STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2015-000312

THE STATE,

Respondent,

vs.

JERALD DENTON GASKINS, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

To the extent Appellant is challenging the solicitor's cross-examination of him about incriminating text messages he purportedly sent to the victim's family members prior to trial, that issue is not properly preserved for appellate review because Appellant conceded to the trial judge it was permissible for the solicitor to ask the questions about the text messages during trial and because defense counsel did not any seek additional relief after the trial judge sustained several of his objections to the questioning. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by permitting the solicitor to question Appellant about the text messages he allegedly sent because the solicitor had a good faith factual basis for asking the questions in light of the testimony presented during trial in regard to the text messages and the fact the solicitor was provided with a physical copy of the purported text messages just before trial.

STATEMENT OF THE CASE

In November of 2012, Appellant Jerald Denton Gaskins, Jr. was arrested following an investigation into an alleged sexual assault. In April of 2013, the Greenville County Grand Jury indicted Appellant for four counts of second-degree criminal sexual conduct with a minor along with two count of committing or attempting to commit a lewd act upon a child. On February 4, 2015, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable D. Garrison Hill, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In the spring of 2011, Appellant Jerald Denton Gaskins, Jr. and his wife at the time, Rachel Gaskins ("Rachel"), attended a horseshoe tournament at a home located in Travelers Rest, South Carolina. (R. p. 54; pp. 62-63; pp. 82-83; pp. 134-135). After the tournament, Appellant began regularly socializing with the family that lived at the home, including with a thirteen-year-old girl ("Victim") who was a part of that family. (R. pp. 64-66; pp. 82-83; pp. 135-136). Over the course of the next few months, Appellant developed a close friendship with Victim, and Victim began to regularly visit with Appellant and his family at different homes he lived in during that time period. (R. pp. 64-65; p. 98; p. 137; pp. 139-140; pp. 145-146; pp. 150-151). However, Victim's mother ("Mother") became uneasy when she found Victim in possession of a phone covertly provided to her by Appellant and when Appellant eventually began to act controlling with Victim, and she ended Victim's contact with Appellant as a result. (R. pp. 73-75; p. 227).

Subsequently, in November of 2012, Appellant's mother-in-law contacted Mother and provided her with information that made her become even more concerned about Victim and Appellant's relationship. (R. p. 75; pp. 87-88; pp. 156-157). In response, Mother and Victim's father confronted Victim about what had been revealed, and Victim initially denied anything inappropriate occurred between her and Appellant. (R. pp. 75-76). However, as the conversation with her parents continued, Victim began to cry before revealing she had been sexually abused by Appellant. (R. pp. 76-77). Thereafter, Mother immediately reported the sexual abuse to the authorities, and Deputy Paul Floyd of the Greenville County Sheriff's Office quickly responded to Victim's home. (R. pp. 53-54; pp. 76-77; p. 89). The deputy then spoke

with Victim alone, and, during their conversation, Victim disclosed she had been sexually abused by Appellant on multiple occasions over the course of more than a year. (R. pp. 56-58).

Following Victim's disclosure, Investigator Robert Perry of the Greenville County Sheriff's Office began an investigation into the reported sexual abuse and spoke with Victim at her school. (R. pp. 345-348; p. 361). During their conversation, Victim disclosed she was sexually abused by Appellant on multiple occasions at different places where he lived from the spring of 2011 until the fall of 2012. (R. pp. 348-349). After speaking with Victim, Investigator Perry attempted to gain access to Victim's phone to examine her communications with Appellant but was unable to do so in light of the fact he was advised Appellant had already taken the phone back from her. (R. p. 353). He then repeatedly attempted to make contact with Appellant, who was thirty years old at the time, but all his attempts to do so were unsuccessful. (R. p. 347; pp. 353-354). Thereafter, Investigator Perry obtained arrest warrants for Appellant based on the reported sexual abuse of Victim. (R. p. 354). Appellant was then arrested and indicted for multiple counts of second-degree criminal sexual conduct with a minor and committing or attempting to commit a lewd act upon a child, and he proceeded to trial. (R. p. 6; pp. 519-540).

During trial, Victim testified about the sexual abuse she suffered at Appellant's hands.[1] (R. p. 192). Regarding that abuse, Victim indicated she met Appellant at a horseshoe tournament in March of 2011 when she was a thirteen-year-old middle school student, and Appellant gave her his phone number at that event. (R. pp. 185-187). Shortly after that, Victim stated she and Appellant began visiting each other's homes and hanging out on a regular basis, and she indicated she spent the night at Appellant's home on some of those occasions. (R. p. 185; pp. 188-189). During one of the visits, Victim testified Appellant asked her if she was a virgin before informing her he would "spoil" her for the remainder of her life if he was the one who

[1] At the time of trial, Victim was seventeen years old and Appellant was thirty-two years old. (R. p. 183; p. 376).

took her virginity. (R. pp. 189-190). A few weeks after that, Victim indicated Appellant brought the subject of her virginity up again, and the two then engaged in sexual intercourse while Appellant's wife took a bath in another room. (R. pp. 190-193). Specifically, during that incident, Victim stated Appellant removed both of their pants, began fondling and kissing her, and then quickly had sexual intercourse with her. (R. pp. 193-194). Afterwards, Victim testified the two pretended like nothing had occurred, and, from that point forward, Appellant began providing her with phones and other gifts, gave her "a lot of attention," and promised to give her whatever she wanted. (R. pp. 194-196; pp. 213-214). As their relationship continued, Victim indicated she and Appellant engaged in sexual intercourse on multiple occasions at different homes Appellant moved to over the course of the next year and a half, and she noted Appellant always wore a condom during the acts of sexual abuse. (R. pp. 197-199). Victim further indicated Appellant performed oral sex on her during some of the incidents, and she recounted Appellant had sexual intercourse with her in a car on one occasion after driving her to an abandoned house while they were out to pick up food for other people in the home. (R. pp. 200-202; pp. 216-217). Additionally, Victim stated she had sexual intercourse with Appellant on one occasion after they dropped his wife off at the hospital, she indicated the two had sexual intercourse on one occasion after Appellant pretended he was going to take her to a country music concert, and she recounted an incident where Appellant's wife found Appellant lying next to her on a couch, which led to a heated argument between Appellant and his wife. (R. pp. 205-210; pp. 224-225). Furthermore, Victim testified Appellant convinced her they were going to get married, tried to talk her into getting legally emancipated from her parents, and tried to alienate her from her family. (R. pp. 222-224). Subsequently, Victim noted her relationship with

Appellant continued until her mother found a phone Appellant had given her, and she eventually revealed the sexual abuse when confronted by her parents about Appellant. (R. pp. 227-229).

As Victim's testimony continued, the solicitor asked Victim about her friend, Hannah Barton, who was present on the day Victim met Appellant.[2] (R. pp. 234-235). The solicitor then asked for permission to address a matter outside of the presence of the jury, and the trial judge excused the jury from the courtroom. (R. pp. 235-236). After that, the solicitor indicated she intended to introduce Barton's testimony as prior bad act evidence while noting Victim and Barton were the same ages, were in the same grades in school, met Appellant in the same manner, engaged in the same types of acts with Appellant, and were told the same things by Appellant during the courses of their relationships with him. (R. pp. 236-241). In response, defense counsel objected, contended the appellate court decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), was "bad law," and asserted the prior bad act evidence involving Barton was not admissible as evidence of a common scheme or plan because there was allegedly no evidence of a modus operandi. (R. pp. 242-243).

Thereafter, the trial judge asked the solicitor to proffer Barton's testimony, and Barton was called to the witness stand. (R. pp. 245-246). During her proffered testimony, Barton stated she met Appellant in the spring of 2011 just after she turned fourteen years old when she was visiting Victim's home for a horseshoe tournament. (R. pp. 246-248). Upon meeting Appellant, Barton indicated Appellant was immediately flirtatious towards her, and the two exchanged telephone numbers. (R. p. 248). After that, Barton testified she began hanging out with Appellant, and Appellant said "very nice things" to her. (R. p. 249). A few weeks later, Barton indicated the two began kissing and eventually began having sexual intercourse when she was alone with Appellant after he made her feel "very special." (R. pp. 249-251). Regarding the

[2] By the time of trial, Barton was eighteen years old and no longer a minor child. (R. p. 246; p. 306).

sexual intercourse, Barton recounted it was quick, it always involved a condom, it always occurred when she was alone with Appellant, and only their pants were removed during it. (R. pp. 251-254). Additionally, Barton stated Appellant made her feel like the "most special person in the world" and got her whatever she wanted. (R. p. 252). As their relationship continued, Barton noted they had sex on a few more occasions, including on one occasion at an abandoned house. (R. pp. 253-254). Eventually, Barton indicated she ended the relationship with Appellant, and, when she did so, he informed her he was going to "make his next move" on Victim. (R. pp. 255-256).

Following Barton's proffered testimony, defense counsel conceded it would "be stupid" to suggest no similarities existed between the acts involving Barton and the acts involving Victim, but he contended the acts did not rise to the level of a common scheme or plan based on the fact the "whole series of events" allegedly occurred much differently for each of Appellant's victims. (R. p. 259). Defense counsel further renewed his assertion the decision in Wallace was "bad law" while contending prior bad act evidence was the most prejudicial type of evidence that could be admitted. (R. p. 260). In response, the solicitor asserted the prior bad act evidence was extremely probative in Appellant's case as evidence of the existence of a common scheme or plan and contended the probative value of that evidence outweighed the potential for undue prejudice in light of the lack of physical evidence in the case. (R. pp. 261-263). After considering the arguments of counsel, the trial judge found the similarities between the acts outweighed the dissimilarities due to the similarities regarding the ages of the victims, the timing of the sexual abuse, the locations where the abuse occurred, the relationship between Appellant and his victims, the manner and type of sexual abuse, and the use of coercion or seduction on the victims. (R. p. 264). Furthermore, the trial judge concluded the prior bad act evidence was not

unfairly prejudicial in Appellant's case while offering to give a limiting instruction if one was desired. (R. pp. 265-267).

Subsequently, Victim resumed her testimony before the jury, and she confirmed she never discussed Appellant or their relationship with Barton. (R. p. 268). Additionally, she indicated Appellant manipulated and coerced her into doing things with him, and she noted the acts of sexual abuse occurred during the few occasions she was alone with Appellant during the course of their relationship. (R. p. 280; p. 286). Furthermore, Victim testified Appellant got her whatever she asked for, singled her out, showed her favoritism, and made her feel special through his attention to her. (R. pp. 293-294).

Following Victim's testimony, Barton took the witness stand and testified about her relationship with Appellant before the jury. (R. p. 306). Specifically, Barton stated she met Appellant in the spring of 2011 at a horseshoe tournament taking place at Victim's house when she was a fourteen-year-old middle school student. (R. pp. 308-309). Upon meeting Appellant, Barton stated he was flirtatious towards her, and the two exchanged phone numbers. (R. p. 310). A few weeks later, Barton indicated Appellant invited her over and gave her special attention, and the two kissed while Appellant's wife and Victim were in another room of the home. (R. pp. 310-312). Shortly after that, Barton stated she visited Appellant's home again and engaged in a brief act of sexual intercourse with Appellant while he was wearing a condom and while her pants were removed. (R. pp. 313-314). Subsequently, Barton testified she engaged in a few more briefs acts of sexual intercourse with Appellant, including at an abandoned house, before ending their relationship. (R. pp. 315-316). At that point, Barton stated Appellant informed her he was going to go after Victim next. (R. p. 317).

In addition to Barton and Victim's testimony, the investigating officers testified about the investigation into the sexual abuse disclosed by Victim, which led to Appellant's arrest. (R. pp. 54-59; pp. 346-355). Additionally, Mother testified about the details of how Appellant and Victim began to regularly spend time together after meeting at the horseshoe tournament, and she noted Victim's behavior began to change after she started associating with Appellant. (R. pp. 62-67; pp. 72-73). Mother further discussed Victim's subsequent disclosure of the sexual abuse and their actions in response to that disclosure. (R. pp. 75-78; p. 89). Likewise, Victim's older sister ("Sister") testified about her interactions with Appellant after he began spending time with Victim, and she indicated she believed something was going on between Appellant and Victim based on the way Appellant treated her. (R. pp. 97-99). Sister further noted she spoke with Appellant on the phone and exchanged text messages with him after they became friendly towards one another, and she stated Appellant informed her he loved Victim most of all while also referring to her as his "beautiful future wife" during their communications.[3] (R. pp. 100-101; pp. 107-108; p. 112). Furthermore, Dr. Mary-Fran Croswell, an expert in pediatric medicine and child abuse pediatrics, testified about her examination of Victim following the disclosure of the sexual abuse, indicated her examination of Victim was normal, and noted a normal examination did not exclude the possibility of sexual abuse. (R. pp. 332-338).

Beyond that testimony, Appellant's former wife, Rachel, also testified for the prosecution.[4] (R. p. 130). During her testimony, Rachel confirmed she and Appellant became friends with Victim's family after meeting them at a horseshoe tournament in March of 2011, and she indicated Victim began regularly visiting their home and sometimes spent the night

[3] During her testimony, Sister also noted she provided the prosecution with a physical copy of Appellant's text messages just before trial. (R. pp. 125-127).

[4] During trial, Rachel noted she obtained a divorce from Appellant at some point after the events involving Victim occurred. (R. p. 154; pp. 172-173).

there.[5] (R. pp. 134-137; p. 139). After that, she stated she became uncomfortable about the relationship and confronted Appellant, who reacted angrily. (R. p. 138). Rachel further testified Appellant and Victim were alone together numerous times during her visits, and she recounted on one occasion she found Appellant and Victim lying on a couch together in the middle of the night with Appellant's leg draped over Victim's legs. (R. p. 148). After finding them in that compromising position, Rachel stated she confronted Appellant and he became very threatening in response. (R. p. 149). At some point after that, Rachel indicated Appellant kicked her out of the home. (R. p. 152). She then testified she eventually revealed her concerns about Appellant and Victim to Victim's mother and Investigator Perry. (R. pp. 157-159).

Subsequently, at the conclusion of the State's case, Appellant elected to testify in his own defense. (R. p. 362; p. 376). During his testimony, Appellant asserted he first met Victim's family at a horseshoe tournament that took place on June 7, 2011, but claimed he did not speak to either Victim or Barton at that time.[6] (R. pp. 394-395). After that, he indicated he and Rachel began regularly visiting with Victim's family while Victim began visiting his home to babysit his daughter. (R. pp. 394-396). After Victim began visiting, Appellant acknowledged she spent the night at his home on some occasions, but he claimed she was never alone with him on any occasions and simply played with his daughter, played video games, and used his "humongous"

[5] At the outset of her testimony, Rachel indicated she met Appellant, who was twenty-six years old at the time, in September of 2008 when she was a seventeen-year-old high school student. (R. p. 131). She further stated he convinced her to move in with him through manipulation within two weeks of initially meeting her, and they got married less than a year later. (R. pp. 132-134; pp. 175-176). After that, Rachel indicated Appellant was abusive and manipulative towards her, and she noted he forced her to make a false allegation of sexual abuse against her father that she subsequently recanted. (R. pp. 143-144; pp. 165-166; p. 175; pp. 178-179). Later during trial, Appellant confirmed he met Rachel when she was seventeen years old and he was twenty-six years old, acknowledged she moved in with him two weeks later, and indicated she married him a few months later before giving birth to their first child together not long after that. (R. pp. 378-380; p. 388). He further asserted Rachel was violent and unfaithful towards him during the course of their relationship and claimed they both decided together for her to file a rape allegation against her stepfather. (R. pp. 382-383).

[6] At the outset of his testimony, Appellant asserted he was disabled due to a diagnosis of attention deficit hyperactivity disorder and had been receiving disability benefits since the age of thirteen as a result. (R. p. 377).

television.[7] (R. pp. 398-399). Eventually, Appellant stated he ceased spending time with Victim's family due to their alleged violent tendencies, and he denied Victim visited him at one of the homes he moved to in Travelers Rest.[8] (R. pp. 408-410). Subsequently, in October on 2012, he claimed he cut off all ties with Victim's family after discovering Victim's father had secretly added multiple vehicles to his insurance policy. (R. pp. 415-418). As his testimony continued, he insisted he only possibly saw Victim in passing after cutting off ties with her family, and he denied Barton had ever been to his home. (R. pp. 418-419). He further denied having an inappropriate relationship with either Victim or Barton, and he insisted he had never heard about an abandoned house and had never discussed going to a country music concert with anyone. (R. pp. 420-421).

Thereafter, on cross-examination, the solicitor began asking Appellant if he sent a text message to Victim's father in regard to his divorce from Rachel, and Appellant insisted he did not send the message while contending someone else had been sending messages pretending to be him. (R. pp. 424-425). Defense counsel then objected to the solicitor's questioning while asserting a foundation had not been established in regard to the text messages he contended the solicitor was attempting to have Appellant read, and the trial judge sustained the objection. (R. pp. 425-426). Thereafter, the solicitor asked Appellant if he sent a text message to Victim's father asking if he was going to drop the charges, and Appellant denied he sent such a message. (R. p. 426). Defense counsel then again objected, and the trial judge sustained the objection before excusing the jury from the courtroom. (R. p. 426).

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[7] Appellant further indicated he tried to keep witnesses around him all the time to verify his innocence because he had been accused of many things during his lifetime. (R. pp. 400-401; p. 440).

[8] He further alternately claimed Victim was present and was not present when he separated from Rachel. (R. pp. 411-412).

Once the jury was excused from the courtroom, the solicitor noted it was permissible for her to question Appellant about statements he was alleged to have made, and she further asserted she could call a witness in rebuttal to establish a foundation if she moved to admit the actual text messages themselves into evidence. (R. p. 427). In response, defense counsel asserted a foundation had to be established before the solicitor could ask questions regarding the messages, and the trial judge inquired of defense counsel why the solicitor could not ask Appellant if he made a particular statement. (R. pp. 427-428). Defense counsel then replied: "I think she – well, she can ask if he makes a statement, Your Honor. But she was, actually, reading the text messages verbatim." (R. p. 428). The trial judge and defense counsel then continued to discuss the matter, and defense counsel confirmed his concern was the solicitor's questions allegedly created the appearance she was publishing something that had not been admitted into evidence. (R. pp. 428-429). After that discussion, the following exchange occurred:

> **[Defense Counsel]**: But my issue is not necessarily, Your Honor, that [the solicitor]'s asking [Appellant] that. That's fine. But she's, actually, walking up to him, laying these down in front of him as they were – as though they were a statement that he gave.
>
> **[Trial Judge]**: Yes, I know. That's why I sustained the objection when you objected to that. But, I mean, I think she can ask about alleged previous statements the witness –
>
> **[Defense Counsel]**: Well, I would agree with that.
>
> **[Trial Judge]**: – who was a party, made.
>
> **[Defense Counsel]**: Yeah, I would agree with that, Your Honor. I just – when she – she, at first, seemed as though she was, actually, going to have him read it. Then she's questioning him about it while it's laying up there in front of him. And I, clearly, believe that's improper.
>
> **[Trial Judge]**: Well, I overrule the objection.

(R. p. 429).

Thereafter, the solicitor resumed her cross-examination of Appellant and asked him if he sent a text message to Victim's father about how they could go to Oklahoma and make money if he would drop the bogus charges, and Appellant denied sending such a message. (R. pp. 432-433). The solicitor then asked Appellant if he sent a text message to Sister in regard to not having enough tickets for a country music concert, and Appellant denied doing so while insisting he never sent a text message to Sister on any occasion. (R. pp. 435-437). After that, the solicitor asked Appellant if he sent a text message to Sister indicating Victim was his favorite, and Appellant again insisted he never sent a text message to Sister about anything. (R. pp. 437-438). As her cross-examination of Appellant continued, the solicitor asked Appellant if he knew Barton, and he responded he did not and had only met her on two occasions. (R. p. 455). The solicitor then inquired if Appellant had sent a Facebook message to Barton a few weeks earlier, and Appellant denied doing so while challenging the solicitor to prove it. (R. pp. 454-455).

Subsequently, the defense rested its case, and the solicitor indicated she did not believe it was necessary for her to call any rebuttal witnesses. (R. p. 463). The parties then presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 465-506). During his jury instructions, the trial judge explained to the jury evidence consisted of witness testimony and exhibits while expressly cautioning the jury the statements of counsel were not evidence.[9] (R. p. 498). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. pp. 510-511). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of twenty-five years. (R. pp. 516-517).

[9] At the outset of trial, the trial judge had similarly instructed the jury evidence consisted of witness testimony and physical exhibits while also expressly informing the jury evidence could not be considered if an objection to it was sustained. (R. pp. 35-36).

ARGUMENT

I.

The trial judge did not abuse his broad discretion by admitting the testimony of one of the victim's friends, who was sexually abused by Appellant in a strikingly similar manner to the manner in which Appellant sexually abused the victim, because the victim's friend's testimony constituted evidence of the existence of a common scheme or plan due to its numerous significant similarities to the testimony of the victim, including in regard to the circumstances under which Appellant met his victims, the similar ages of the victims when the abuse occurred, the identical genders of the victims, the similar manners in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, Appellant's special treatment of the victims, and Appellant's provision of gifts to both victims, and because the probative value of the victim's friend's testimony was not substantially outweighed by its potential for undue prejudice.

Appellant contends the trial judge committed reversible error by admitting the testimony of Barton, a friend of Victim who was sexually abused by Appellant just before Appellant began sexually abusing Victim, as evidence of the existence of a common scheme or plan during Appellant's trial for sexually abusing Victim. In support of that contention, Appellant maintains the prior bad act evidence was inadmissible because it was not sufficiently similar to Appellant's more recent acts involving Victim and was overly prejudicial. To the contrary, the trial judge properly admitted Barton's testimony because it was highly similar to the testimony of Victim, including in regard to the circumstances under which Appellant met the victims, the similar ages of the victims when the abuse occurred, the identical genders of the victims, the similar manners in which the abuse occurred, the similar nature of the abuse, the similar locations at which the abuse occurred, Appellant's special treatment of the victims, and Appellant's provision of gifts to both victims, and constituted proof of the existence of Appellant's common scheme or plan to seduce and sexually assault teenaged girls. Moreover, in light of the high degree of similarity between the charged offenses and Appellant's prior bad acts coupled with the lack of physical evidence in Appellant's case, the high probative value of Barton's testimony was not outweighed

by its potential for undue prejudice. As a result, the trial judge did not abuse his broad discretion in admitting Barton's testimony regarding Appellant's prior bad acts. Appellant's convictions should be affirmed.

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

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). 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, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594

(Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

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

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between

the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, our 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 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278.

Finally, after determining the prior bad act evidence is relevant and 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 State v. Blanton, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct. App. 1994), Blanton was arrested and charged with first-degree criminal sexual conduct with a minor after Blanton's granddaughter alleged Blanton sexually molested her on several occasions. During trial, two other girls were permitted to testify over Blanton's objection about being sexually abused by Blanton approximately seven or eight years before Blanton sexually abused his granddaughter. Id. Following trial, Blanton appealed his conviction and asserted the prior bad act evidence was not sufficiently similar to the charged offense to constitute evidence of a common scheme or plan. Id. However, this Court disagreed and noted the following similarities existed between the prior bad act evidence and the incident involving Blanton's granddaughter:

> 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 of 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.

Id. at 33, 446 S.E.2d at 439. Based on those similarities, this Court found the evidence of the prior bad acts was admissible and affirmed Blanton's conviction. Id.

Similarly, in State v. Hubner, 362 S.C. 572, 575, 608 S.E.2d 463, 464 (Ct. App. 2005), Hubner was arrested and charged with six counts of committing a lewd act upon a child after allegations arose he sexually abused a girl who attended his church. During trial, the victim testified she met Hubner through his involvement with the church youth group and their relationship gradually progressed to being sexual in nature. Id. at 575-576, 608 S.E.2d at 464. The victim stated Hubner – over the course of two years – reached into her pants, massaged her, touched her breasts, hugged her, fondled her between her vagina and rectum, told her he loved her, forced her to touch his penis, used religion to gain her acquiescence, gave her gifts, touched her vagina in a swimming pool, kissed her, and fondled her vagina in a garage. Id. at 575-579, 608 S.E.2d at 464-467. In addition to the victim's testimony, the State sought to introduce the testimony of a witness who was molested by Hubner approximately fourteen to fifteen years earlier. Id. at 579, 608 S.E.2d at 466. During an in camera hearing, the witness stated Hubner – over the course of two months – hugged her and fondled her breasts while she was babysitting, massaged her vagina and buttocks through her clothes, masturbated in front of her, engaged in sexual intercourse with her, threatened to kill her if she revealed the abuse to anyone, kissed her, slapped her, involved other people in their sexual encounters, and offered her money to perform sexual acts on him. Id. at 579-581, 608 S.E.2d at 466-467. Following the hearing, the trial judge ruled the witness' testimony regarding the hugging, kissing, and inappropriate touching was admissible as evidence of the existence of a common scheme or plan. Id. at 582, 608 S.E.2d at 467. Following the trial, Hubner appealed his convictions and asserted the prior bad act evidence should not have been admitted. Id. at 575, 608 S.E.2d at 464. On appeal, this Court reversed Hubner's convictions after finding the acts were not sufficiently similar to be admissible under the common scheme or plan exception. Id. at 585, 608 S.E.2d at 469.

However, the Supreme Court subsequently reversed this Court's decision and affirmed Hubner's convictions after finding the trial judge properly admitted the evidence of the prior sexual assaults. State v. Hubner, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

Likewise, in State v. Scott, 405 S.C. 489, 492-493, 748 S.E.2d 236, 238-239 (Ct. App. 2013), cert. dismissed as improvidently granted, 413 S.C. 24, 773 S.E.2d 912 (2015), Scott was arrested and charged with numerous offenses, including one count of second-degree criminal sexual conduct with a minor and and three counts of committing a lewd act upon a child, following an investigation into allegations he sexually abused his four biological daughters when they were minors. During trial, the State sought to admit evidence regarding Scott's prior acts of sexual abuse to establish the existence of a common scheme or plan through the testimony of two unrelated witnesses who alleged Scott sexually abused them when they were minors approximately eleven years before Scott first began sexually absuing the oldest of his four daughters, who had not yet been born at the time Scott engaged in the sexual abuse of his earlier victims. Id. at 492-493, 748 S.E.2d at 238-239. In response, defense counsel objected to the admission of that testimony on the grounds it was too remote and its probative value was substantially outweighed by the danger of unfair prejudice. Id. at 499, 748 S.E.2d at 242. However, the trial judge permitted Scott's prior victims to testify over objection, and Scott was ultimately convicted of numerous offenses. Id. at 496-497, 748 S.E.2d at 240-241. Subsequently, Scott appealed his convictions, arguing the prior bad act evidence was not sufficiently similar to the charged crimes to establish the existence of a common scheme or plan and was so remote its probative value was substantially outweighed by the danger of unfair prejudice. Id. at 492, 748 S.E.2d at 238. On appeal, this Court affirmed. Id. In affirming, this Court first concluded Scott's prior victims' testimony was admissible pursuant to Rule 404(b),

SCRE, because the many similarities existing between the charged crimes and the prior bad acts, including in regard to the ages of the victims at the time of the abuse, the locations and situations where the victims were abused, and the nature of the abuse, outweighed any of the dissimilarities, which included the facts Scott was not biologically related to his prior victims and did not abuse his prior victims in all the same ways he abused his daughters. Id. at 503, 748 S.E.2d at 244. Furthermore, this Court determined the probative value of the prior bad act evidence was not substantially outweighed by a danger of unfair prejudice despite the fact Scott had abused his prior victims eleven years before he began the abuse of his daughters. Id. at 508-509, 748 S.E.2d at 247.

In the case sub judice, the trial judge did not abuse his broad discretion by admitting the testimony of Barton concerning Appellant's prior bad acts because her testimony constituted evidence of the existence of Appellant's common scheme or plan to seduce and sexually assault teenaged girls. Notably, during trial, Victim testified she met Appellant for the first time at a horseshoe tournament when she was a thirteen-year-old middle school student and Appellant provided her with his phone number at that tournament. After that, Victim indicated Appellant began communicating with her and invited her to his home, and she stated he talked with her, made her feel special, and began providing her with whatever she wanted once she began visiting with him. Victim's testimony further established Appellant began sexually abusing her a few weeks after he initiated contact with her, and she noted the abuse always occurred either at one of Appellant's homes or at an abandoned house when no one else was present or in the same room as them. Furthermore, Victim's testimony established Appellant sexually abused her by performing oral sex on her or by engaging in sexual intercourse with her, and she noted the

sexual intercourse was always brief, Appellant always wore a condom during it, and her pants were the only clothing removed.

Similar to Victim's testimony, Barton testified she met Appellant for the first time at a horseshoe tournament, which was the same exact place where Appellant met Victim, just after she turned fourteen years old and while she was a middle school student, and she noted Appellant provided her with his phone number at that tournament. Additionally, like Victim, Barton indicated Appellant began communicating with her and invited her to his home after that, and she stated he talked with her, made her feel like the "most special person in the world," and got her whatever she wanted. Likewise, similar to Victim's testimony, Barton's testimony further established Appellant began sexually abusing her within a few weeks of inviting her to his home, and she recounted the abuse always occurred either at Appellant's home or at an abandoned house when no one else was present or in the same room as them. Furthermore, Barton's testimony established Appellant sexually abused her by engaging in sexual intercourse with her, and, just like Victim, she indicated the sexual intercourse was always brief, Appellant always wore a condom during it, and her pants were the only clothing removed. Finally and critically, Barton testified Appellant established a direct connection between his sexual abuse of her and his sexual abuse of Victim by informing her he was going to move onto Victim when she ended her relationship with him.

Thus, in Appellant's case, each of Appellant's victims was a young girl attending middle school, and both of his victims were approximately the same age. Moreover, Appellant met both of his victims at the same location – a horseshoe tournament – and provided both of the girls with his phone number upon meeting them. Additionally, with each of his victims, Appellant invited the girls to his home a short time after meeting them, and he began sexually abusing the

victims after talking with them, making them feel special, and providing them with whatever they desired. Furthermore, although Victim was subjected to oral sex while Barton was not, Appellant engaged in sexual intercourse with both girls in a highly similar manner, with Appellant always wearing a condom, always engaging in the intercourse while just the girls' pants were removed, and always ending the sexual intercourse quickly. Likewise, both girls testified they were sexually abused by Appellant in his home and at an abandoned house while they were alone with him or while no one else was in the same room. Accordingly, the testimony of Appellant's most recent victim, Victim, was highly similar to the testimony of Appellant's previous victim, Barton, in regard to: (1) the approximate ages of the victims when the abuse occurred; (2) the genders of the victims; (3) the statuses of the victims as middle school students when they first met Appellant; (4) the location where Appellant met the victims; (5) Appellant's acts of providing his phone number to the victims and inviting them to his home within a few weeks of meeting them; (6) the locations where Appellant abused the victims; (7) the nature and type of the sexual abuse Appellant inflicted upon them; (8) the circumstances under which the sexual abuse occurred; and (9) Appellant's acts of making the girls feel special and providing them with gifts. See Wallace, 384 S.C. at 434, n. 5, 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."); cf. Blanton, 316 S.C. at 33, 446 S.E.2d at 439 (finding the prior bad acts were sufficiently similar to the charged offense to be admissible where the victims in all of the acts were approximately the same age, each of the victims was subjected to the same type of sexual abuse in the same locations, and Blanton took advantage of his relationship with the victims for sexual gratification in each of the acts). Furthermore, those similarities between the acts outweighed any dissimilarities, which

established a clear and logical connection between the earlier acts and more recent crimes. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("In sum, there are similarities in the class of the victim, timing, place, and warning that outweigh any dissimilarity."); cf. Scott, 405 S.C. at 501, 748 S.E.2d at 243 (finding prior bad act evidence to be admissible where some distinctions existed between the prior bad act testimony and the testimony of Scott's most recent victims but the distinctions did not outweigh the significant similarities). As a result, Barton's testimony was properly admitted towards establishing the existence of Appellant's common scheme or plan to seduce and sexually assault teenaged girls, which was confirmed by Appellant's own statements to Barton evincing his intention to continue his plan by moving onto Victim after her, and the trial judge's decision to admit that testimony did not constitute an abuse of discretion under those circumstances. See Wallace, 384 S.C. at 433-434, 683 S.E.2d at 278 ("When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). . . . A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility.").

Moreover, the trial judge properly concluded the probative value of Burrow's testimony was not substantially outweighed by a danger of unfair prejudice. Critically, in Appellant's case, the prior bad act evidence was extremely probative and significant due to the lack of physical evidence corroborating Victim's testimony, which could not be obtained based on the fact Appellant always wore a condom during the sexual abuse coupled with the fact both Barton and Victim delayed their disclosures of the abuse. As a result, Barton's testimony was extremely probative and significant because it established the existence of a common scheme or plan on Appellant's part and constituted strong proof of the highly similar incidents involving Victim based on the similarities between the Appellant's prior abuse of Barton and Appellant's

subsequent abuse of Victim. See id. at 433, 683 S.E.2d at 277 ("Such evidence is relevant because proof of one is strong proof of the other."). Accordingly, the probative value of the prior bad act evidence was extremely high. Cf. State v. Clasby, 385 S.C. 148, 158-159, 682 S.E.2d 892, 898 (2009) ("Given there was no physical evidence to corroborate B.C.'s testimony regarding the indicted offense of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charge criminal sexual conduct underlying the offense of lewd act upon a child."). In light of the high probative value of the evidence, the potential for undue prejudice that could have resulted from the admission of the evidence was not sufficient to substantially outweigh the evidence's probative value. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is **substantially outweighed by the danger of unfair prejudice**, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)); see also State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (" 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " (citations omitted)). Therefore, the trial judge did not abuse his broad discretion in weighing the probative value of the prior bad act evidence against its potential for undue prejudice. See Hamilton, 344 S.C. at 358, 543 S.E.2d at 594 ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

In conclusion, the prior bad act evidence introduced during Appellant's trial through Barton's testimony was strikingly similar to the testimony of Victim in regard to the similar ages of the victims, the similar circumstances under which Appellant initiated contact with the

victims, the similar timing of the sexual abuse, the manner in which the abuse occurred, the nature of the abuse, the locations where the abuse occurred, and Appellant's special treatment of the victims and provision of gifts to them. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("Here, the similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity."); see also State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008) ("Where there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan."); cf. State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) ("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 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. We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect."). Therefore, like in Blanton, Hubner, Scott, and numerous other cases, the prior bad act evidence was relevant and admissible as proof of the existence of a common scheme or plan, and its high probative value substantially outweighed its potential for undue prejudice. Cf. State v. Fonseca, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009) (concluding prior bad act evidence was not admissible under the common scheme or plan exception because "[t]he State provide[d] no compelling argument **of any similarities** between the two occurrences, or any argument to

overcome the fact that the incidents [were] remote in time" (emphasis added)). For those reasons, the trial judge did not abuse his broad discretion in admitting the testimony regarding Appellant's prior bad acts. See Kelley, 319 S.C at 176, 460 S.E.2d at 370 ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also Martucci, 380 S.C. at 253, 669 S.E.2d at 609 ("If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal."). Appellant's convictions should be affirmed.

II.

To the extent Appellant is challenging the solicitor's cross-examination of him about incriminating text messages he purportedly sent to the victim's family members prior to trial, that issue is not properly preserved for appellate review because Appellant conceded to the trial judge it was permissible for the solicitor to ask the questions about the text messages during trial and because defense counsel did not any seek additional relief after the trial judge sustained several of his objections to the questioning. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by permitting the solicitor to question Appellant about the text messages he allegedly sent because the solicitor had a good faith factual basis for asking the questions in light of the testimony presented during trial in regard to the text messages and the fact the solicitor was provided with a physical copy of the purported text messages just before trial.

Appellant contends the trial judge erred by allowing the solicitor to question Appellant about text messages he allegedly sent to members of Victim's family that related to his criminal case. In support of that contention, Appellant maintains the solicitor should not have been permitted to ask Appellant about the contents of the text messages he allegedly sent and which he now characterizes on appeal as "inculpatory" without first establishing a foundation for those text messages to be admitted into evidence. Initially, Appellant's appellate challenge to the solicitor's questioning of Appellant about the alleged text messages on cross-examination is wholly unpreserved for appellate review because defense counsel repeatedly conceded to the trial judge it was permissible for the solicitor to question Appellant about the text messages. Based on that trial concession, Appellant is precluded from now raising a challenge to the solicitor's cross-examination questioning on appeal. Likewise, to the extent Appellant is complaining on appeal about the initial questions the solicitor asked Appellant after presenting him with a physical copy of the text messages, that issue is similarly unpreserved for appellate review because defense counsel's trial objections to those questions were sustained by the trial judge, and defense counsel sought no further relief from the trial judge after his objections were sustained. However, regardless of any issue preservation concerns, the trial judge nonetheless

committed no error by permitting the solicitor to question Appellant about the text messages he allegedly sent to Victim's family members because – just as defense counsel conceded during trial – it was permissible for the solicitor to question Appellant about the text messages in light of the fact she had a good faith factual basis for doing so based on the information available to her at that time. Appellant's convictions should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Imposing issue preservation requirements on a party "is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

However, even if a party properly objects to an issue that arises during trial, no issue is preserved for appellate review if the trial judge sustains the party's objection and the party does subsequently move to strike the allegedly objectionable matter or request some curative measure from the trial judge. State v. Wingo, 304 S.C. 173, 177-178, 403 S.E.2d 322, 325 (Ct. App. 1991); see State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) ("The requirement that a party move to strike objectionable testimony applies when an objection has been *sustained*."). Critically, if party fails to request additional relief after an objection is sustained, that party has obtained the only relief sought while preserving no issue for appellate review. See State v.

Thompson, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991) ("[T]he trial judge sustained defense counsel's objections to the testimony of which [Thompson] complains. No motion to strike, no request for instruction that the jury disregard the testimony, nor a motion for a new trial based on the admission of the testimony was made at trial. Appellant has failed to preserve this issue. He obtained the only relief he sought and this court, therefore, has no issue to decide.").

Similarly, even if a party properly raises an objection during trial and the objection is overruled, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Significantly, a party can waive an objection to an issue by indicating to the trial judge the party no longer has an objection to an issue the party previously objected to or by eliciting similar testimony to testimony to which the party previously raised an objection without reserving that earlier objection. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course of the trial certain testimony was admitted over the objection of [McKinney's] counsel. Thereafter, counsel for [McKinney] cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured."); O'Neal, 210 S.C. at 312, 42 S.E.2d at 526 ("An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no

objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). Likewise, a party can waive a previously-raised objection to an issue by subsequently conceding that issue to the trial judge. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal).

In the case at bar, the trial judge sustained several objections to questions the solicitor asked of Appellant on cross-examination after presenting him with a physical copy of text messages, and, following the trial judge's rulings sustaining defense counsel's objections, defense counsel did **not** seek any further relief from the trial judge or ask the trial judge to employ any curative measures. Thereafter, the trial judge and the parties discussed the matter outside of the presence of the jury, and, during that discussion, the trial judge afforded defense counsel an opportunity to identify any authority that would prohibit the solicitor from questioning Appellant about statements he was purported to have made against his own interests. In response, defense counsel conceded the solicitor **could**, in fact, ask Appellant if he made a particular statement while specifically asserting his issue was **not** with the solicitor's act of asking the questions. The trial judge then indicated he believed it was permissible for the solicitor to question Appellant about statements he was alleged to have made, and defense counsel responded unequivocally he agreed with the trial judge's position.

Because defense counsel conceded to the trial judge it was permissible for the solicitor to question Appellant about the statements he was alleged to have made, any issue regarding the propriety of the solicitor's questioning of Appellant was waived and cannot now properly be raised or addressed on appeal. See id. at 315-316, 642 S.E.2d at 588 (recognizing an issue conceded during trial cannot properly be argued on appeal); see also Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to a ruling on an issue

during trial and then complain of an error with the issue on appeal); cf. State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none). Likewise, to the extent Appellant is complaining on appeal about the initial questions the solicitor asked of Appellant after presenting him with a physical copy of the text messages, such an issue is similarly unpreserved for appellate review because defense counsel's objections to those questions were **sustained** during trial and no further relief was sought in regard to those questions. See Thompson, 304 S.C. at 87, 403 S.E.2d at 140 (holding Thompson failed to preserve any issue in regard to an objection that was sustained because he failed to make a motion to strike, request a curative strike, or move for a new trial after the objection was sustained); see also State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide."). Accordingly, Appellant failed to preserve any issue for appellate review in regard to the solicitor's questioning of him about the text messages he purportedly sent to Victim's family members. See TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); McMillan, 319 S.C. at 335, 461 S.E.2d at 45 (finding an issue to be procedurally barred on appeal because it was conceded at trial); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). Appellant's convictions should be affirmed.

B. Propriety of the Solicitor's Questioning of Appellant on Cross-Examination

When a defendant elects to take the witness stand and testify on his own behalf during a criminal trial, the solicitor has a right to conduct cross-examination of that defendant. State v.

Holmes, 171 S.C. 8, __, 171 S.E. 440, 443 (1933). As part of that cross-examination, the solicitor unquestionably is permitted to ask the defendant about any inculpatory or otherwise relevant statements he may have previously made that would be pertinent to the trial **so long as** the solicitor has a good faith factual basis for any questions asked. See Rule 801(d)(2), SCRE (instructing a party-opponent's own statements do **not** constitute inadmissible hearsay); see State v. McEachern, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012) ("[O]ur courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct."); see also State v. Gilchrist, 342 S.C. 369, 372-373, n. 3, 536 S.E.2d 868, 869-870 (2000) (finding Gilchrist's incriminating statement was admissible as an admission by a party-opponent). Thus, while a solicitor is **not** permitted to merely "go on a fishing expedition" when cross-examining a defendant, the solicitor can question the defendant about matter relevant to the trial when the solicitor has a good faith basis for doing so. See State v. Joseph, 328 S.C. 352, 359, 491 S.E.2d 275, 278 (Ct. App. 1997) ("The cross-examiner must have a good faith factual basis before questioning a witness about his past conduct."); see also State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 105 (1979) ("Counsel should not be permitted to go on a fishing expedition in hopes of finding some misconduct involving moral turpitude by a witness.").

In Appellant's case, Sister testified during trial in regard to text messages she had previously received from Appellant, and she noted she had communicated with him through both text messages and phone calls. See generally State v. Henry, 292 Neb. 834, 868-869, 875 N.W.2d 374, 400 (Neb. 2016) (finding a sufficient foundation had been established for the admission of a **physical copy** of text messages purportedly sent by Henry based on the testimony of witnesses who indicated they spoke with Henry at the phone number used to send the text

messages and knew Henry was the sender based on the context of the messages and further noting a party seeking to admit text messages is **not** required to conclusively prove who authored the messages before they can be admitted into evidence). Sister further indicated she provided the prosecution just before trial with a copy of text messages that were purportedly sent by Appellant. In light of Sister's testimony about the inculpatory text messages she had received from Appellant in regard to Victim and her provision of a copy of the text messages she contended were sent by Appellant to the prosecution, the solicitor had a good faith basis for asking Appellant whether he sent the incriminating text messages attributed to him.[10] See McEachern, 399 S.C. at 147, 731 S.E.2d at 615 (recognizing a good faith factual basis is necessary to ask a particular question on cross-examination); see also State v. Needs, 333 S.C. 134, 160, 508 S.E.2d 857, 865 (1998) (holding testimony in regard to incriminating statements made by Needs was admissible as evidence of an admission by a party-opponent). Thus, just as defense counsel repeatedly conceded during trial, the solicitor was permitted to question Appellant about the text messages, and the trial judge did not abuse his broad discretion by permitting the solicitor to do so.[11] See State v. Sherard, 303 S.C. 172, 174, 399 S.E.2d 595, 596

[10] Notably, depending on Appellant's responses to her questions, the solicitor's questioning of Appellant also could have aided the solicitor in establishing a foundation for the admission of the physical copy of the text messages had she subsequently chosen to seek the admission of that matter into evidence during trial. See Rule 901(b)(1), SCRE (recognizing the requirements for authentication can be satisfied in numerous ways, including through the presentation of the testimony of a witness with knowledge the matter is what it is purported to be); see also Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-577, 201 S.E.2d 372, 376 (1973) (instructing direct proof is **not** required in order to authenticate a particular piece of evidence, and, instead, evidence can be authenticated through indirect or circumstantial evidence).

[11] Moreover, as Appellant denied sending any of the text messages the solicitor asked him about, Appellant suffered no actual prejudice as a result of the solicitor's questioning in that regard. Cf. McEachern, 399 S.C. at 148, 731 S.E.2d at 616 ("[W]e note that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result. Here, Hollie denied even knowing Warren or Gibbs, and denied 'being involved' with any of the three men. Thus, we find any error in allowing these questions was harmless." (citation omitted)). Likewise, the trial judge's instructions to the jurors cautioning them the statements of counsel were not evidence and instructing them evidence consisted only of witness testimony and exhibits helped to ensure Appellant suffered no prejudice from the solicitor's act of asking the questions regarding the text messages. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the

(1991) ("It is well settled that the scope of cross-examination is within the trial judge's discretion, and this Court will not interfere absent a showing of prejudice by the complaining party."); see also State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007) (recognizing the trial judge retains wide discretion in regard to the scope of cross-examination). Appellant's convictions should be affirmed.[12]

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jurors disregarded those instructions, this Court declines to presume prejudice." (citations omitted)); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("An instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them." (citations omitted)); cf. State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) ("The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented.").

[12] In seeking a reversal of his convictions on appeal, Appellant contends this Court should consider a number of unpreserved errors that allegedly occurred during trial when determining whether any preserved error that occurred in his case was harmless. Notably though, Appellant's proposed harmless error analysis is entirely inconsistent with the established law in South Carolina. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 863 (1993) (instructing any error in the admission of evidence that is merely cumulative to other unobjected-to evidence is harmless); State v. Blalock, 357 S.C. 74, 82, 591 S.E.2d 632, 636 (Ct. App. 2003) (finding any error resulting from the publication of a prior statement would have been harmless where its publication was merely cumulative to a previous, unchallenged publication of the relevant portions of the same statement); see also State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) ("South Carolina has no 'plain error' rule."); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (recognizing unchallenged rulings are the law of the case regardless of whether they are right or wrong).

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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June 9, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2015-000312

THE STATE,

Respondent,

vs.

JERALD DENTON GASKINS, JR.,

Appellant.

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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