married Appellant in 1998, they moved to the farmhouse in Cades, the same home that Victim lived in for a short time with Appellant. R. 257 -258. Before moving to the farmhouse and when the witness was seven years old, Appellant engaged the witness in an explicit discussion with illustration about sex. R. 258-259. Appellant's penis was erect during the discussion. R. 259-260. The witness recounted that before moving to the farmhouse, Appellant would hold her legs open after baths, pull her vagina apart, and look at it. R. 261. These incidents led to Appellant having "his hands all in like around and inside of [her vagina]" resulting in digital penetration of her vagina with a little bit of his finger. R. 261. Although Appellant never performed oral sex, he would place his face very close to her vagina and smell it and then place his fingers to her nose and ask her to smell the fingers that were in her vagina. R. 261. The witness stated that they were living at the farmhouse at the time. She testified that Appellant never performed oral sex on her, but that he would "have his face very close up to [her vagina] and he would smell it." R. 261. She then testified that during one incident, Appellant did penetrate her vagina with his finger, and then he put his finger up to her nose and he wanted her to smell it. *Id.* ("I wouldn't say that there was full digital penetration, but a little bit of his finger did penetrate [Witness's vagina]").

Finally, the witness testified that as she got a little older and while she lived with Appellant, he had a habit of walking into the bathroom while she was showering. "He would come into the bathroom and kind of pull the curtain open and, you know, ask me

random questions just kind of like it was an accident or whatever.” R. 263. Appellant then decided to replace the shower curtain with a clear shower curtain “so you don’t have to pull the curtain back anymore. You can just walk in the bathroom and see whoever was in the shower.” R. 263-264. The witness testified that this occurred at the farmhouse “15 times probably or more.” R. 264. Also, while still living on Gilland Avenue and before Appellant and her mother were married, Appellant put her in a hot tub when he and the witness’ mother were naked and Appellant had an erection. R. 269; 273.

The witness testified that she and her mother lived at Appellant’s farmhouse for about one year but that Appellant and her mother separated in August of 1999 and shortly after her ninth birthday. R. 262-263. She also stated that only she and Appellant were present in the house when the incidents occurred. R. 265. The witness testified that she did not tell anyone about the assaults because she did not know the conduct was inappropriate even though it made her uncomfortable and, later, she felt shame and did not want to acknowledge it. R. 268.

The witness also testified to Appellant engaging in tickling episodes during which he tickled and touched her and which progressed to groping her breast and vaginal areas. On one occasion, Appellant was lying on top of her doing so. R. 274.

The Victim testified that she too was abused at the farmhouse in Cades. The Victim testified that she and Appellant went to the farmhouse, “just me and him, and he took me into what was my mom’s old bedroom. He had me sit on the bed and took my pants off, had me spread my legs, and then he put his mouth on my vagina.” R. 157. She testified that she was nine or ten at the time of the assault, and that he put his hands around her vagina and that he performed oral sex on her. Id. This is the same location that

the 404(b) witness testified that Appellant would “have his face very close up to [her vagina] and he would smell it.” R. 261. Clearly, with regards to the criminal sexual conduct involving the performance of oral sex on the victim, the location was the same.

The Victim also testified that after her mother and Appellant got married, they moved to the townhouse in Kingtree on Clearview Street. During the time that the Victim lived with Appellant in Kingtree, she recalled that she was doing yard work when she told Appellant that she was not feeling well in her “private area.” R. 160. She testified that Appellant took her into a bathroom, sat her on the counter, and proceeded to look around her vagina and then inserted his finger into her vagina. R. 161. The victim was ten years old at the time. Tr. 235. Just as the 404(b) witness testified that her sexual abuse occurred at the residence her family shared with Appellant, the Victim was digitally penetrated in a residence her family shared with Appellant. While the addresses may have been in separate cities, the fact remains that the abuse occurred in a home Appellant shared with his victim and in an area which isolated the girls and rendered them under Appellant’s control. The charged events and the 404(b) testimony each arose out of actions at similar isolated locations under Appellant’s control, and the fourth Wallace factor weighs in favor of admissibility. See also R. 26 -72; SROA. 1-11 for testimony elicited during the pre-trial hearing regarding admission of this evidence.

ii. Fifth Wallace Factor: Similarity of the Manner of the Occurrence

Appellant also argues that there are a number of dissimilarities with regards to the manner in which Appellant sexually abused both the 404(b) witness and Victim. While Appellant seeks to characterize these dissimilarities as fatal to the 404(b) analysis, many of them are not material, and some of them are not dissimilar at all. The record reflects

that while acting in the role of an authoritative caregiver, Appellant engaged in acts of repeatedly viewing both girls when the girls were naked, including the installation of a clear shower curtain to enable his viewing of the girls while showering. The record also reflects Appellant inappropriately groped the breast and vaginal areas of both girls while purportedly engaging them in playful conduct. He also opened the girls' legs and inspected their vaginal areas, digitally penetrated both girls while purportedly assisting them, engaged both girls in graphic discussions and demonstrations of sexual acts under the guise of education, placed his hands around the vaginal areas of both girls, and put his face in the vaginal areas of both girls.

Initially, it is important to note the pattern and behavior of an abuser. As Ms. Allen-Cook testified, "if you're grooming a child and trying to make inappropriate things normal you will obviously test the waters a little bit to say, to see how far you can go with this child." R. 348. Appellant's path as an abuser began with the instances of seemingly playful acts of tickling or grabbing progressing to touching the 404(b) witness while he bathed her, escalating to touching her breast and vagina and putting his face very close to her vagina, and further escalated to both digital penetration and oral sex with the Victim. Appellant points to the fact the he never digitally penetrate or performed oral sex on the 404(b) witness. However, the evidence supports a finding of digital penetration of both girls. The lack of oral sex with the 404(b) witness reflects merely that Appellant's grooming of this young girl had not yet progressed to that point but Appellant was certainly progressing to that point. The totality of the circumstances as reflected in the 404(b) witness' testimony as well as the victim's testimony show a gradual, escalating pattern of grooming and sexual abuse on both stepdaughters.

It is also noteworthy that Appellant's actions focused primarily on the bathroom. While the 404(b) witness testified that her abuse began in the bathtub, she also testified that Appellant made a habit of coming into the bathroom while she was in the shower and repeatedly looking at her naked as she showered. Eventually, Appellant replaced the shower curtain with a clear shower curtain, presumably so that he did not have to open the shower curtain to see his stepdaughter naked. The same clear shower curtain was also present when the Victim lived with Appellant.³ Furthermore, Appellant's habit of entering the bathroom to see his stepdaughter continued with the Victim. She testified that she began locking the door and turning off the light so that he would not know that she was in the bathroom because he interrupted her on such a consistent basis. While the evidence presented from the two witnesses is not identical, Appellant's habitual use of the bathroom as a location to watch his stepdaughters shows a pattern or plan that is common to the victim and the 404(b) witness.

Appellant asserts that, while he did have a sex education talk with both children while they were seven or eight years old, the 404(b) witness' mother sent her daughter to Appellant to have the discussion, but he did not have permission to give a sex education talk to the Victim. R. 282. This dissimilarity is immaterial. Appellant had an explicit and inappropriate conversation with two very young girls about sex. With the Victim, he showed her how to use a condom and, while fully clothed, showed her what sexual

³ Appellant argues that the testimony regarding the clear shower curtain detailed "similar bad acts between different victims that were not specific to the crimes charged, [and] was textbook propensity evidence. Motion at 15. However, the State presented the evidence regarding the shower curtain to demonstrate the common plan to observe his stepdaughters in the bathroom, as an act of grooming and normalization. While Appellant was not charged with voyeurism for his repeated violations of his stepdaughters' privacy, Rule 404 does not apply only to crimes, but also applies to "acts" that tend to show a common scheme or plan.

positions, including “doggy style” and “missionary” would look like. R. 156. With the 404(b) witness, he explained what a man’s penis was, and how sexual intercourse worked. While fully clothed, he pointed to certain parts of his body and her body to make his point. R. 258-259. The two conversations had some minor differences, but the acts reveal an escalation by Appellant to becoming more sexually explicit as his experience as an abuser increased. With regard to Appellant’s sex talks, the similarities substantially outweigh any dissimilarity.

Finally, the State presented evidence, and Judge James found, that Appellant targeted single mothers with only female daughters, between six and eight years old. Appellant began his abuse with “seemingly harmless acts, first of all with [404(b) witness] in the context of her taking a bath some 20 some odd times, and with [Victim] in taking her on an outing to the pond house or the farmhouse where they would just have some alone time.” R. 141. Furthermore, Appellant opened the legs of both girls and touched both in their vaginas.

The record reflects that the circumstances of Appellant’s relationship and access to both girls was the same, the ages of both girls during the abuse was the same, the locations and situations where the abuse occurred and the nature of the grooming and acts committed were profoundly similar. Taken as a whole, the trial court properly found that the similarities between the testimonies of these two victims outweigh any dissimilarity that Appellant raised. State v. Scott, at 503, 748 S.E.2d at 244.

B. The Trial Court Properly Weighed the Evidence Pursuant to Rule 403, SCRE.

Appellant essentially repeats his similarity arguments by arguing that the events complained of by the 404(b) witness were not sufficiently similar to provide probative evidence to outweigh the prejudicial effect of her testimony. The trial court expressed some concern about the “403 analysis” but after the trial court carefully and thoughtfully balanced the probative value and the danger of unfair prejudice, he admitted the witness’ testimony. R. 105; 141-146.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”⁴ Rule 403, SCRE. However, the prior bad act may still be deemed inadmissible if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. State v. Clasby, 385 S.C. 148, 682 S.E.2d 892; see also State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); SCRE 401, 403 and 404. The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.” Id. *citing* Rule 403,

⁴ Appellant misstates the Rule 403 analysis at different points within his brief. Appellant initially quotes Wallace that “the probative value of the proffered evidence must not substantially outweigh the danger of unfair prejudice to the defendant.” Brief of Appellant at 5. Appellant concludes his argument regarding this witness by reiterating that “since the probative value of Witness’s testimony did not substantially outweigh the danger of unfair prejudice to the Appellant, the trial court, respectfully, erred in admitting her testimony.” Id. at 16. The trial court properly corrected the Solicitor when she incorrectly stated this same test. “Well, that’s one of the confusing things about State versus Wallace. The Court, and as Mr. Lofton did in his motion correctly quotes the rule. The rule is – that’s 403 – although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, so on and so forth. The Supreme Court quotes that rule and then the body of the opinion got it backwards.” R. 80-81. The State agrees with Judge James correctly interpreted Wallace to require the court to do a normal Rule 403 balancing test to determine if the probative value is substantially outweighed by the danger of unfair prejudice.

SCRE; State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Prejudice is shown if there is a reasonable probability the jury's verdict was influenced by the challenged evidence. Id. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Appellate courts review a trial court's decision pursuant to Rule 403 using the abuse of discretion standard, and give great deference to the trial court. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000).

A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subject factors of the probative value or the prejudice presented by the evidence.

Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-94 (citing United States v. Long, 574 F.2d 761 (3d Cir. 1978)). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594. There must be a reasonable probability that the jury's verdict was influenced by the evidence in question in order to establish prejudice. State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012).

Judge James correctly placed the burden to prove whether the probative value outweighs the danger of unfair prejudice on the Appellant, and found that Appellant failed to carry his burden. R. 144-146. "All in all, I do not think that the probative value is substantially outweighed by the danger of unfair prejudice." R. 145. The trial court recognized that the evidence would be prejudicial to Appellant, "but the key is whether or

not the probative value is substantially outweighed by the danger of unfair prejudice.” R. 145-146.

Because the trial court properly considered all of the testimony pursuant to the Wallace factors, and made findings of fact and law that the testimony met the Wallace test, this court should not disturb the trial court’s decision to admit the testimony. The record supports the trial court’s ruling in that there was a close degree of similarity between the facts of the crime charged and the prior bad acts as outlined above. See State v. Scott, at 506, 748 S.E.2d at 245 (stating that the trial court must reconsider the similarities and dissimilarities in determining whether the probative value is substantially outweighed by the danger of undue prejudice when conducting a Rule 403 analysis). A review of the entire record reveals that the probative value of this evidence was not substantially outweighed the danger of unfair prejudice to Appellant. The choice of method and means by which Appellant selected the victims, the similarity of age of his victims, the peculiar pattern of grooming, the escalating pattern and close similarity of the numerous acts committed, the isolated locations under Appellant’s control, the great level of specificity provided by the girls about the incidents, and lack of physical evidence to corroborate the sexual assaults enhanced the probative value. State v. Clasby, 385 S.C. at 148, 682 S.E.2d at 89; State v. Taylor, 396 S.C. at 193, 720 S.E.2d at 522; State v. Atieh, at 648, 725 S.E.2d at 734; State v. McCombs, 410 S.C. 90, 100, 762 S.E.2d 744, 750 (Ct. App. 2014). Moreover, the trial judge’s jury charge specifically limited the use of this evidence by the jury to the proper purpose. R. 358.

II.

Gaye Allen-Cook's testimony did not improperly bolster the victim when Allen-Cook did not testify as to any details of her interviews with the victim except to say that she met with the victim and when her testimony did not include anything, express or implied, relating to the victim's veracity.

Appellant argues the trial court erred by allowing the State to present any of the testimony of Gaye Allen-Cook, an expert in child sex abuse assessment and counseling. R. 321-324; 334; 336-338. He argued to the trial court that the entire line of Ms. Allen-Cook's testimony constituted improper bolstering and that the State's intent to elicit from the witness that Victim had eleven counseling sessions was improper bolstering because it suggested something happened requiring counseling for Victim. R. 321; 324. Appellant acknowledged that he could not provide the trial court with any legal authority to support his argument that the expert's testimony must be excluded in its entirety. After the proffer of Ms. Allen-Cook's testimony, the trial court ruled her testimony admissible and limited any reference to meeting with Victim to one rather than the seven meetings that occurred. R. 337. Appellant did not further object. R. 339; 351. Relying on State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) and State v. Jennings, 394 S.C. 473, 473, 716 S.E.2d 91 (2011), Appellant asserts on appeal that Gaye-Cook impermissibly bolstered Victim's testimony in that Allen-Cook's acknowledgement that she met with Victim once "permitted the jury to draw the inference that what Victim testified to was true. The State disagrees and submits Appellant's argument is without merit.

The decision to admit or exclude expert testimony is within the sound discretion of the trial judge. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). The circuit court's decision to admit expert testimony will not be disturbed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). An abuse of discretion occurs when the trial court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013).

"Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." State v. Weaverling, at 474, 523 S.E.2d at 794; see also State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect"); State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult). "It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." Id. at 475, 523 S.E.2d at 794; see also Rule 702, SCRE.

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Brown, 768 S.E.2d 246, 252. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "Therefore, "it is

improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter”, Kromah, 401 S.C. at 358-59, 737 S.E.2d at 500; however, bolstering is not impermissible where the testimony is relevant to the witness’ own testimony and not that of another witness. State v. Taylor, 404 S.C. 506, 515, 745 S.E.2d 124, 128 (Ct. App. 2013); see also State v. Perry, 410 S.C. 191, 208, 763 S.E.2d 603, 611 (Ct. App. 2014). “Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.” State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 238 (Ct. App. 2013) *citing* State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006).

Gaye Allen-Cook was qualified as an expert witness in the fields of child sexual abuse assessment and counseling. Ms. Allen-Cook has a bachelor’s degree in early childhood education from Francis Marion University, a master’s degree in clinical counseling from Southeastern Baptist College, and has completed post-graduate studies in trauma abuse from Gardner Webb University. R. 341–342. Ms. Allen-Cook is currently listed on the University of South Carolina’s Children’s Law Office list of expert witnesses, and has practiced in this field for fourteen years. R. 341-342. Because of Ms. Allen-Cook’s education, expertise and experience, she was qualified as a witness without objection. R. 343.

Ms. Allen-Cook testified generally regarding child abuse dynamics, delayed disclosure, and grooming. She explored generally and briefly how children who are being sexually abused react to different situations, and also how their abusers may treat them.

Specifically, Ms. Allen-Cook described the process of how an abuser grooms their victim, how normalization occurs in an abused child, why an abused child might delay disclosure of abuse, and why an abused child may remember abuse, but not in the chronological order in which the events occurred. R. 231-356. There was no reference to Victim in any of this general testimony. After describing why abused children act the way they do, Ms. Allen-Cook was then asked if she met with the Victim. She responded that she had.⁵ R. 351. Ms. Allen-Cook's testimony did not mention her personal interactions with the Victim, except for this response. There was also no indication Allen-Cook provided therapy or any treatment for Victim or engaged in a discussion at all about the events in question. The prosecution did not attempt to have Allen-Cook render an opinion on the facts of the case.

Ms. Allen-Cook's testimony was in no way improper bolstering. The trial court found that "the witness' testimony [regarding the child's reactions] will assist the trier of fact in determining a fact at issue." R. 337. There is no doubt, and Appellant makes no argument, that the witness' background information regarding abused children's actions was proper expert testimony to educate the jury. See Weaverling, at 474, 523 S.E.2d at 794 (finding that where an expert's testimony regarding typical behavior patterns or victims of sexual assault assists the jury). Rather, Appellant requests this Court to hold that asking an expert if he or she has met with a victim, without more, is improper bolstering of the victim.

⁵ The Solicitor initially sought to present evidence that Ms. Allen-Cook met with the victim seven times. Judge James, however, refused to allow that. "The witness will not be able to testify, Ms. Barr, that she has seen her seven times. She'll be able to say that she has met her." R. 234; 337.

The only bolstering that occurred as a result of Ms. Allen-Cook's testimony that she met with the victim, was her own. The trial court, in limiting the Solicitor's ability to illicit the number of times Ms. Allen-Cook met with the Victim, recognized that an expert's credibility is many times questioned if they have not met with a victim. The trial court observed that allowing the solicitor to show that Ms. Allen-Cook had met with the Victim, "will remove any suggestion or question in the jury's mind that this witness has not had an opportunity to see" the Victim. R. 337. The Solicitor's question and Ms. Allen-Cook's answer in no way bolstered the Victim's testimony; rather, the question and answer merely enhanced Ms. Allen-Cook's credibility in testifying in this case. State v. Taylor, 404 S.C. at 514, 745 S.E.2d at 238.

Appellant argues that State v. McKerley controls in this case. 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). However, the witness in McKerley was a forensic interviewer and testified in great detail about the interview she had with the victim. This Court found a number of her statements to be "her inadmissible opinion as to whether the victim was telling the truth." Id. at 465, 725 S.E.2d at 142.⁶ However, in this case, Ms. Allen-Cook testified only that she met with the Victim. She did not testify that she believed the victim, or that she took any other action because of the Victim's statement that would intimate that she believed the victim's story. She was never asked about the content of the Victim's statements and there is no indication on the record that she had knowledge of the facts of the case. Simply, the expert never commented directly or indirectly on the credibility of Victim's complaints or testimony.

⁶ This Court found that in addition to the witness' statement that she found the interviews "to be compelling for sexual abuse"; at least ten other statements were problematic.

This case is more aligned with this Court’s recent decision in State v. Brown, 768 S.E.2d 246 (Ct. App. 2015), *rehearing denied* (Feb. 11, 2015). There, the court found that the trial court did not abuse its discretion in admitting the testimony of an expert where the expert’s testimony was relevant and assisted the jury in that the jurors did not have any prior knowledge about sex abuse. The State’s witness testified as to why children may delay in disclosing sexual abuse and why children may remember events in a different order than they actually occurred. Id. The State’s witness then testified that she had not examined the victim in the case. Id. This Court found that the witness “never commented—directly or indirectly—about the credibility of the victims’ allegations or testimony, nor did she make any of the statements prohibited by our supreme court in *Kromah*.” Id. at 252.⁷ Here too, the witness never offered testimony regarding the veracity of the child’s statements, nor did she reveal any of the contents of the child’s statements or of the applicability of her expert testimony to the victim in this case. Just as in Brown, the expert in this case testified in broad terms about grooming and delayed disclosure. Therefore, this Court’s precedent in Brown should control.

Moreover, there was no prejudice. Allen-Cook was not a forensic interviewer and she did not restate, repeat, or improperly corroborate the testimony of Victim or express an opinion on Victim’s veracity. Also, as in Brown, Allen-Cook’s testimony assisted the

⁷ “In *Kromah*, our supreme court held forensic interviewers should avoid (1) stating the child was instructed to be truthful; (2) offering a direct opinion on the ‘child’s veracity or tendency to tell the truth’; (3) indirectly vouching for the child, ‘such as stating the interviewer has made a “compelling finding” of abuse’; (4) indicating ‘the interviewer believes the child’s allegations in the current matter’; or (5) opining ‘the child’s behavior indicated the child was telling the truth.’” Brown, at 252 (citing *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500).

jury in understanding the general behavioral dynamics and demeanor of sexual assault victims, a topic that neither Victim nor any other lay witness could have testified.

Given the extremely limited content of the witness' testimony, there is no basis for a claim of improper bolstering of Victim's testimony by Ms. Allen-Cook.

CONCLUSION

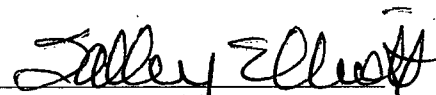
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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June 1, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001666

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JUN 01 2015

SC Court of Appeals

THE STATE,.....RESPONDENT

v.

WILLIE MARION BROWN,.....APPELLANT.

CERTIFICATE OF COUNSEL

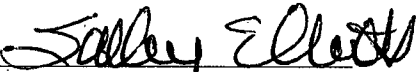
The undersigned hereby certifies that the Final Brief of Respondent complies with Rule
211(b), SCACR.

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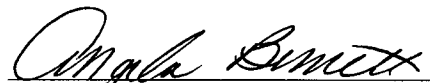
PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated June 1, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 1st, day of June, 2015.



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