

**THE STATE OF SOUTH CAROLINA
Court of Appeals**

**APPEAL FROM LANCASTER COUNTY
Court of General Sessions**

Honorable Judge Brooks P. Goldsmith

**Appellate Case No. 2012-209191
Case No. 2008-GS-484 and 2008-GS-29-206**

The State Respondent,

v.

Joseph Bradley Loftin,Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities..... iii

Arguments..... 1

1. The Trial Court erred in ruling that the Chester County incident Possessed a sufficiently close amount of similarity to the remaining incidents at the Brady House to constitute common scheme..... 1

2. The Trial Court erred in not allowing Petitioner to inquire about the Complainant’s prior sexual activity after the State introduced a pregnancy test and medical testimony 3

+ a) This error was preserved..... 5

Conclusion..... 8

CASES

State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911)..... 1

State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955)..... 1

State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999)..... 1, 2

State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008)..... 1

State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009)..... 1

State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009)..... 1, 2

State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011))..... 1, 2

State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003)..... 1, 2

Iron, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)..... 2

State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005)..... 3

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001)..... 3, 4, 5

State v. Muller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995)..... 3, 5

State v. Tennant, 383 S.C. 245, 678 S.E.2d 812 (Ct. App. 2009)..... 4

STATUTES AND OTHER AUTHORITIES

S.C. Code Ann. § 16-3-659.1 5

ARGUMENT

I. The Trial Court erred in ruling that the Chester County incident possessed a sufficiently close amount of similarity to the remaining incidents at the Brady House to constitute common scheme.

The Respondent relies on several cases to support its position that the Chester County incident is sufficiently similar to constitute a common scheme (*see* Resp. Br. p. 9-12). The Petitioner notes, however, the several distinctions between the Respondent's legal authority and the facts and allegations set forth in the Petitioner's case. First, the Court in State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911), fails to give a substantive analysis explaining how the acts at issue were sufficiently similar. Moreover, the separate acts discussed in State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955), occurred less than two hours apart in time, and the Court again failed to give a substantive analysis of the similarities between the acts. Thirdly, unlike the allegations in the Petitioner's case, State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), involved an ongoing and consistent relationship between the Defendant and the Complainant, similar locations of where the abuse occurred, continuing use of coercion, and similar sexual acts. Finally, unlike Petitioner's case, the decisions in State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008) and State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009) involved patterns of escalating abuse that evolved over time. The alleged acts at issue in this case, however, are distinctly different acts that did not evolve into a pattern until after the Chester County incident.

The Petitioner contends that the analysis provided in State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009)(*aff'd by* State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011)) and State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), are more

closely aligned with the facts and testimony in this case. This Court in Fonseca found an earlier alleged act committed against the same Defendant and against the same Complainant to not be sufficiently similar to constitute a common scheme. Fonseca at 649, 681 S.E.2d at 6. Likewise, this Court found in Tutton insufficient similarities between alleged acts to constitute a common scheme. Tutton at 328, 580 S.E.2d at 191. Most importantly, this Court went on to point out that cases such as Weaverling “do not lower the bar for admissibility under Lyle simply because sexual crimes are involved.” Id.

Finally, the Petitioner finds it necessary to address the Respondent’s new claim that, regardless of common scheme, the evidence of the Chester County incident would have been admissible under *res gestae* theory, and the Respondent’s alternative position regarding harmless error. Resp. Br. p. 12-13.

The Supreme Court of South Carolina has addressed a Respondent’s duty to preserve arguments at the trial level. F’on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). Specifically the Court stated:

While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it. Id. at 421, 526 S.E.2d at 724.

Here, the Respondent failed to raise the theory of *res gestae* at trial, and this Court should accordingly not give weight to the argument now.

Additionally, this theory should be given no consideration as the Respondent cannot seem to determine whether the Chester County incident was “an integral part of the crime” under the theory of *res gestae* or “negligible” under a harmless error analysis. Resp. Br. p. 12-13.

Therefore, the Petitioner contends that the trial court erred in allowing any testimony regarding the Chester County incident, which caused significant prejudice to the Petitioner. As noted in the Petitioner’s initial brief, the Chester County incident was not sufficiently similar to the charged Brady House incidents so as to constitute a common scheme, and in any event, would not have adequate probative value so as to sufficiently outweigh the danger of unfair prejudice.

II. The Trial Court erred in not allowing Petitioner to inquire about the Complainant’s prior sexual activity after the State introduced a pregnancy test and medical testimony into evidence.

As an initial matter, the Petitioner contends that his objection has been preserved. “The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal.” State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005). Accordingly, if a party is ruled against in a motion in limine, he must generally raise the issue again during the trial to adequately preserve it. Id. “Nevertheless, the rule that an unpreserved issue will not be considered on appeal does have its exceptions.” Id. at 584, 611 S.E.2d at 282. These exceptions include futility. Id.

Moreover, an exception is warranted when a pre-trial ruling is indeed a final ruling. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Muller, 319

S.C. 266, 460 S.E.2d 409 (Ct. App. 1995). This Court in Muller found an issue to be preserved in a situation similar to the Petitioner in trial:

Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion *in limine*. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal. Muller at 268-69, 460 S.E.2d at 410.

Likewise, in Forrester, the Court found that because no evidence was taken in between a pre-trial ruling admitting evidence and that evidence's introduction into trial, a second objection was not required. Forrester at 642-43, 541 S.E.2d at 840. The Court found that the circumstances of the case had not changed between the trial court's initial ruling and the introduction of evidence, and therefore, the issue was properly preserved. Id.

The scenario presented in this case is somewhat unusual. It is common for evidence to be *excluded* in a motion in limine and natural for a contemporaneous objection to be made at that evidence's introduction. However, here, the pre-trial motion was regarding the scope of cross examination by a Defendant. Accordingly, it is not quite as apparent when a subsequent objection is appropriate. Indeed, this Court faced a similar situation and found the issue to be preserved in State v. Tennant, 383 S.C. 245, 678 S.E.2d 812 (Ct. App. 2009). There, a motion in limine regarding the scope of cross was denied. Id. at 258, 678 S.E.2d at 818-19. However, this Court addressed the issue on the merits even though the issue was not raised again during cross examination. Id. This Court, nonetheless, found no error on the merits. Id. However, the Supreme Court of South Carolina found the Defendant's claims to be meritorious, but without prejudice,

apparently finding adequate preservation. State v. Tennant, 394 S.C. 5, 714 S.E.2d 297 (2011).

The Petitioner adequately preserved his issue here. First, the Petitioner clearly argued in a pre-trial motion his intention to cross examine the Complainant regarding possible alternative explanations to explain the medical examination and the presence of a pregnancy test. (R. p.62-69). The Petitioner filed a written motion in accordance with S.C. Code Ann. § 16-3-659.1 and argued the point extensively as evidenced by the record. (Id.; Motion to Allow Evidence). Moreover, the trial judge was clear in his ruling that Petitioner would not be allowed to cross examine the Complainant regarding alternative explanations to the medical exam and presence of a pregnancy test, finding the subjects barred by S.C. Code Ann. § 16-3-659.1 and, in any case, not even reaching the low standard of relevance. Id.

Furthermore, similarly to Forrester and Mueller, the cross examination of the complainant occurred almost immediately after the trial court's ruling. In fact, there was only one witness in between the ruling and the testimony of the Complainant. (R. p. 62-69). Moreover, that intervening witness's testimony did not relate to this issue and consisted of a total of seventeen questions on the initial direct examination. Id. The substance of the testimony consisted of the witness testifying that she told a school official of the Complainant's disclosure. Id. It in no way affected the trial judge's ruling regarding Petitioner's motion to explore possible alternative explanations for the Complainant's medical examination and the Complainant's possession of a pregnancy test. Accordingly, the pre-trial motion was not a motion in limine, but a final ruling.

Moreover, even if it were not a final ruling, any subsequent objection would have been futile.

As to the merits, the Petitioner finds it necessary to address several points. First, to be clear, the Petitioner has not argued that the Complainant's subsequent pregnancy should have been a subject for cross examination. Rather, the Petitioner contends that the pregnancy itself gave the Petitioner a good faith basis for questioning the Complainant about any sexual activity she may have been engaged in before the medical examination or around the time she was in possession of the pregnancy test. Indeed, the pregnancy was close in time to the medical examination.¹ Moreover, the pregnancy was the result of a sexual relationship between the Complainant and a male friend with whom she had met without permission multiple times before the medical examination and around the time she was in possession of the pregnancy test.

Cross examination regarding her relationship with the male friend around this time would have been highly relevant as it would have provided an alternative explanation as to why the medical examination produced the results that it did and explained why the Complainant was in possession of a pregnancy test. The Petitioner was entitled to question the Complainant about these alternative explanations provided the questioning is not for the purpose of attacking the Complainant's morality. As has been stated in Petitioner's initial brief, an attack on morality was not the purpose. Rather, the purpose was to be able to provide an alternative reasoning as to the existence of certain pieces of material evidence in this factually unique case. When the Respondent's

¹ It appears from the Record that approximately two months had passed between the medical examination and the Complainant's pregnancy. (R. p. 54, line 14; R. p. 278, line 2).

motion in limine was denied, he was left to defend against material evidence such as an expert witness's opinion as to the physical condition of a young Complainant with no opportunity to confront, thus securing a conviction against him.

Accordingly, Petitioner's objection regarding the introduction of evidence for the purposes of cross-examination was properly preserved. Moreover, the substance of the proposed cross examination was not only relevant, but crucial to the Petitioner's right to cross examine the witnesses against him, to have a full defense, and to have a fair trial, as argued by the Petitioner at trial.

CONCLUSION

Giving the jury an alternative source for the State's evidence would have prevented the Petitioner from being identified as the only person that could have created that evidence. Because the trial court erred in prohibiting Petitioner from inquiring about the Complainant's sexual activities prior to the January 2008, disclosure, Petitioner's conviction should be reversed. Furthermore, because the trial court erred in ruling evidence of sexual conduct in a separate county admissible as a common scheme, Petitioner's conviction should be reversed.

Respectfully submitted,

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