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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-001608

Robert S. Horton, Petitioner,

v.

State of South Carolina, Respondent.

**BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE**

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QUESTION PRESENTED

Did the trial court properly exclude evidence that an anonymous report had been made to DSS when victim was approximately five years old regarding possible sexual abuse by her biological father where no investigation was done, it was remote in time, and was not factually similar?

STATEMENT OF THE CASE

Respondent agrees with Appellant's procedural statement of the case.

STANDARD OF REVIEW

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

ARGUMENT

The trial court properly excluded evidence that an anonymous report had been made to DSS when victim was approximately five years old regarding possible sexual abuse by her biological father where no investigation was done, it was remote in time, and was not factually similar.

A. Preservation

As an initial matter, Respondent submits that any issue raised regarding Appellant's rights under the Confrontation Clause with respect to the excluded evidence is not preserved for review on appeal. Appellant's counsel did not reference the Confrontation Clause in seeking to introduce the alleged prior allegations. Appellant specifically stated he "would like to have the possibility to get into [the testimony] as relates [sic] to past learned behavior potentially of [Victim]." (R. p. 177, lines 23-25). Appellant's counsel told the trial court that he was unable to ascertain whether the alleged allegation was "found" or "unfound," but that "the fact that some of the activity that has been alleged [could have] been learned at some other stage and that . . . is the portion that we would at least like to be able to question." (R. p. 10, line 12-p. 11, line 1). He never raised the Confrontation Clause. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (finding to preserve an issue for review there must be a contemporaneous objection that is ruled on by the lower court); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

B. Merits

The Court did not abuse its discretion in excluding evidence of an alleged prior accusation of sexual abuse by the victim [Victim] against her biological father. Regarding the admission of such evidence, this Court has held:

[I]n deciding admissibility of evidence of a victim's prior accusation [against one other than the defendant], the trial judge should first determine whether such accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the trial court shall consider the factual similarity between prior and present allegations to determine relevancy.

State v. Boiter, 302 S.C. 381, 383-84, 396 S.E.2d 364, 365 (1990) (emphasis added). In Boiter, the Court upheld the trial court's refusal to allow the defendant to cross-examine the seventeen-year-old victim, his stepdaughter, about her prior allegation of sexual abuse by her biological father where "the previous accusation was not investigated[,] [t]he defense presented no evidence to establish its falsity[.]" and "the bare accusation of an eight year old child made nine years earlier was too remote to be of sufficient probative value." Id. at 384, 396 at 365-66. Significantly, the Court used suggestive language in Boiter, except for its instruction that the trial court "shall" consider the factual similarities between the allegations in determining the relevancy of the evidence.

Here, there was no showing that a false report was made. Rather, there was simply testimony from Victim's mother that at some point in the past, an anonymous report was filed with the Department of Social Services ("DSS") but that DSS determined an investigation was not necessary. In this case, Victim's mother, Ms. Horton, testified that when Victim was five years old, she caught Victim masturbating, and Victim told her that "it was ok, that [her stepmother] did it." (R. p. 179, lines 9-12). She also testified that Victim at one point said that people at her father's house "walked around naked . . . or they . . . would sleep naked." (R. p.

180, lines 20-23). Ms. Horton also testified that she discovered that "there was actually a DSS report done in Greenville County, . . . but it was not founded, someone obviously looked into it but then they [did not] find a reason why they should investigate." (R. p. 181, lines 13-20). However, Ms. Horton confirmed that other than Victim's allegation against Appellant, Victim never reported sexual abuse to her. (R. p. 183, lines 15-18). Ms. Horton admitted she never read the report but that she was told about it. (R. p. 182, lines 14-15).

This was the only evidence Appellant proffered to show that Victim made a false allegation. Based on this proffer, the Court sustained the State's objection, finding that the testimony was not relevant. (R. p. 184, lines 19-23). Ms. Horton's testimony showed only that Victim, when she was approximately four or five years old, made comments to her mother that certain behavior was occurring at her father's house. This would have been approximately eight years before Victim reported the abuse by Appellant. Further, Ms. Horton's testimony showed only that someone made a report to DSS that DSS ultimately did not pursue. Though the Court did not state explicitly on the record that it was applying the Boiter analysis, based on Ms. Horton's testimony, the Court found that Ms. Horton's testimony was not relevant. Pursuant to Rule 401, 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." "The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) (citing State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983)). Furthermore, even if evidence is relevant, it may be excluded under Rule 403, SCRE, if its "probative value is substantially outweighed by the danger of unfair prejudice." E.g., Id. The fact that this alleged

accusation was made approximately eight years before, that it was against a different individual, and that it was non-specific and factually different from the allegations in the instant case, also support the trial court's exclusion of this evidence under Rule 403, SCRE. Accordingly, the trial court did not abuse its sound discretion in excluding this evidence.

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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Attorney General

ALICIA A. OLIVE
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SC Bar #102089

By: 
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May 23rd, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No: 2015-001608

ROBERT S. HORTON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 23rd day of May, 2016.



Ashley Haworth
Legal Assistant
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ALAN WILSON
ATTORNEY GENERAL

May 23, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Robert S. Horton v. State of South Carolina
Appellate Case No.: 2015-001608

Dear Mr. Shearouse:

Attached are the original and thirteen (13) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

Alicia A. Olive
Assistant Attorney General

AAO/ah
Enclosures

cc: Susan B. Hackett, Esquire