STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Carmen T. Mullen, Circuit Court Judge

RECEIVED
JUL 05 2017
SC Court of Appeals

Appellate Case No. 2016-001086

THE STATE,

Respondent,

v.

STANLEY MILLER,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 13

I. The trial court properly admitted the video recording of Victim's forensic interview because it met the requirements of section 17-23-175 of the South Carolina Code that it demonstrate particularized guarantees of trustworthiness. Specifically, it was not unreliable or untrustworthy and did not contain leading and suggestive questions. 13

II. The trial court properly allowed testimony of prior bad acts by Appellant because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993) 13

State v. Brown, 389 S.C. 84, 697 S.E.2d 622 (Ct. App. 2010) 17

State v. Chavis, 412 S.C. 101, 114, 771 S.E.2d 336, 342 (2015) 18

State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998) 20, 21

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 18

State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) 22, 23

State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007) 22

State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973) 20

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 13, 18

State v. Legg, 416 S.C. 9, 785 S.E.2d 369 (2016) 16

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) .... i, 1, 3, 20

State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) 22

State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008) 22

State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986 11

State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004) 21, 22

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 20

State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) 13

State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010) 14

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) 5, 18, 20, 21

State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) 22

State v. Whitner, 399 S.C. 547, 559–60, 732 S.E.2d 861, 867 (2012) 18

State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009) 22

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 13, 20

Other Authorities:

S.C. Code Ann. § 17-23-175 (2014) 14, 17

S.C. Code Ann. § 17-23-175(A) (2014) 14

S.C. Code Ann. § 17-23-175(B) (2014) 13, 14

S.C. Code Ann. § 17-23-175(B)(2) (2014) 19

Rule 404(b), SCRE .... i, 1, 3, 18, 19

STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly admitted the video recording of Victim's forensic interview because it met the requirements of section 17-23-175 of the South Carolina Code that it demonstrate particularized guarantees of trustworthiness. Specifically, it was not unreliable or untrustworthy and did not contain leading and suggestive questions.

II.

The trial court properly allowed testimony of prior bad acts by Appellant because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for criminal sexual conduct (CSC) with a minor in the first degree and CSC in the third degree (R.* Indictments.) On May 16–18, 2016, Appellant proceeded to a trial before the Honorable Carmen T. Mullen and a jury. Charles Cochran, Esquire, and Megan Ehrlich, Esquire, represented Appellant, and Assistant Solicitors Shannon Elliott and Debbie Herring-Lash represented the State. Judge Mullen granted a directed verdict on the first-degree CSC charge, and the jury found Appellant guilty of third-degree CSC. Judge Mullen sentenced him to fifteen years' imprisonment with credit for time served. (Tr. 306, 316).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of her appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

When Victim was in the third grade, a woman approached her after school about Victim inappropriately dancing with the woman's son behind a building. (Tr. 112, line 16–Tr. 113, line 5). The woman asked Victim if Victim wanted to tell her mother about the incident herself or if the woman should do it. (Tr. 112, lines 21–22). That same day, after being asked about the inappropriate dancing, Victim disclosed to her mother that Appellant had been sexually abusing her "because [she] was tired of him doing the bad stuff to [her] and [she] wanted him to stop." (Tr. 112, lines 16–17; Tr. 113, lines 18–21; Tr. 114, lines 1–4). After she told her mother, they packed up their clothes and went to her grandmother's house. (Tr. 114, lines 14–22). She then met with the police and a forensic interviewer at the Lowcountry Children's Center. (Tr. 114, line 23–Tr. 115, line 10). Appellant was arrested and was initially charged with third-degree CSC and later was charged additionally with first-degree CSC.[1] (R. *Indictment).

Pretrial, Victim testified *in camera* about prior incidents of sexual abuse she suffered at the hands of Appellant. (Tr. 49–60). The State moved to admit this prior bad act evidence under Rule 404(b), SCRE, and *State v. Lyle*.[2] (Tr. 61, line 7–Tr. 62, line 5). The solicitor argued the similarities outweighed the dissimilarities; the incidents occurred: (1) between the same actors, (2) when Victim was a prepubescent female, and (3) at night while people were sleeping around her, and the incidents: (4) involved anal contact beginning in the spooning position, (5) involved him wiping her off afterward, and (6) resulted in him telling her not to tell. (Tr. 61, lines 14–25). The only dissimilarities she noted were different addresses and in one place the abuse occurred

[1] As noted in the Statement of the Case, a directed verdict was granted on the first-degree CSC charge.

[2] 125 S.C. 406, 118 S.E.2d 803 (1923).

in the mother's bedroom while in the other location it occurred in Victim's bedroom. (Tr. 62, lines 1–5).

Defense counsel began by arguing that *Lyle* was an identity case and that here identity is not an issue so "to use common scheme or plan in that sense is completely inappropriate." (Tr. 63, lines 1–25). He also noted that the alleged prior bad acts did not result in a conviction and opined that the State could not prove the evidence by clear and convincing evidence "just by having their witnesses say it." (Tr. 64, lines 12–21). Counsel then specifically argued the dissimilarities were: the mother was home in one location while she was away from home working the night shift in the other location, and he was allegedly taking Victim out of her bedroom that she shared with a potential witness and sexually assaulting her in another room versus carrying out the sexual assault in Victim's room. (Tr. 65, line 11–Tr. 66, line 14).

The State pointed out that South Carolina case law allows a judge to determine whether there is a clear and convincing disclosure on the part of the child without any corroborating evidence. (Tr. 68, lines 1–11). She again articulated for the trial judge that she was not using this other evidence as propensity evidence but to show common scheme or plan as to the process Appellant used to commit the acts and his knowledge of how she would react: knowing she would not fight or scream or cry out so that he could carry it out while her mother and brother were nearby. (Tr. 69, lines 8–20).

The trial judge found the incidents were clearly more similar than dissimilar. (Tr. 71, lines 1–5). She agreed with the State that they did show a "common course of conduct wherein he entered the bedroom, how the sexual assault occurred, that he took off her clothing in both of them, that following it he wiped her and himself and the bed and told her not to tell." (Tr. 71,

lines 6–10). She then considered the *Wallace*[3] factors: the defendant's relationship to the victim, place where the abuse occurred and where other family members were at the time, and admonishment not to tell. (Tr. 71, lines 11–18). She found, as the factfinder charged with judging the credibility and whether the victim's testimony was proved by clear and convincing evidence: "I do believe it by clearly and convincing evidence that she was assaulted at both places and by him. And respectfully I am going to allow the *Lyle* evidence." (Tr. 71, lines 19–25). She added later:

> Just on the record back to the *Lyle* 404(b) issue about the previous allegations of sexual abuse in Dorchester County I think it also goes to allowing that talks about the whole course of conduct and how we get to the point where it occurred for a couple of year period then there was the break when they weren't living together and then it started back immediately because I think it would be strange to not be able to tell why did it all of [a] sudden happen after he had access to this child for all this time. So I think it explains the whole thing.
> I think also with it I don't think there would be a true telling of the whole story and the whole issue so I think it is more probative than prejudicial.

(Tr. 81, lines 2–15).

Defense counsel then objected to any attempt by the State to introduce the forensic interview video, arguing that the State would be using an accusation of pain to get past a directed verdict on the first-degree CSC charge, even though Victim denied pain or penetration to the responding officer and the forensic interviewer. (Tr. 72, line 24–Tr. 73, line 7). He argued "the reliability of the video is called into question by the State itself because they are basically saying believe everything that is said in this video except for the part where she says it didn't hurt it felt like a tickle." (Tr. 73, lines 15–22). He stated, "So what we would say and our agreement [sic] would be is they can either go forward with the video just on the CSC third degree or go forward

[3] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

on both accusations with no video. To do otherwise I don't think makes sense." (Tr. 74, lines 1–5).

The State reiterated that it was the trial judge's responsibility to look at the video and determine for herself whether there was suggestibility, whether the questions were leading, whether the interview was done by a trained person, and whether the statement was a detailed account of the offense and was coherent, based on the requirements of the statute. (Tr. 74, lines 10–17). The trial judge then stated that she found the video coherent, not suggestive in any way, and not leading, and she found Victim was not confused and gave a coherent recitation of what had occurred. (Tr. 74, line 18–Tr. 75, line 2). However, the judge also expressed concern that the first time there was disclosure of pain and anal penetration was just to the Solicitor's office. (Tr. 75, line 24–Tr. 76, line 4). The solicitor pointed out that Victim was not asked about pain during the forensic interview and that when one of the solicitors and the victim advocate were talking to Victim about how she would testify if asked how it felt physically rather than emotionally, she answered that it "hurted"—that it tickled then "hurted." (Tr. 76, lines 5–23). Defense counsel complained there was no follow-up with the detective or the forensic interviewer after this accusation of pain. (Tr. 77, lines 1–7).

Next, defense counsel objected to potential leading or suggestive questions, specifically objecting to a line of questions involving Victim's allegation that Appellant spit on his "thing." (Tr. 77, lines 8–13). He argued the interviewer responded to Victim's statement by giving a completely alternative descriptor, suggesting and handing her a different explanation influenced by her own experience as an interviewer. (Tr. 77, line 13–Tr. 78, line 13). After completing this piecemeal attack of the forensic interviewer's questions, Counsel stated that his most strenuous argument was that "the State is going to be basically arguing to the jury that this video is unreliable in terms of its reliability regarding pain but it's reliable enough to be presented to

them should there be any argument of the court's reliable enough to be presented to them as proof of this child's testimony." (Tr. 78, lines 14–20).

The trial judge noted that she had never seen a forensic interview video mirror perfectly what the child testified to on the stand and that if she did see identical disclosures, she would think the victim had been coached. (Tr. 78, line 21–Tr. 79, line 4). She advised defense counsel to cross-examine Victim on pain versus tickling and said it was a question for the jury. (Tr. 79, lines 5–21). The trial court concluded the video would be admitted into evidence.

The State began its case by calling Victim to the stand. She explained she was eleven years old and in the fifth grade at the time of trial. (Tr. 101, line 1–Tr. 102, line 2). She testified she lived with her grandmother, mother, and two brothers. (Tr. 102, lines 15–17). Victim testified that Appellant was the father of her two brothers and that she used to live with him and called him Daddy. (Tr. 103, lines 3–16). She described the first place she lived with Appellant (Hunter's Ridge) and testified that she and one of her brothers shared a room there and had bunk beds. (Tr. 103, line 17–Tr. 104, line 1). While they lived in that house, Appellant would watch her while her mother worked nights. (Tr. 106, lines 1–8). Victim testified that Appellant would sometimes come to her room, pick her up by the waist, and carry her into her mother's bedroom. (Tr. 106, lines 11–17). He would lie down beside her, pull her pants and underwear down, pull his pants down, and rub his private part against her "butt." (Tr. 106, line 18-Tr. 107, line 7). She would be lying on her stomach and he would lie on top of her. (Tr. 107, lines 9–10). She testified that it hurt and that when he would stop, he would wipe her off with a cold rag and also wipe off the bed. Then he would put her back in her room. (Tr. 107, lines 13–22). When asked what he was wiping, she answered, "Spit." (Tr. 107, lines 23–24). She testified she did not see the spit, but she could feel it. (Tr. 107, line 25–Tr. 108, line 5). When he put her back in her bed, he would tell her not to tell. (Tr. 108, lines 8–12). She testified that her brother was asleep

while this was going on and never woke up. (Tr. 108, lines 15–18). She did not tell her mother about any of this while they were living there because she was scared. (Tr. 108, line 22–Tr. 109, line 1).

Victim testified the family moved to another house for a time and then moved to a house on Reed Street. (Tr. 109, lines 2–15). The Reed Street house is the location of the incidents for which Appellant was on trial. Victim and her brother shared a room and had two beds side by side. (Tr. 111, lines 1–5). Appellant would come into her room at night, lie beside her in her bed, and pull down her pants. (Tr. 111, lines 6–17). He would then rub his private part against her "butt," which she testified "hurted." (Tr. 111, lines 18–22). He would wipe her and the bed off when he was finished, tell her not to tell anyone, and go back to his bedroom, where she knew her mother was sleeping because she could hear her snoring. (Tr. 111, line 23–Tr. 112, line 15). Her brother was in the room but never woke up. (Tr. 112, lines 4–6).

Victim then testified about telling her mother what Appellant was doing to her after a woman approached her after school one day about dancing inappropriately with her son behind a building. She said the woman asked her if Victim wanted to tell her mother about the incident herself or if the woman should do it. ((Tr. 112, line 16–Tr. 113, line 5). Victim testified she told her mother what had been going on with Appellant "because [she] was tired of him doing the bad stuff to [her] and [she] wanted him to stop." (Tr. 112, lines 16–17; Tr. 113, lines 18–21; Tr. 114, lines 1–4). After she told her mother, they packed up their clothes and moved into her grandmother's house. (Tr. 114, lines 14–22).

On cross-examination, defense counsel asked Victim if the officer she spoke to about the incident "asked you if it hurt or if anything went in your butt when he would do these things to you and you told her no, right?" and she said, "Yes." (Tr. 118, lines 8–11). She did not

remember whether Appellant would close the door when he came into her room at the Reed Street house.[4] (Tr. 119, lines 15–17).

Victim's mother (Mother) testified next. When asked about the arrangement of Victim and her brother's bedroom, she testified that the beds were on either side with a walkway in between and that one could not see the beds from the door. (Tr. 143, lines 1–9). She recalled a time she got up one night and found Appellant lying on the couch but said she did not even know he had gotten up and out of the bed. (Tr. 143, line 24–Tr. 144, line 5). She recalled the day Victim told her about being sexually assaulted. (Tr. 144, lines 8–24). Mother testified that Victim told her it happened in her room and that it had happened a couple of nights ago; she was crying and upset. (Tr. 145, lines 1–7). She stated that she took both Victim and her son, the one who shared the bedroom with Victim, to the Lowcountry Children's Center and to Mental Health. (Tr. 146, lines 17–25). It was her understanding that her son, who was five at the time, was asleep during the assaults. (Tr. 147, lines 1–4). She explained that he slept hard, that once he fell out of the bed but was still asleep, and that she routinely had to shake him to wake him up. (Tr. 147, lines 5–13).

Officer Jessie Demalo of the City of North Charleston Police Department testified that on November 11, 2013, she responded to Victim's grandmother's house and spoke with Victim, her mother, and her grandmother. (Tr. 165, line 2–Tr. 166, line 16). Victim told her she was assaulted at night in the bedroom. (Tr. 167, lines 1–18). When asked on cross-examination if Victim denied penetration, she answered, "Correct." (Tr. 170, lines 2–3).

Dr. Carrie Busch, a professor in pediatrics at the Medical University of South Carolina, was qualified as an expert in pediatrics and child sexual abuse examination without objection.

[4] During the *in camera* testimony during pretrial motions, defense counsel asked whether Appellant closed the door at either of the two houses where he sexually abused her, and Victim answered that she did not remember. (Tr. 59, lines 6–12).

(Tr. 182, lines 9–20). She explained that DNA and evidence on clothing can only be collected within seventy-two hours of an assault. (Tr. 183, lines 3–17). She examined Victim in November of 2013 and found her to be unremarkable and normal for her age. (Tr. 186, line 2–20). She explained that a normal examination did not mean there was not any sexual abuse or penetration because those areas of the body, whether the abuse was vaginal or anal, are stretchy and heal quickly. (Tr. 187, line 6–Tr. 190, line 2). Dr. Busch testified that the difference between "in" and "on" is a hard distinction for children, especially when it involves the structured layers of skin in the anus. (Tr. 190, lines 3–16). She stated that if a child reports pain with a certain incident, that elevates her level of concern for penetration. (Tr. 190, lines 18–25). However, on cross-examination, she admitted she did not know of any disclosure of pain at the time of her assessment. (Tr. 192, lines 12–16). On redirect, she confessed she did not ask Victim herself whether there was pain but rather relied on the reports of others. (Tr. 197, lines 3–7).

The State next called Carole Swiecicki, the executive director of the Dee Norton Lowcountry Children's Center. She was qualified as an expert in child abuse dynamics without objection. (Tr. 201, lines 16–23). She first explained she had not met Victim or anyone else involved in the case and had not reviewed any files or materials associated with the case. (Tr. 201, line 24–Tr. 202, line 8). She then testified what delayed disclosure is, reasons for it, what causes a child to disclose, that disclosure is a process, and that it can sometimes be prompted by being questioned about the child's own sexualized behavior. (Tr. 202, line 9–Tr. 212, line 19).

Next Michelle Scott, the forensic interviewer, testified *in camera* about her education, her training, and the fact that she worked at the Lowcountry Children's Center. (Tr. 225, line 16–Tr. 226, line 10). Defense counsel again objected to the video coming in and the trial judge again determined she would allow it. (Tr. 227, lines 13–25). Scott testified before the jury, explaining

that she interviewed Victim on November 27, 2013, and that the video was an accurate recording of the interview. (Tr. 229, line 1–Tr. 230, line 7). After the jury watched the video, defense counsel began cross-examination by asking, "[Y]ou didn't directly ask [Victim] if she felt pain I guess right?" to which she replied, "That's correct." (Tr. 231, lines 3–5). Scott also stated, "That's correct," when asked if she specifically asked Victim whether anything went in her "butt." (Tr. 232, lines 9–11). She explained that they are trained to avoid leading questions but to ask follow-up questions to clarify their understanding so they are not guessing at what the child means. (Tr. 233, lines 10–24). Defense counsel specifically asked: "And then you said when he spits on it I mean you actually see him spit on it or what you see looks like spit correct?" (Tr. 234, lines 10–12). She answered, "That's correct." (Tr. 234, line 13). He then asked, "And that could be construed as a leading question could it not?" to which she replied, "I wanted to clarify. I considered it a clarifying question." (Tr. 234, lines 14–17).

After the State rested, defense counsel moved for a directed verdict and renewed his *Lyle* objection to the prior bad act evidence. (Tr. 242, lines 119). He also renewed his objection to the admissibility of the video and all other motions and objections. (Tr. 244, lines 1–3). Specifically as to the first-degree CSC charge, he moved for a directed verdict based on the State's failure to provide any evidence of penetration. (Tr. 244, line 3–Tr. 245, line 3). The State referred to *State v. Mathis*, 287 S.C. 589, 340 S.E.2d 538 (1986), for the proposition that any evidence of pain is sufficient to establish penetration. (Tr. 246, lines 1–6). However, after taking the matter under advisement during the lunch break, the trial judge ruled that there was not enough evidence, simply based on Victim saying it hurt, to rise to the level of the elements of the first-degree CSC charge. (Tr. 253, line 16–Tr. 254, line 2). She pointed out the factual distinction between *Mathis* and the case at hand, where the child in *Mathis* said she could not remember when asked if there was any type of penetration whereas here Victim said in the

forensic interview that there was no penetration. (Tr. 258, line 22–Tr. 259, line 5). The trial judge granted the directed verdict motion and did not send the first-degree CSC charge to the jury. (Tr. 259, lines 5–7).

Ultimately, the jury found Appellant guilty of the remaining third-degree CSC charge, and Judge Mullen sentenced him to fifteen years' imprisonment with credit for time served. (Tr. 306, 316).

ARGUMENT

I.

The trial court properly admitted the video recording of Victim's forensic interview because it met the requirements of section 17-23-175 of the South Carolina Code that it demonstrate particularized guarantees of trustworthiness. Specifically, it was not unreliable or untrustworthy and did not contain leading and suggestive questions.

Appellant argues the trial court erred in admitting the forensic interview video, claiming it was not sufficiently reliable or trustworthy due to alleged inconsistent statements by Victim made after the interview, and leading questions by the interviewer. On the contrary, the trial judge properly concluded the interview was coherent, not suggestive in any way, and not leading, and she found Victim was not confused and gave a good recitation of what had occurred. There was evidence in the record to support these conclusions; therefore, the trial judge did not abuse her discretion and there was no error. The trial judge based her ruling admitting the video recording on the statutory requirements under S.C. Code Ann. § 17-23-175(B), and this Court should affirm.

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). This Court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000) (citing *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) (appellate courts are bound by the trial court's fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law)).

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. Kromah*, 401 S.C. 340, 349,

737 S.E.2d 490, 494–95 (2013); *see also State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. *Kromah*, 401 S.C. at 349, 737 S.E.2d at 495 (2000).

Section 17-23-175 provides:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
>
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175(A) (2014). The statute provides factors for the trial court to consider in determining whether sufficient guarantees of trustworthiness are present:

> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> (1) whether the statement was elicited by leading questions;
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
> (3) whether the statement represents a detailed account of the alleged offense;
> (4) whether the statement has internal coherence; and
> (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17-23-175(B) (2014). The trial court here considered the above factors and determined the video was admissible.

In making her ruling, the trial judge specifically stated: "I can tell you having viewed the video I think it is definitely coherent and I think it is fine. I don't see anything suggestive in any way. I did not find it leading. I think that she did, which is a common technique is that when the child testified to something she just repeated it to say is this what you said and are you sure and is this it? And I thought the child in it was certainly not confused in any way and gave a good recitation of what had occurred and I don't think it was leading . . . ." (Tr. 74, line 18–Tr. 75, line 2).

A review of the video demonstrates the interviewer allowed Victim to direct where the interview went throughout the majority of the interview. She did not ask leading questions, but instead asked questions designed to allow the child to answer and explain. She consistently repeated statements back to the child for clarification. The video was internally consistent and coherent.

Victim provided a detailed account of the abuse. She said it happened at the first house she lived in with Appellant (Hunter's Ridge) and had started happening again at the last house she lived in with him (Reed Street). She indicated Appellant rubbed her "butt" with his "thing" and wiped her and the bed off with a cold rag afterward. She indicated that Appellant would then kiss her on the cheek and tell her not to tell anyone. Victim explained it happened in the Reed Street house while her brother was in the room and her mother was asleep in her own room. She indicated the abuse occurred more than one time. She did not give inconsistent or incoherent accounts of the abuse during the course of the interview. Victim then testified very similarly at trial, except for the fact that she stated it hurt or "hurted" when he rubbed her "butt." (State's Exhibit 3, Video of Interview; Tr. 107, lines 7–17; Tr. 111, lines 20–22).

Appellant argues that the videotape lacks particularized guarantees of trustworthiness. He claims the inconsistent statements of the victim—not mentioning pain at the interview versus telling the solicitor and victim advocate it "hurted"—make the interview itself unreliable and untrustworthy. This claim is preposterous. The Statute contemplates consideration of "internal coherence," not consistency with statements made before or after the interview. Indeed, the trial judge appropriately focused on the forensic interview in question to determine whether "the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness." In regard to internal coherence, the trial court noted, "I can say this in my experience of having defended these cases and having sat on the bench for ten years I don't think I've ever seen a Lowcountry Children's Center disclosure on a video that mirrors as perfect to what the child testifies on the stand. I don't think I've ever from my experience seen one that is identical. And quite frankly if I did I would question it. I would think that someone had been coached or something along those lines." (Tr. 78, line 21–Tr. 79, line 4).

First, the fact that Victim did not indicate during the forensic interview that the sexual abuse hurt does not in any way affect the guarantees of trustworthiness the trial judge found present and, thus, its admissibility. Second, to the extent Appellant is arguing any prejudice exists from the video being admitted, the first-degree CSC charge was dismissed following the grant of his directed verdict motion and, thus, any argument regarding penetration is moot. Finally, in regard to Appellant's argument that the judge erred in her assertion that defense counsel could use the video and Victim's inconsistent statements to impeach her, the complaint is specious. *See State v. Legg*, 416 S.C. 9, 15–16, 785 S.E.2d 369, 372 (2016) (noting that appellant was able to extensively cross-examine minor as to prior inconsistent statements given during the videotaped interview, thus strengthening his defense by impeaching the only witness of the alleged sexual abuse). Appellant focuses on the belief that the State should not have been

allowed to argue that part of the interview was reliable while also arguing that parts of the interview should be disregarded. Indeed, he argued at trial and reasserts in his brief that "they can either go forward with the video just on the CSC third degree (no penetration) or go forward on both accusations with no video." (Tr. 74, lines 1–5; App.Br.4). Yet in essence, this is exactly what Appellant got. He successfully argued and won his directed verdict motion as to the first-degree CSC charge. So the State was indeed limited to going forward with the video just on the third-degree CSC charge, which defense counsel indicated was exactly what he wanted. Accordingly, he may not now be heard to complain. *State v. Brown*, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) (holding where the defendant received the relief requested from the trial court, there is no issue for the appellate court to decide).

Nothing in the videotape indicates anything other than a properly conducted interview, and it contains proper guarantees of trustworthiness as found by the trial court. (State's Exhibit 3, Video of Interview). Any discrepancies between the interview and other disclosures by Victim could be, and were, brought out on cross-examination. Appellant's counsel asked Victim:

> [Defense counsel]: Now you said that you spoke with a woman at the Lowcountry Children's Center right and she asked you about all this stuff back then too?
>
> A. Yes.
>
> [Defense counsel]: And she also asked you if these things that [Appellant] was doing if they ever hurt or if anything ever went in your butt and you told her that it did not hurt right?
>
> [Solicitor]: Objection, Your Honor. May we approach?
>
> The Court: You may.
>
> Off the record bench conference held

[Defense counsel]: I'm sorry . . . . You said you do remember sitting down and talking with the woman from the Lowcountry Children's Center?

A. Yes.

[Defense counsel]: And you didn't tell her [then] any of these things hurt right? Do you remember?

A. No, I don't remember.

(Tr. 119, line 21–Tr. 120, line 14). Thus, the video was appropriately admitted, and Appellant was appropriately allowed to cross-examine Victim about the statements she made during, before, and after the recording was made.

In another line of attack on the video, Appellant also argues the interviewer asked leading or suggestive questions. Specifically, he claims Scott's question about spit was leading and called spit "the internal forensic interviewer term for semen."[5] (App.Br.5). Additionally, he claims Scott asked leading questions regarding threats made by Appellant.[6] Oddly, Appellant points out these two examples of leading questions but does not in any way explain why he believes they were leading or suggestive. As Scott explained on cross-examination, she

---

[5] Notably, Appellant offers no proof or foundation for this inflammatory comment other than his apparent disdain for the practice of forensic interviews. Our Supreme Court recognized section 17-23-175 as a valid legislative enactment in *State v. Whitner*, 399 S.C. 547, 559–60, 732 S.E.2d 861, 867 (2012) (finding admission of the forensic interview and mere foundational trial testimony of the interviewer served as a model of how the statute was designed to work). Although our Supreme Court has cautioned against forensic interviewers vouching for victims (*see State v. Kromah*, 401 S.C. 340, 358–60, 737 S.E.2d 490, 499–501 (2013)), it has never discounted the validity of the statute or the value of such interviews. *Cf. State v. Chavis*, 412 S.C. 101, 114, 771 S.E.2d 336, 342 (2015) (Toal, C.J., dissenting) ("In my opinion, forensic interviewing [has] an important role to play in these cases, not just because of the sensitive subject matter and relative immaturity of the victims, but because children often communicate differently than adults.").

[6] While Appellant raised the issue of the question regarding spit at the trial court, he did not raise the threat question. Thus, the issue of whether the question regarding threats was leading is not properly preserved for this Court's review. *See State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

considered the question about "spit" a clarifying question. (Tr. 234, lines 14–17). The questions regarding threats were also clarifying questions after Victim had told Scott Appellant told her not to tell. Scott's follow-up questions involved asking if he said who not to tell and whether he said he would do something to her if she did tell, to which Victim responded that he said he would make her read. Scott then asked Victim if she knew what a threat was, to which Victim responded that she did not. At that point, based on Victim's answer, Scott asked whether Appellant ever said he would hurt her or her mom. Victim answered that he did not; he only told her he would make her read. Even if this Court found the questions to be leading, the answers to those questions demonstrated Victim was not "led" to give a particular answer; therefore, Appellant could not have suffered any prejudice.

Based on the totality of the circumstances surrounding the video, the trial judge properly found it contained the requisite particularized guarantees of trustworthiness and properly allowed it to be admitted into evidence. She did not abuse her discretion in her finding because the video provides ample support for the finding. As a result, the interview complied with the factors the court could consider under section 17-23-175(B)(2). Accordingly, the trial court did not err in admitting the video of the interview conducted with the child victim under section 17-23-175 of the South Carolina Code.

II.

The trial court properly allowed testimony of prior bad acts by Appellant because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

Appellant argues the trial court erred in admitting evidence of prior bad acts under *State v. Lyle*[7], claiming the similarities between the prior acts and the allegations in the current case did not establish a common scheme or plan. He argues Victim's testimony regarding the prior bad acts did not fit the common scheme or plan exception to Rule 404(b). On the contrary, the trial court properly considered the evidence and allowed the evidence of Victim's sexual abuse by Appellant as part of a common scheme or plan based on the similarities to the acts charged. This Court should affirm its decision.

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) the existence of a common scheme or plan; or (5) identity).

The trial judge must 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*,

[7] 125 S.C. 406, 118 S.E.2d 803 (1923).

332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, the Supreme 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 433–34, 683 S.E.2d at 277–78 (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 n.5 (emphasis added).

After determining the prior bad act evidence falls within a permissible exception of Rule 404(b), SCRE, the trial judge must weigh the probative value of the evidence against its prejudicial effect. *State v. Mathis*, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278. 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." *Mathis*, 359 S.C. at 463, 597 S.E.2d at 879. "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)).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial court abused its discretion. *Wilson*, 345 S.C. at 6, 545 S.E.2d 829. "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). Furthermore, in reviewing such a ruling, the trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. *State v. Lyles*, 379 S.C. 328, 339–40, 665 S.E.2d 201, 207 (Ct. App. 2008).

In a criminal case, evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction. *State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008) (citing *State v. Weaverling*, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999)). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24,

of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). In *Fletcher*, the Court found clear and convincing evidence did not exist when no testimony named Fletcher as the person who handcuffed the victim or placed him in the attic. *Id.*

Prior to trial, the State moved to admit the testimony of Victim regarding prior bad acts of sexual abuse by Appellant. Victim testified Appellant was the actor in the prior bad acts as well as in the abuse that was the subject of the charges for which he was on trial. She was a prepubescent female during both. Both happened at night while people were sleeping near her. Both involved anal contact in the spoon position. Both ended with Appellant wiping her off and telling her not to tell. The similarities the trial judge noted here were: "he entered the bedroom, how the sexual assault occurred, that he took off her clothing in both of them, that following it he wiped her and himself and the bed and told her not to tell." (Tr. 71, lines 6–10). She also considered the *Wallace* factors: the defendant's relationship to the victim, place where the abuse occurred and where other family members were at the time, and admonishment not to tell. (Tr. 71, lines 11–18). She found, as the person judging the credibility and where the victim's testimony was proved by clear and convincing evidence: "I do believe it by clearly and convincing evidence that she was assaulted at both places and by him. And respectfully I am going to allow the *Lyle* evidence." (Tr. 71, lines 19–25). She later added to her ruling and made a finding that the evidence was more probative than prejudicial. (Tr. 81, lines 2–15).

Victim's testimony regarding the prior bad acts was sufficiently similar to the testimony about the current charges to be admissible. The only dissimilarities were where the abuse

occurred: different addresses and different bedrooms. The similarities in this case certainly outweigh the slight difference of where the abuse occurred.

Appellant argues the major differences that make the cases too dissimilar to be admissible are that the prior bad acts that took place at Hunter's Ridge involved Appellant going into Victim's room and taking her from the top bunk while her brother slept on the bottom bunk and into the mother's bedroom whereas the incidents at Reed Street occurred in the same room with Victim's brother in his bed while her mother was in "the next room."[8] He also argues when writing about how the abuse happened at the Reed Street house, "*The minor could not even remember if [A]ppellant closed the door before molesting her.*" (App.Br.13). However, during the *in camera* testimony during pretrial motions, defense counsel asked whether Appellant closed the door at either of the two houses where he sexually abused her, and Victim answered that she did not remember. Thus, if he is attempting to argue the "difference" is that she did remember at one house but not the other, this is simply not true.

Here, the State provided direct evidence through Victim's own testimony that Appellant rubbed his penis on her "butt" during the prior incident, did it at night while her mother was either sleeping or not home, wiped her and the bed off with a cold rag afterward, and told her not to tell. The trial judge found Victim's testimony clear and convincing, noted the similarities, and correctly admitted the *Lyle* evidence based on the similarities outweighing the dissimilarities.

---

[8] Appellant uses the phrase "next room" twice. (App.Br.13). This seems to imply the room was next to, or beside, Victim's bedroom. However, the record indicates the mother's bedroom was actually across the hall from Victim's—not directly across but a short distance down the hall past the bathroom. (Tr. 56, line 21–Tr. 57, line 8; 110, lines 17–25).

CONCLUSION

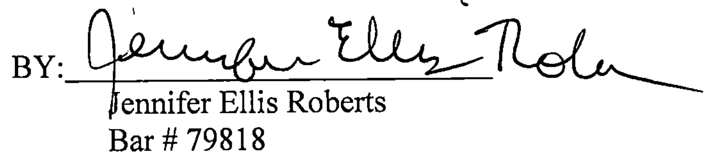
Because the trial judge did not abuse her discretion in admitting the forensic interview video and the prior bad act evidence, the State respectfully submits that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 5, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of General Sessions

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-001086

THE STATE,

Respondent,

v.

STANLEY MILLER,

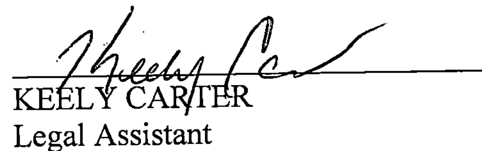
Appellant.

PROOF OF SERVICE

I, Keely Carter, 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:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 5th day of July, 2017.



KEELY CARTER
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

July 5, 2017

RECEIVED
JUL 05 2017
SC Court of Appeals

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Stanley Miller
Appellate Case No. 2016-001086

Dear Mr. Dudek,

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/kc
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services