STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-002654

THE STATE,

Respondent,

v.

WALLACE STEVE PERRY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted at the October 2012 term of the grand jury for Greenville County for two counts of criminal sexual conduct with a minor in the first degree (2012-GS-23-08496 & 2012-GS-23-08498) and two counts of criminal sexual conduct with a minor in the second degree (2012-GS-23-08495 & 2012-GS-23-08497). Appellant proceeded to a trial by jury from December 1-3, 2014, in Greenville, South Carolina. At the conclusion of trial, Appellant was found guilty as indicted. He was sentenced by the Honorable Edward W. Miller to imprisonment for a term of thirty years on each count of criminal sexual conduct in the first degree and imprisonment for a term of twenty years on each count of criminal sexual conduct in the second degree, with all sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant and Mother had two sets of twins, Victim 1 and Sister, and Victim 2 and Brother. Tr. pp. 72-73. Appellant and Mother began dating in 1993 and separated in 2000. Tr. pp. 73-74. At the time of their separation, Victim 1 and Sister were five years old and Victim 2 and Brother were three years old. Tr. p. 75. Upon their Separation, Appellant moved to Greenville and Mother remained in Spartanburg. Mother and Appellant worked out a custody agreement whereby Mother had custody of the children during the week and Appellant had custody on the weekends. Tr. p. 75. In March of 2012, Victim 2 disclosed that Appellant was sexually abusing her. Tr. p. 76. Victim 2 told Mother the abuse occurred at Appellant's apartment when they had their visitations with him on the weekends. Tr. p. 77. After Victim 2 disclosed Appellant's abuse, Victim 1 told Mother she had also been sexually abused by Appellant. Tr. p. 78. Mother decided to wait to call DSS until Victim 1 and Victim 2 graduated because they were involved in activities at school and she did not want anything to interfere with that. Tr. pp. 77-78. Following a school play, Mother made the decision to contact DSS. Tr. p. 80. In May of 2012, Mother was contacted by officers from the Greenville Police Department. Tr. pp. 81-82.

Victim 1 was born in 1994. Tr. p. 131. Victim 1's first memory of Appellant sexually abusing her occurred on a Friday night when she went into Appellant's bedroom to watch television. Tr. p. 135. Victim 1 was seven years old at the time. Tr. p. 136. Appellant entered the bedroom and told her to move over in the bed. Tr. p. 136. Victim 1 testified Appellant then stuck his fingers down her pants. Tr. p. 136. Appellant told her if she told anyone she would get in trouble and she would not be able to see her mother anymore. Tr. p. 136. After the first incident, the abuse began occurring every weekend. Tr. p. 136. Victim 1 recounted, "It was every

weekend, both Saturday and Sunday, early mornings around 5 or 6 o'clock in the morning. He would come in there and lay in the bed. And he would finger me. Just like any other time, he would threaten that we'd be taken or we'd get in trouble." Tr, pp. 136-37. Victim 1 shared an air mattress with Victim 2 and Sister. Tr. pp. 134-35. Victim 1 stated that she never said anything or made loud noises during the abuse because she was afraid of waking her sisters up. Tr. p. 137.

When the family moved to a new apartment, Appellant continued to digitally penetrate Victim 1. Tr. p. 138. Victim 1 also recounted two occasions where Appellant orally penetrated her. Tr. p. 138. Victim 1 testified that the only weekends Appellant did not sexually abuse her were when she was on her period or when Appellant had a girlfriend. Tr. p. 141. The abuse stopped when Appellant moved to Columbia. Tr. p. 141. Victim 1 was fifteen years old at the time the sexual abuse stopped. Tr. p. 158. Victim 1 testified that she tried to tell Sister about Appellant's abuse on one occasion but she responded, "just be quiet. Just be quiet. I don't want to hear it." Tr. p. 142. Victim 1 testified she believed that if it was hard for Sister to hear, it would also be hard for Mother to hear. Tr. p. 142.

Victim 2 was born in 1996. Tr. p. 91. Victim 2 recounted the first occasion when Appellant sexually abused her, stating:

> I remember one night I had a nightmare. I went to my dad's bedroom. I thought he would comfort me like a dad should. I remember waking up with my underwear on the floor. I wasn't sure if I just turned too hard or if I tossed and turned. And then it kept happening and then it happened a lot. It happened probably like on one hand. Then I woke up. It was one early morning. He had his finger in my vagina.

Tr. pp. 95-96. Victim 2 testified that the abuse occurred less than five times. Tr. p. 96. All the instances of abuse occurred at home in the early hours of the morning. Tr. p. 97. Victim 2 could not recall what specific age she was when Appellant abused her, however she recalled the abuse occurred before she was in the sixth grade. Tr. p. 96. Appellant told Victim 2 that if she ever told

anyone about the abuse, she and her sisters would be the ones who got in trouble and they would be taken away from their mother. Tr. p. 96. Victim 2 recounted another specific incident where Appellant entered her bedroom, stating:

> He would come in our bedroom because he said [Brother] was kicking him and he couldn't sleep. So he came in our bedroom early in the morning and he laid down beside [Victim 1]. I remember hearing her saying, Dad, stop, get away from me. Then I would feel - - I wouldn't feel him pull her towards him, but I could just sense it by the force that was going on in the bed.

Tr. p. 99. Victim 2 later told Victim 1 she knew what Appellant was doing to her. Tr. p. 99. Victim 2 eventually decided to tell Mother about the abuse following a powerful youth church service. Tr. p. 102. Victim 2 previously disclosed the abuse to her youth pastor who encouraged her to tell her Mother immediately. Tr. p. 104. Victim 2 was sixteen years old at the time she finally told Mother about the abuse. Tr. p. 106.

Detective Mary Ashley Thomas of the Greenville Police Department became involved in Appellant's case after the family made a report to DSS. Tr. p. 160. The DSS case worker then forwarded the case to the Greenville Police Department. Tr. p. 160. As part of her investigation, Detective Thomas interviewed both Victim 1 and Victim 2 at the Law Enforcement Center in downtown Greenville. Tr. p. 162. After completing her investigation, Detective Thomas obtained arrest warrants for Appellant. Tr. p. 168.

Brandy Newcomer also testified at trial. Tr. pp. 223-57. Appellant was formerly Newcomer's stepfather. Tr. p. 241. Appellant and Newcomer's mother married when Newcomer was five years old and separated when she was fourteen. Tr. pp. 242-43. Newcomer described an incident when she was nine years old when Appellant entered her bedroom, forced his hand into her pajamas, and inserted a finger in her vagina. Tr. p. 244. Following the incident, Appellant told her not to tell anyone because no one would believe her and it would hurt her family. Tr. p.

245. Appellant digitally penetrated her on around five occasions. Tr. p. 246. On one occasion, the abuse progressed to oral sex by Appellant. Tr. p. 247. Appellant also forced Newcomer to bathe in front of him on one occasion. Tr. p. 247. Aside from the incident in the bathtub, all of the instances of abuse occurred in Newcomer's bedroom. Tr. p. 247. Newcomer testified the abuse continued until she was fourteen years old. Tr. p. 246. When she was fourteen, Newcomer told her mother about the abuse. Tr. p. 246. After Newcomer disclosed the abuse, her mother divorced Appellant and the family moved away from Spartanburg. Tr. p. 247.

ARGUMENT

I.

The trial judge properly admitted evidence of Appellant's prior sexual abuse of his step-daughter where the testimony of the witness constituted evidence of a common scheme or plan due to the significant similarity to the testimony of Victim 1 and Victim 2, including the age of the victims when the abuse occurred, the relationship between Appellant and his victims, the location where the abuse occurred, the use of threats, and the manner in which the abuse occurred, and the probative value was not substantially outweighed by the risk of unfair prejudice.

Relevant Facts

Prior to trial, the State indicated that it had a Lyle[1] motion. Tr. p. 38. The State then proffered the testimony of Brandy Newcomer. Tr. pp. 41-50. Following Newcomer's testimony, the trial judge indicated he would rule at a later time. Tr. p. 57. The trial judge subsequently found, "the State has shown the prior bad act by clear and convincing evidence that it is probative. It does fit under the 404(b) exception and I'm going to allow it." Tr. p. 183.

Discussion

Appellant asserts the trial judge erred in finding Newcomer's testimony admissible as evidence of a common scheme or plan. Appellant also contends the trial court erred in finding Newcomer's testimony more probative than prejudicial under Rule 403, SCRE. These arguments lack merit, as there was a close degree of similarity between Appellant's prior sexual abuse of Newcomer and his sexual abuse of Victim 1 and Victim 2. Furthermore, the evidence of the prior bad act had significant probative value that was not substantially outweighed by the risk of unfair prejudice.

Evidence of Appellant's Prior Sexual Abuse of Brandy Newcomer was Admissible to Show a Common Scheme or Plan

[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). An abuse of discretion occurs when the trial judge's conclusions either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008).

Generally, evidence of prior bad acts is not admissible to prove a defendant's guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See also State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277

(2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "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"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, this Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).
>
> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of

similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278.

In the current case, all five of the factors enumerated in Wallace weigh in favor of admitting the evidence due to the substantial degree of similarity between Appellant's abuse of Victim 1 and Victim 2 and Appellant's abuse of Brandy Newcomer. As to the first factor, the age of the victims when the abuse occurred, all of the abuse began when the victims were at a pre-pubescent age. In her direct testimony, Victim 1 testified she was around seven when the abuse began.[2] Tr. p. 136, 141. Victim 2 had difficulty determining what her age was when the abuse occurred, but testified it was before she was in the sixth grade. Tr. p. 96. Newcomer testified the first instance of abuse was when she was nine years old. Tr. pp. 243-44. All three victims were pre-pubescent. The ages of the victims, even accounting for the minor confusion Victim 1 and Victim 2 had in determining their age when the abuse began, are all within a few years of each other. The ages of Appellant's victims, were thus similar at the time of the abuse.

As to the second factor, the relationship between the victims and the perpetrator, the relationship between Appellant, the relationship between Appellant and each victim is strikingly similar. Appellant was the biological father of Victim 1 and Victim 2 and the stepfather of Newcomer. Appellant's victims all shared the unfortunate circumstance of having him as a father-figure in their life.

[2] On cross-examination, Defense Counsel asked Victim 1, "And you testified earlier that you were accusing your father of starting to touch you inappropriately at age 5?" Tr. p. 147. Victim 1 replied, "Yes ma'am. I think there is some kind of blockage there from the ages of 5 to 7. I tried to block it out for so long. I really can't remember." Tr. p. 148. At Defense Counsel's further urging, Victim 1 stated she believed Appellant started touching her at age 5. Tr. p. 148.

As to the third factor, the location where the abuse occurred, the sexual abuse occurred within the home. Victim 1 and Victim 2 testified that the abuse occurred in either their bedroom or in Appellant's bedroom, and Newcomer testified the abuse occurred in her bedroom on every occasion except for one where Appellant watched her bathe.

As to the fourth factor, the use of coercion or threats, Appellant threatened all three victims in order to prevent them from disclosing the abuse to others. Appellant told Victim 1 that if she told anyone she would get in trouble and she would not be able to see her mother anymore. Appellant told Victim 2 that if she ever told anyone about the abuse, she and her sisters would be the ones who got in trouble and they would be taken away from their mother. Appellant told Newcomer not to tell anyone because no one would believe her and it would hurt her family. Appellant's use of threats in order to ensure his victims' silence was commonplace throughout his decades of abuse. The use of threats by Appellant in his abuse of Victim 1 and Victim 2 and Newcomer thus demonstrates further similarity between the prior bad act and the charged offense.

As to the fifth factor, the manner of the occurrence, the type of sexual battery was similar for Victim 1, Victim 2, and Newcomer. The primary manner of abuse for all three victims was digital penetration. Appellant also engaged in oral sex with both Victim 1 and Newcomer. In his brief, Appellant attempts to differentiate the sexual assaults on Victim 1 and Victim 2 and Newcomer by asserting the abuse of Newcomer progressed to actual sexual intercourse while Appellant never had sexual intercourse with Victim 1 or Victim 2. Prior to the hearing on the Lyle motion, the Solicitor stated with respect to Newcomer, "Of course there was digital penetration, oral sex. It did progress into actual vaginal/penile penetration. We understand that that portion of her testimony of her abuse could not be admissible because it goes beyond the

scope of similar." Tr. p. 40. Aside from the Solicitor's statements, there is no clear testimony from Newcomer during the proffer or during her direct testimony at trial that there was penile penetration.[3] Newcomer's testimony during the proffer as well as her testimony during direct examination focused on digital and oral penetration, the exact acts Appellant was accused of committing in this case. Even if Appellant's abuse of Newcomer progressed to sexual intercourse, the abuse of Victim 1 and Victim 2 and Newcomer are still strikingly similar. If Appellant did engage in sexual intercourse with Newcomer, it was merely the last step in a progression of abuse that included digital and oral penetration. Regardless of whether there actually was penile penetration, Newcomer's trial testimony consisted only of the identical acts of digital and oral penetration, thus there was no unfair prejudice to Appellant.

In State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose that he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner – over the course of two years – reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim's testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner – over the course of

[3] During the proffer, Newcomer testified, "One incident, I had two friends over. He snuck into my bedroom. The penetration and everything started. Then he got up and left." Tr. pp. 46-46. It is unclear whether Newcomer is referring to digital penetration or penile penetration.

two months – hugged her and fondled her breasts while she was baby-sitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. Id. at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness' testimony regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan but found any testimony related to the dissimilar acts was inadmissible. Id. at 582, 608 S.E.2d at 467. Following the trial, Hubner appealed his convictions and asserted the prior bad act evidence should not have been admitted. Id. at 575, 608 S.E.2d at 464. On appeal, this Court reversed Hubner's convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. Id. at 585, 608 S.E.2d at 469. However, the South Carolina Supreme Court subsequently reversed the decision of this Court and affirmed Hubner's convictions after finding the trial judge properly admitted the evidence of the prior sexual assaults. State v. Hubner, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

All five of the aforementioned factors demonstrate the significant degree of similarity between Appellant's prior abuse of Newcomer and Appellant's abuse of Victim 1 and Victim 2. The trial judge properly admitted the prior bad act evidence due to the similarities outweighing any potential dissimilarities.

The Probative Value of the Prior Instances of Sexual Abuse by Appellant Was Not Substantially Outweighed by the Threat of Unfair Prejudice.

Evidence of prior bad acts must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999). Prejudicial evidence is still proper unless

it amounts to undue or unfair prejudice. See State v. Beck, 342 S.C. 129, 136-37, 536 S.E.2d 679, 683 (2000) ("We find that evidence of the [prior bad act], although certainly prejudicial to Appellant, is not unduly so under our previous decisions."). "'Unfair prejudice' within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible." State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (2004). "Stated differently, evidence which is 'logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime.'" State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

Due to the extreme similarities between the prior bad acts and the charged offense, the evidence had significant probative value. The evidence of prior instances of Appellant's sexual misconduct where Appellant previously performed the same sexual acts with another child he was in a father figure role with enhances the probative value of the evidence as to outweigh its prejudicial effect. There were striking similarities in regards to the age of the victims when the abuse occurred, the manner in which the abuse occurred, the nature of the abuse, the timing of the abuse, the location of the abuse, and other important factors. Cf. Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("Here, the similarities between the acts include petitioner's relationship to the

victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity."). Any potential prejudicial effect of the evidence comes from the evidence's legitimate probative value, and that prejudicial effect does not substantially outweigh the evidence's probative value. The trial judge, thus, properly declined to exclude the evidence under Rule 403, SCRE. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly overruled Appellant's objection to Dr. Henderson's testimony where the full context of the testimony reveals that Dr. Henderson was providing permissible medical testimony concerning normal findings in cases involving sexual abuse. Furthermore, any alleged error is insubstantial and not sufficient to warrant reversal of Appellant's conviction.

Relevant Facts

Dr. Nancy Henderson is a pediatrician employed with the Greenville Health System. Tr. p. 196. Dr. Henderson conducted an examination of Victim 1 and Victim 2 at the Child Advocacy Center in Spartanburg. Tr. p. 200.

Prior to physically examining Victim 2, Victim 2 shared details with Dr. Henderson concerning what the abuse entailed. Tr. p. 204. Based on Victim 2's description of the abuse, Dr. Henderson performed a head-to-toe physical exam and conducted tests related to concerns for sexually transmitted infections. Tr. p. 204. Dr. Henderson testified that during such an exam she is looking specifically at the genital area for any kind of tears, scars, or discharge. Tr. p. 205. Dr. Henderson testified that based on what Victim 2 shared regarding the particular sexual assault, she was looking for all of the aforementioned signs during the physical examination. Tr. p. 205. The Solicitor then asked, "Based on what [Victim 2] shared with you, did you expect to find any

indications of injury." Tr. p. 205. Dr. Henderson responded, "It would have been very unlikely based on the information that she had shared to find anything on the exam." Tr. p. 205. Dr. Henderson elaborated:

> At the time that I saw her, she was 16. The incidents had happened at least three years prior. So the genital area has incredibly good blood supply and even small tears or even larger tears can heal very, very quickly. So with there being years delay between the last incident and the time of the exam, it would make it unlikely to find something on the exam. Another reason that what she had shared happened often never finds any evidence on exam. So even if I had seen her earlier, the likelihood of seeing a trauma, permanent trauma related to that is extremely uncommon.

Tr. pp. 205-06.

Dr. Henderson testified that aside from a minor amount of vaginal discharge, Victim 2's exam was normal. Tr. p. 206. The Solicitor then asked what "normal" meant. Tr. p. 206. Dr. Henderson responded:

> Normal means that there were no tears, no scars, uh, and there were no specific findings on her exam that in and of itself would have linked to allegations of abuse. But in light of what she had shared with me and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case.

Tr. p. 206. The Solicitor then asked, "So in your opinion, were your findings consistent with [Victim 2] having experienced sexual abuse?" Dr. Henderson responded, "Yes." Tr. p. 206. Defense Counsel objected, arguing that the testimony amounted to improper vouching by the witness. The trial judge overruled the objection, ruling, "I think she testified that your findings were consistent. So I - - it's close, but I'm going to overrule your objection." Tr. p. 206.

Dr. Henderson's examination of Victim 1 also yielded normal results. Tr. p. 208. The Solicitor asked, "Based on what [Victim 1] described to you with respect to the abuse that she experienced, did you expect to find any injuries to [Victim 1]?" Tr. pp. 208-09. Dr. Henderson responded, "A normal exam would be quite common almost the majority of time with those type

of allegations." Tr. p. 209. The Solicitor then asked, "And with respect to [Victim 1], were your findings during that examination consistent with the possibility that she had also experienced sexual abuse." Tr. p. 209. Dr. Henderson replied, "Yes, a normal exam would be consistent with those types of findings, with those allegations that she had made." Tr. p. 209.

Discussion

Appellant asserts Dr. Henderson improperly commented on the veracity of Victim 2's testimony. Specifically, Appellant argues, "There is no way to interpret Dr. Henderson's testimony other than she believed Daughter Three's[4] allegations were true despite the fact that Daughter Three had a completely normal examination." Br. of App. p. 21. This argument lacks merit, as Dr. Henderson's testimony was merely stating that despite the fact her examination of Victim 2 revealed no injury, that finding could still be consistent with sexual assault due to the substantial time period between the assault and the examination. Even if Dr. Henderson's comment was deemed inappropriate, any error is insubstantial and not sufficiently prejudicial to warrant a reversal of Appellant's conviction.

It is improper for an expert to comment on the veracity of a child's allegations of sexual abuse. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). Looking at the full and proper context of Dr. Henderson's testimony, it is clear that she was not commenting on the veracity of Victim 2's testimony. Instead, Dr. Henderson provided background medical knowledge on what a "normal" examination would look like in a situation where sexual assault occurred years prior to the examination. Dr. Henderson's statement, "But in light of what she had shared with me, and, as I mentioned, finding a normal exam is something quite common and not surprising in this particular case" related directly to the absence of any physical injury due to the delay in disclosure. Dr. Henderson's statement was not indicating that she believed Victim 2's

[4] "Daughter 3" in Appellant's brief is the same as "Victim 2" in the Brief of Respondent.

allegations; Dr. Henderson was merely indicating that an absence of sexual injury can still be consistent with sexual assault given the delay in disclosure, that tears to the vagina tend to heal very quickly, and that physical exams often do not reveal injuries from digital and oral penetration. When the trial judge ruled, "I think she testified that your findings were consistent. So I - - it's close, but I'm going to overrule your objection," he recognized what the testimony truly meant when viewed in the context it was made and knew it was not improper even though it could appear to be so when stripped of context.

In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the United States Supreme Court dealt with a question of whether remarks made by the prosecutor during closing argument, in the context of the entire trial, were sufficiently prejudicial to violate the respondent's due process rights. In upholding the respondent's conviction, the Court emphasized, "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Id. at 647. While Donnelly dealt with a closing argument issue, its logic is applicable to the current case. This Court should not infer that Dr. Henderson's testimony concerning what a "normal exam" was given the circumstances and whether a "normal" exam could still be consistent with sexual abuse was actually Dr. Henderson testifying she believed Victim 2's allegations. Instead, the full context reveals an intent to provide admissible expert medical testimony, not to bolster the credibility of the victims. Dr. Henderson's testimony, therefore, did not convey an improper or damaging meaning to the jury, and thus was not erroneously admitted

Even if this Court were to find that Dr. Henderson's testimony was an improper comment on the veracity of Victim 2's testimony, any error in the case is harmless. As a general rule, the

appellate court will decline to set aside a conviction due to insubstantial errors not affecting the result. State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). Determining whether an error is harmless depends on the circumstances of the particular case and no set rule governs this finding. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Instead, the materiality and any prejudicial character of the alleged error must be determined from its relationship to the entire case. Id. The comment made by Dr. Henderson complained of on appeal was rendered harmless by the explanation and context of the remainder of her testimony. Furthermore, Dr. Henderson's statement was isolated, vague, and offered no clear indication she believed Victim 2. Also, the comment was never mentioned again during the remainder of trial, and the solicitor made no reference to it during his closing argument. Dr. Henderson's testimony was therefore not sufficiently prejudicial to warrant a reversal of Appellant's conviction, especially in light of significant strength of the testimony from the other witnesses and the probative prior-bad act evidence. Appellant's convictions and sentences should be affirmed.

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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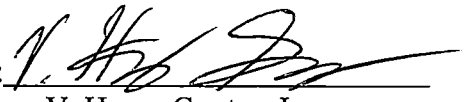
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

WILLIAM W. WILKINS, III.
Solicitor, Thirteenth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

May 23, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent

v.

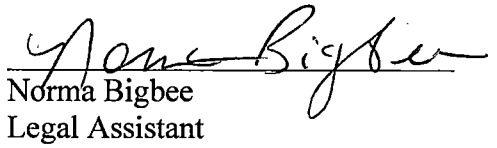
WALLACE STEVE PERRY, Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Kerri A. Rupert, Esquire, P.O. Box 12487, Columbia, SC 29211 and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of May, 2016.



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ALAN WILSON
ATTORNEY GENERAL

May 23, 2016

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

Re: **State v. Wallace Steve Perry**
Appellate Case No: 2014-002654

Dear Ms. Kitchings:

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

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
Bar No: 102259

VHG/nb
Enclosures

cc: Kerri B. Rupert, Esquire (2 copies enclosed)
Robert M. Dudek, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)