

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Perry M. Buckner, Circuit Court Judge

Case No. 2011-GS-32-2356
Case No. 2011-GS-32-2357
Appellate Case No. 2012-212998

State of South Carolina,

Respondent

v.

Glenn Edwin Vanover,

Appellant

FINAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in admitting testimony concerning alleged prior acts of the defendant toward the mother of the alleged victim?

ARGUMENT

THE COURT ERRED IN ADMITTING TESTIMONY CONCERNING ALLEGED PRIOR ACTS OF THE DEFENDANT TOWARD THE MOTHER OF THE ALLEGED VICTIM.

The state contends the issue raised in this appeal fails, for procedural and substantive reasons. Those contentions are addressed in turn, below.

- A. The issue and arguments raised in appellant's brief are properly preserved for appellate review.
1. The court ruled on the defense's objection on the grounds asserted by the defense.

This appeal challenges the court's admission, over a defense objection, of certain testimony of the defendant's daughter, the alleged victim. The state contends the court did not rule on the objection on the grounds asserted by the defense. This contention is premised on the state's mistaken interpretation of the court's ruling and subsequent comments. The relevant passage of testimony is as follows:

Q. And why did you hold it in so long?

A. I seen the way he treated my mom and how he hit her.

MR. WILLIAMS: Objection, Your Honor.

THE COURT: Grounds?

MR. WILLIAMS: It's prejudicial and it has nothing to do with the charge.

THE COURT: I believe she can testify to what she said, counsel.

MR. WILLIAMS: All right, sir.

THE COURT: Proceed.

R. p. 25, lines 4-13.

The Supreme Court long ago articulated its issue preservation standard, as follows: “all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court.” *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). Simply put, an objection is preserved if it was raised to and ruled upon by the court. *State v. Frazier*, 401 S.C. 224, 233 n. 2, 736 S.E.2d 301, 305 n.2 (Ct. App. 2013). The objection of the defense and the ruling of the trial court meet this requirement.

The court’s statement – “I believe she can testify to what she said” – was the equivalent of its having ruled “objection overruled.” Following its ruling, the court instructed the prosecutor to “proceed.” Nothing more was necessary to meet the requirement that the objection be raised to and ruled upon by the court. The issue is preserved.

The state contends that a later statement by the court indicates the ruling was actually on hearsay grounds, not the grounds asserted by the defense. However, a careful reading of the court’s ruling and its later comment refutes this contention. After the court overruled the defense objection and the prosecution had resumed its questioning of the witness, the court interrupted and had the following exchange with the witness:

THE COURT: Tell us just what you said and not what someone else said.
Do you understand?

THE WITNESS: Yes.

THE COURT: Very well. Proceed.

R. p. 25, lines 16-20. It is disingenuous to contend that this admonition to the witness indicates the court's earlier ruling was on hearsay grounds. The court's earlier ruling was that the witness could testify to what "she" – the witness – had said, not that the witness could testify to what "she" – some other individual – had said. If the court's ruling had been to allow the testimony on hearsay grounds, as the state argues, the court would not have interrupted the continued questioning with an admonition *not* to give hearsay testimony. The state's interpretation of the court's comment is mistaken. The court ruled upon the actual objection made by the defense, and the issue is preserved for appellate review.

2. Appellant's arguments based on Rule 404, SCRE, are preserved.

The state contends appellant's arguments under Rules 404(a) and 404(b) of the South Carolina Rules of Evidence are not preserved. To the contrary, the stated grounds – that the testimony was prejudicial and had nothing to do with the charge – were sufficient, in the context of the testimony to which the objection was interposed, to preserve all of the arguments appellant asserts under Rules 401 through 404 of the relevance rules. *See* Rule 103(a)(1), SCRE (requiring an evidentiary objection to state the specific ground of objection, "if the specific ground was not apparent from the context"). A party is not required to cite the evidence rule or use special words in the objection, where the context reveals the basis for the objection. *See State v. Foster*, 354 S.C. 614, 620 n.4, 582 S.E.2d 426, 429 n.4 (2003) (objection to admission of prior consistent statement because it "would add to [the witness's] credibility" was sufficient to preserve issue of admissibility under Rule 801(d)(1)(B), because the danger of erroneously admitting such a statement under that rule is its bolstering effect).

In this case, the challenged testimony was the witness's statement that she had seen the way the defendant treated her mom and how he hit her, a direct comment on the defendant's character and alleged prior bad acts. The character and prior bad acts rules, Rules 404(a) and (b), are part of Article IV of the South Carolina Rules of Evidence, entitled "Relevancy and Its Limits." In the context of the witness's statement about extraneous acts of the defendant unrelated to the instant charge, the objection to improper character and prior acts evidence was apparent and those grounds were encompassed by the defense's objection on the basis that it was prejudicial and "it has nothing to do with the charge."

In *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2009), the Supreme Court found that a vagueness challenge to a statute on appeal was preserved by an argument in the lower court that did not invoke the "void for vagueness" doctrine. In the lower court, the defense argued the "overbreadth" doctrine, which the Supreme Court held was inapplicable. However, the Court found the vagueness objection was "incorporated" in counsel's reference to the Fourth and Fourteenth amendments and counsel's other statements that "necessarily included a due process challenge." See *Neuman*, 384 S.C. at 401-02, 683 S.E.2d at 270-71. Similarly, in this case, the defense's stated objection was sufficient to incorporate arguments under Rules 401, 402, 403, and 404, and all the arguments based on those rules are preserved.

B. Substantively, the challenged testimony should have been excluded under Rules 401-404, SCRE, and the error in admitting the testimony was not harmless.

In the remaining sections of the state's brief (Sections B-E), it contends the challenged testimony was admissible under Rules 401, 402, 403, and 404, but that if error was committed, it was harmless. The state contends the evidence was relevant and

admissible under Rules 401 and 402, because it tended to show why the alleged victim delayed in reporting the alleged abuse. The state relies on two decisions from other states – a Minnesota decision of a different issue than the issue presented in this case, and a New Hampshire decision in which prior acts evidence was inadmissible to show delayed disclosure. In *State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984), the court upheld admission of expert testimony concerning the traits and characteristics of child victims of sexual abuse in order to explain the conduct and demeanor of the victim in that case and, in particular, her delayed disclosure. The court was addressing the behavior of the child victim, not testimony concerning other alleged acts of the defendant toward a different individual. In *State v. Cook*, 158 N.H. 708, 714-15, 972 A.2d 1059, 1064-65 (2009), evidence of prior contact between the defendant and the victim was deemed irrelevant and inadmissible to show delayed disclosure, and admission of the evidence was not harmless.

It is not enough for the state simply to argue this testimony was admissible under Rules 401 and 402. Because the testimony pertained to other alleged bad acts of the defendant, the analysis is not complete without consideration of Rule 404(b). Nowhere in the state's brief does it address the five exceptions of Rule 404(b) or attempt to articulate why the challenged testimony was admissible under one of those exceptions. As is fully argued in appellant's principal brief, pp. 4-6, none of the exceptions are applicable and the evidence was inadmissible.

The state claims this evidence was not admitted as propensity evidence or character evidence or to suggest the defendant was a bad person. Regardless of the claimed purpose for which the state elicited this testimony, it was propensity and

character evidence nonetheless and it did suggest to the jury that he was a bad person, exactly what Rule 404 prohibits unless specific requirements are met. *See* Rule 404(a), (b), SCRE. This evidence gave the jury improper information concerning other alleged crimes, wrongs, or bad acts of the defendant toward a different individual. In a case where the only evidence was the competing testimony of the defendant and his daughter, it allowed the jury to rely on evidence of extraneous acts and to convict not on the basis of the alleged conduct for which the defendant was on trial but on the basis of a conclusion that, if the defendant would hit his wife, he would also commit the alleged sexual misconduct.

Contrary to the state's contention, this evidence was not necessary to establish the reason for the daughter's delay in disclosure and was therefore of minimal probative value. Elsewhere in her testimony she explained her delay, without reference to other alleged misconduct. She testified her father told her she would be in trouble, and she was scared and afraid. R. pp. 20, 56, 57. The prejudice resulting from the additional injection of a reference to the defendant's other alleged bad acts far outweighed the probative value of the challenged testimony. *See* Rule 403, SCRE. It allowed the jury to convict not because the defendant was actually guilty but because he was a bad person.


The error was not harmless. Appellant's principal brief, pp. 8-9, points out the inconclusive nature of the case against the defendant, the evidence of the daughter's motive to fabricate the charges, and the inconsistencies in her testimony. The state does not address these weaknesses in its case, instead asserting that the comment was made only once and reasserting that the testimony gave the jury an explanation for why the daughter waited so long to disclose. The purpose of the evidence – explaining delayed

disclosure – is irrelevant to the harmless error analysis. And the fact that the statement was made only once is not dispositive. Indeed, the single reference that injected extraneous and improper propensity and character evidence into the jury’s considerations very likely tipped the scales toward a verdict of guilt, where the state’s evidence did not conclusively prove the defendant’s guilt and another rational conclusion could have been reached by the jury. The error was not harmless, and this Court should reverse.

CONCLUSION

For the foregoing reasons and for those articulated in the appellant’s principal brief, this Court should reverse and remand this case to the lower court for a new trial.

Respectfully submitted,




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CERTIFICATE

Counsel hereby certifies that this final reply brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the appellant's final brief and final reply brief comply with the Order of the Supreme Court of South Carolina entitled *Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, filed August 13, 2007.



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PROOF OF SERVICE

I certify that I have served the record on appeal, the final brief of appellant, and the final reply brief of appellant, by mail, to respondent's attorney, Assistant Attorney General Julie Kate Keeney, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, on August 23, 2013.



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