STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case Tracking No. 2017-001796

The State, Respondent,

vs.

Guadalupe Guzman Morales, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in admitting the testimony of the second victim pursuant to Rule 404(b), SCRE. Further, Appellant's trial counsel acknowledged the similarities and waived any issue regarding Rule 404(b). Finally, neither issue raised by Appellant in his brief is preserved for review on appeal. (Appellant's Issues I and II).

STATEMENT OF THE CASE

In October 2002, Appellant was arrested for two counts of criminal sexual conduct (CSC) with a minor second degree and one count of attempted CSC with a minor second degree. He was subsequently indicted in 2003 for the charges, but a fire in the Lancaster Courthouse in 2008 destroyed the indictments. (5/26T.6-7; R. 6-7) Appellant was re-indicted in 2016 on charges of CSC with a minor first degree, CSC with a minor second degree, and assault with intent to commit CSC with a minor second degree. (True-billed Indictments; R. 402-407).

After two pretrial hearings, Appellant proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury returned verdicts of guilty on all charges. (8/21T.293; R.387). Judge Henderson sentenced Appellant to thirty years imprisonment for CSC with a minor first degree; ten years imprisonment, to be served consecutively, for CSC with a minor second degree; and ten years imprisonment, to be served concurrently, for assault with intent to commit CSC with a minor second degree—totaling forty years in prison. (Sentencing Sheets; R. 408-410).

STATEMENT OF FACTS

When the victim was younger[1], she lived with her mother, Appellant, and two younger sisters. (8/21T.43-44; R. 137-138). The victim's sisters were about two and five years younger than her. While she lived with Appellant, the victim believed he was her biological father, but found out later he was not. (8/21T.46; R.140).

Appellant began sexually touching the victim when she was just four years old. She and her family lived in a different trailer. The victim and her middle sister were jumping on the bed. Appellant flipped her onto her back and pulled her to the edge of the bed. He spread her legs and rubbed his groin against hers on the outside of her clothing. (8/21T.49-50; R. 143-144). When the victim turned around seven, Appellant began digitally penetrating her. Most of the time it occurred at home, but also in the car or at the river. The victim's mom was rarely home when it occurred or occasionally would be in the shower. (8/21T.50-52; R. 144-146).

The abuse continued to escalate to Appellant raping the victim. When she was eleven years old the family planned to go to Carowinds for her birthday. The family was getting ready and her mom was in the shower when Appellant, who the victim believed was her dad, told her to get on the bed with him if she wanted to go to Carowinds. She tried to resist, but he insisted. Appellant then raped the eleven year old victim. (8/21T.47-48; R. 141-142). Later that summer, the victim's mom and sisters went to the store. The victim was in trouble and confined to her room. Appellant entered and again raped the eleven year old girl. She realized the window was open and tried to scream, but Appellant put his hand over her mouth. (8/21T.54-55; R. 148-149). The victim never told anyone because she was scared, did not want to be called a liar, and did not want to be judged. (8/21T.56; R.150).

[1] At the time of trial, the victim was twenty-eight years old. (8/21T.42; R. 136).

After the victim was kicked out of the house with her mother and Appellant, she went to live with her Uncle Jimmy and his girlfriend Michelle. (8/21T.43; 57; R. 137; 151). Michelle walked the victim to the bus stop for school. One day the victim was being very quiet or distant. Michelle asked if the victim was doing okay. (8/21T.57; 166-167; R.151; 260-261). The victim disclosed the years of abuse by Appellant.

Appellant also sexually abused the middle sister, the second victim. She believed Appellant was her father at the time of the abuse, but was unsure of the truth as she got older. The abuse began when she was about three years old. Appellant would have her sit on his lap and would touch her under her underwear. The abuse occurred in the home. (8/21T.175-176; R.269-270). When the second victim was eight, Appellant saw that she could not sleep and had her get in the bed with him. Her mom was not home at the time. Appellant lay in the bed behind the second victim and pulled down her pants and underwear. She felt his penis touch her buttocks. (8/21T.178; R. 272). The second victim did not tell anyone when the abuse was occurring, but later told her grandmother about the abuse after her older sister disclosed to Michelle and their grandmother. (8/21T.178; R.272).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

I. The trial court did not err in admitting the testimony of the second victim pursuant to Rule 404(b), SCRE. Further, Appellant's trial counsel acknowledged the similarities and waived any issue regarding Rule 404(b). Finally, neither issue raised by Appellant in his brief is preserved for review on appeal. (Appellant's Issues I and II).

Appellant contends the trial court erred in allowing the testimony of a second victim pursuant to Rule 404(b), SCRE, and finding the testimony demonstrated a common scheme or plan. While Appellant's trial counsel initially objected to the testimony as not meeting 404(b) at a pre-trial hearing, once testimony was presented at trial he waived his objection and admitted the testimony was similar. Instead he argued impermissible bolstering based on the similarity of the testimony. As a result, any issue regarding application of 404(b) is waived and not preserved for review on appeal. Additionally, he never maintained State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), should be overruled or was not the applicable case law. Therefore, the second issue presented by Appellant is not preserved for review on appeal. Finally, the testimony was properly allowed under Rule 404(b) because it demonstrated a common scheme or plan and the trial court properly considered the testimony pursuant to Wallace.

Waiver/Preservation

Appellant's trial counsel waived any issue regarding the admission of the second victim's testimony pursuant to Rule 404(b). While counsel did raise an objection to the second victim testifying at a pre-trial hearing, arguing the testimony was inadmissible under Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), he waived this ruling at trial.

Initially, the pre-trial hearing regarding the testimony did not result in a final ruling. Specifically, the trial court stated: "I'm prepared to issue a conditional ruling" and later

reiterated: "Again it is a conditional ruling . . . .". (7/26T. 38; R. 113). He ended his ruling by stating: "So -- that's not a ruling that's just, you know, and inclination . . . an inclination on my part at this point in time so - - but I am conditionally riling with regards to the testimony of [the second victim], though." (7/26T.38-39; R. 113-114). Because this was an in limine ruling, it was not a final ruling by the trial court. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."); State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) ("Generally, a motion in limine is not a final determination; a contemporaneous objection must be made when the evidence is introduced."); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.").

Additionally, once at trial, Appellant's trial counsel acknowledged the similarities of the testimony by agreeing the witnesses are saying the "same thing" and that the testimony established a "conspiracy" or a "pattern." Essentially, he admitted the second victim's testimony was sufficiently similar to the victim's testimony to establish a common scheme or plan.

> Your Honor, since the ruling that you made in Chesterfield on a temporary basis. We heard some testimony. We haven't heard Lisa's testimony but we did hear it there that day. It appears to me that it is becoming a little bit more clear as to where the conspiracy is, if that's what you want to call it; **the pattern. And I think that now I'm seeing a pattern** of – I'm seeing a pattern of conspiracy.
>
> . . . .
>
> But the consortium of witnesses **that are saying the same thing for the same reason**. . . . But now after hearing Jessica's testimony it appears to be clear that's what it is. So we think that

> the testimony of Lisa is -- will be improper bolstering of Jessica's testimony.

(8/21T.119; R. 213) (emphasis added). As a result of his acknowledgement regarding the similarities in the testimony, he altered his objection from one based on Lyle and 404(b) to one based on improper bolstering. Accordingly, any issue regarding Lyle and 404(b) was waived and is not preserved for review on appeal. See State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (where counsel acquiesces in the judge's ruling and makes no other objections regarding the issue, the issue is not preserve for appeal); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (an issue conceded at trial cannot be argued on appeal); Richland Cty. v. Carolina Chloride, Inc., 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct. App. 2009) (an issue expressly waived during trial is not preserved for appellate review), aff'd in part, rev'd in part on other grounds, 394 S.C. 154, 714 S.E.2d 869 (2011).

Further, as his actual objection to the testimony at trial was based on improper bolstering, Appellant cannot now raise a different issue on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Finally, Appellant never asked the trial judge to rule Wallace inapplicable, nor did he make any assertion the trial court was applying incorrect law when the trial court presented its analysis of the similarities versus the dissimilarities. (8/21T.120; R. 214). As a result, Appellant's Issue II is not preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Merits

On the merits, the trial court properly admitted the testimony of the second victim in order to establish a common scheme or plan and this common scheme or plan was exemplified by looking at the similarities between the victim's testimony and that of the second victim. Properly applying the Supreme Court precedent of Wallace, the trial court considered the similarities and dissimilarities in testimony and found that a common scheme or plan was established.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

"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. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-278. The South Carolina Supreme Court provided some factors to consider including: (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. Id. at 433-434, 683 S.E.2d at 278. Common scheme or plan evidence which is logically relevant to the charged offense should not 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)).

This Court explained the common scheme or plan exception:

> Where such a plan exists, the charged and uncharged acts represent individual achievements of the purposes for which the plan was established. See 2 Wigmore, § 304 (stating that where separate offenses are sufficiently similar, there is an inference that they are manifestations of a common scheme or plan). Accordingly, the evidence in such cases speaks to the existence of the defendant's plan, not to the defendant's character. This is so because the jury is not asked to draw an inference that the prior bad acts would evince the defendant's propensity to commit the charged offenses; instead, the jury is asked to infer that the defendant developed a criminal scheme and employed that scheme as probative evidence that the charged acts occurred.

State v. Tutton, 354 S.C. 319, 330-31, 580 S.E.2d 186, 192 (Ct. App. 2003).

In analyzing the factors articulated in Wallace and comparing the similarities and dissimilarities in this case, the trial court properly concluded a common scheme or plan existed. As discussed above, both victims believed Appellant was their dad at the time of the abuse. Appellant took advantage of this relationship for his sexual gratification. They both indicated the abuse began when they were very young, three and four years old. They both testified Appellant began by touching them under their clothes. Both victims indicated the abuse generally happened at home when the mom was either not home or occupied and their sisters were not in the same room. The extent of the abuse against the victim—which included intercourse—was worse than the abuse against the second victim—which only included Appellant placing his penis against her buttocks. However, this is likely only because of the disclosure by the victim which ended the opportunity of Appellant to do more to the second victim. As the trial court found, and Appellant's counsel conceded, the testimony presented by both victims indicated a clear patter, a common scheme or plan by Appellant to use his position as their alleged father to sexually abuse them while their mother was either out of the home or occupied.

Cases from both this Court and the South Carolina Supreme Court support the trial court's decision. The Supreme Court in State v. McClellan found prior bad acts committed by the defendant against two older daughters admissible under the common scheme or plan exception in a prosecution for similar acts against the youngest daughter because the "experiences of each daughter parallel that of her sisters . . ." State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Specifically, the Court noted: "[T]he initial attack occurred around age twelve; Appellant entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to "Honor thy Father"]." Id.[2]

In State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), the defendant was charged with molesting his granddaughter. Two other witnesses testified that seven or eight years beforehand, they were molested by the defendant. This Court found the testimony admissible, noting the following:

> . . . All three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification. The prior acts were **sufficiently similar** to the charged offense to be admissible.

Blanton, 316 S.C. at 32, 446 S.E.2d at 439 (emphasis added).

In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), the victim was a foster child in Hallman's home. The trial court allowed testimony of three other women who testified they were abused while they were foster children in Hallman's home. The victim and two other

[2] It should be noted all three of these cases occurred prior to this Court's issuance of Wallace, and all three relied on the significant similarities and the "parallel" of events to find a common scheme or plan.

women each testified that the abuse began shortly after they arrived at Hallman's farm, at either six or seven years of age, and continued while they stayed at the home. In each case, the abuse started with Hallman rubbing the victims on the outside of their clothing and then proceeded to digital penetration. In each case, they were also made to rub Hallman's penis. The events in each case took place in the bedroom, barn or on the tractor, and most frequently during summer. The victim was also abused in the bathroom of the residence when Hallman would remove her clothes and stick his penis between her legs. The remaining victim from prior acts arrived at the farm at four years old and was made to rub his penis four times inside the house. Id., 298 S.C. at 174-175, 379 S.E.2d at 117.

In finding the prior bad acts admissible, the Supreme Court noted the following:

> The prior bad acts here occurred while each of the young women was a foster child to appellant and of **similar** age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of the abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the **same manner** under **similar circumstances**.

Id., 298 S.C. at 175, 379 S.E.2d at 117 (emphasis added). As in McClellan, Blanton, and Hallman, the testimony in this case established the requisite link and commonality to be admissible as a common scheme or plan.

Appellant also argues this Court should overrule the Supreme Court's precedent of Wallace. The South Carolina Supreme Court has stated: "it is incumbent upon the court of appeals to apply this Court's precedent." State v. Phillips, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). This Court has repeatedly acknowledged the same: "this court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court." State v. Cheeks, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012)

(citing S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.")); see also, McKenney v. Jack Eckerd Co., 299 S.C. 523, 386 S.E.2d 263 (Ct. App. 1989), rev'd on other grounds, 304 S.C. 21, 402 S.E.2d 887 (1991) (Court of Appeals has no authority to overrule or modify previous decisions of Supreme Court); Shea v. South Carolina Department of Mental Retardation, 279 S.C. 604, 608, 310 S.E.2d 819, 821 (Ct. App. 1983), overruled on other grounds, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) ("Therefore, if the judicial system is to operate efficiently, this court must be bound by decisions of the Supreme Court."). Accordingly, this Court should apply the precedent of Wallace until a majority[3] of the Supreme Court overrules its prior decision.[4]

[3] It is important to note, only two Justices of the Supreme Court indicated their belief Wallace should be overruled and the Court "restore" the common scheme or plan exception as it existed under Lyle. A majority of the Court has not expressed this opinion.

[4] Additionally, the issue of whether to overrule Wallace has been briefed to the South Carolina Supreme Court in State v. Damyon Cotton, Appellate Case No. 2017-002402 (See https://ctrack.sccourts.org/public/caseView.do?csIID=66278).

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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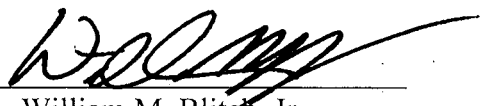
BY: 
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CERTIFICATE OF COUNSEL

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

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