STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of General Sessions
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2019-000302

THE STATE,

Respondent,

v.

WILLIAM EARL SHERLEY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

SCRE 801(d)(1)(D) allows "time and place" corroboration evidence "in a criminal sexual conduct case or attempted criminal sexual conduct case." The former Lewd Act with a Minor statute criminalized "lewd and lascivious" acts performed by an adult against a child done with the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." Is 801(d)(1)(D) corroboration evidence admissible in prosecutions under the former Lewd Act statute?

STATEMENT OF THE CASE

This is an appeal from a 2019 prosecution for Lewd Act with a Minor. Appellant, William Sherley, dated the minor victim's mother. The victim, 18 years old at the time of trial, testified Sherley sexually assaulted her twice, in 2010 and 2011. In the first incident, Sherley groped the victim's buttocks while they were sitting on the mother's living room couch. (Feb. 19 Tr.p.74–78). She was 10 years old at the time. In the second incident, Sherley digitally penetrated her in her bed while he was "tucking [her] in." (Feb. 19 Tr.p.79–82). This incident occurred around the victim's 11th birthday, but she could not give an exact date. The victim disclosed the abuse to her mother and grandmother in 2016. (Feb. 19 Tr.p.114–16; 130–32). She had previously disclosed abuse to two ex-boyfriends and a girlfriend. (Feb. 19 Tr.p.85).

In 2018, a Pickens County grand jury indicted Sherley for Lewd Act with a Minor.[1] Sherley proceeded to jury trial on February 19–20, 2019 before the Honorable Perry H. Gravely. He was convicted and sentenced to ten years' incarceration, suspended on the service of three years' incarceration followed by probation. (Feb. 21 Tr.p.319). This direct appeal follows.

[1] S.C. Code Ann. §16-15-140 (2011), repealed by 2012 Act No. 255, Section 14, eff June 18, 2012.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (internal citation omitted).

ARGUMENT

The trial court correctly admitted "time and place" corroboration evidence because Lewd Act with a Minor is "criminal sexual conduct" within the meaning of SCRE 801(d)(1)(D).

Sherley argues the trial court erred by admitting "time and place" corroboration evidence, claiming Rule 801(d)(1)(D), SCRE applies only to sexual crimes styled as "criminal sexual conduct" in the South Carolina code. His argument is not preserved for review because he did not object when the evidence was offered at trial. Even if preserved, his argument fails because "time and place" corroboration evidence is admissible in all prosecutions for sexual assault. Because the conduct prohibited by the former Lewd Act statute is sexual in nature, and produces the evidentiary issues Rule 801 is designed to address, "time and place" corroboration evidence is admissible in these prosecutions. The trial court correctly admitted the evidence. This Court should affirm.

a. The issue is not preserved because Sherley did not contemporaneously object.

Sherley claims the trial court erred by allowing "time and place" corroboration evidence, but he did not object when the evidence was offered at trial. (Feb.19 Tr.p. 116; 132; 136; 140; 150; 144; 161). Accordingly, the issue is not preserved for review. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Sherley acknowledges in his brief that he did not contemporaneously object to the testimony of any of the seven corroboration witnesses. Brief of Appellant at 10. He nonetheless claims, without citation to authority, that he should be excused from this basic issue preservation requirement because "objections would have been futile. . . ." Brief of Appellant at 10, n.1. He argues the court's pretrial ruling in limine "was final."

"An in limine ruling **is not final** and contemporaneous objection is required to preserved an issue for appeal." State v. Wannamaker, 346 S.C. 495, 499, 552 S.S.2d 284, 286 (2001) (emphasis added). "Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

Defense counsel seemed to recognize the necessity of making some sort of trial objection when he moved to strike the testimony of all seven corroboration witnesses at the conclusion of the State's case. (Feb.20 Tr.p.203). However, a motion to strike, just like an objection, must be timely. Rule 103, SCRE (providing "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (1) *Objection.* In case the ruling is one admitting evidence, a **timely** objection or motion to strike appears of record") (emphasis added); Parr v. Gaines, 309 S.C. 477, 481, 424 S.E.2d 515, 518

(Ct. App. 1992) (explaining party "could not cure their failure to object contemporaneously by moving to exclude the evidence at the end of [opponent's] case"). Sherley's untimely motion to strike does not cure his failure to object when the evidence was offered.

This case illustrates the wisdom of the rule requiring contemporaneous objection. Sherley's motion in limine initially focused on ensuring the corroboration testimony was limited to time and place. He cited cases where witnesses exceeded the allowable "time and place" scope of Rule 801 corroboration, and requested that the witnesses "be carefully instructed that they are not to identify to perpetrator." (Feb. 19 Tr.p.44). While Sherley did question whether Rule 801(d)(1)(D) would apply in a Lewd Act case, he was equivocal about whether he would object when the evidence was offered. Referring to corroboration evidence, he told the court, "I'm not sure if it's admissible at all in a lewd act case. . . . I'm not sure . . . . I'll read the cases and notes." (Feb.19 Tr.p.44; 47).

Nonetheless, the court considered and rejected the idea that a prosecution for Lewd Act is not "a criminal sexual conduct case" within the meaning of Rule 801. The trial court indicated he believed sexual conduct is a "general term," and indicated he believed the rule would apply to a Lewd Act case. However, the court emphasized his ruling was "tentative." (Feb.19 Tr.p.48, line 18). He then adjourned court for lunch. After lunch, the court told the attorneys he had reviewed the cases they provided but "didn't see any that kind of changed my tentative ruling . . . ." (Feb.19 Tr.p.50). Defense counsel made no response and the trial started shortly

after, beginning with the victim's testimony. Seven witnesses gave "time and place" corroboration testimony at trial. Sherley did not object to any of the testimony. (Feb.19 Tr.p. 116; 132; 136; 140; 150; 144; 161).

Sherley does not cite any cases to support his argument that he should be excused for his failure to contemporaneously object. Brief of Appellant at 10, n.1. While an appellate court may forgive the "failure to raise **specific grounds** for an objection" if the grounds are apparent, the party must still object. State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019), reh'g denied (Sept. 20, 2019) (emphasis added); Rule 103, SCRE (requiring specificity of objection if "the specific ground was not apparent from the context"). Had Sherley objected, the nature of his objection likely would have been apparent to the trial court. But he did not object.

The appellate court will excuse the failure to renew a pretrial objection in very limited circumstances, such as when the evidence is admitted immediately after a substantive in camera hearing. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (holding pretrial evidentiary ruling was final because it was made "immediately prior to the introduction of the evidence in question" by the trial's first witness); Cf. State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) (holding a ruling made during an in camera hearing to determine the admissibility of the victim's sister's testimony was not final where, after the in camera hearing, testimony was provided from two other witnesses, a break was taken, and then the victim's sister testified without objection). In this case, the

corroboration evidence was not offered directly after the pretrial hearing, nor was it offered by the first witness at trial.

In rare cases, the appellate court may excuse the failure to object when objection would be obviously futile. See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (failure to object to a trial judge's demeaning, improper comments directed towards counsel would have been futile). However, the futility exception should not be applied to tentative pretrial evidentiary rulings. Although the court did indicate it was inclined to allow the evidence, it had yet to hear any of the testimony, most importantly the victim's description of the abuse. Especially where defense counsel was equivocal about his intention to object, Sherley was required to contemporaneously object. In these circumstances, Sherley's failure to object should not be excused as futile.

Sherley failed to preserve this issue when he did not contemporaneously object when the evidence was offered. His invitation for this Court to infer an objection into the record should be declined. This Court should affirm.

b. "Time and place" corroboration evidence is admissible in all sexual assault cases.

Sherley argues "time and place" corroboration evidence is not admissible in Lewd Act cases because the crime was not styled as "criminal sexual conduct" in the code of laws. His argument should be rejected because it rests on a superficial reading of Rule 801 that would lead to incongruous results and defeat the purpose of the rule. Rule 801(d)(1)(D) applies to a category of cases—sex crimes. This is so even if the particular crime being prosecuted is not styled as "criminal sexual

conduct" in the code of laws because the rule is meant to address the evidentiary issues common among sexual crimes.

That Rule 801 applies to a general type of case is apparent from the text of the rule. It provides that a statement is not hearsay if the declarant testifies at trial and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident . . . ." Rule 801(d)(1)(D) SCRE. The phrase "criminal sexual conduct" is not capitalized, and the rule does not refer to a particular statute number. Compare with S.C. Code Ann. § 16-3-657 (providing the testimony of the victim need not be corroborated "in prosecutions under Sections 16-3-652 through 16-3-658"). If the rule-making body intended to limit Rule 801 to prosecutions under statutes with the phrase "criminal sexual conduct" in the heading, it would have referenced the particular statutes within the rule. See Rule 412, SCRE (providing admission of victim's sexual history is "subject to the limitations contained in S.C. Code Ann. § 16-3-659.1").

In this regard, Rule 801(d)(1)(D) is similar to Rule 804(b)(2), which establishes a hearsay exception where the declarant is unavailable "[i]n a prosecution for homicide . . . ." Both rules address a category of case because the facts typical to those cases justify the rule in the first place. The problem of declarant unavailability arises in homicide cases for obvious reasons. It does not matter whether the homicide being prosecuted is a murder, manslaughter, or other

homicide crime; the rule applies in each case because they all involve the evidentiary issue the rule seeks to address.

The same reasoning applies to Rule 801 because sex crimes share common evidentiary issues despite the distinctions between the crimes. For example, when comparing the crime of Lewd Act with a Minor with Criminal Sexual Conduct with a Minor, the existence of a "sexual battery" distinguishes the crimes. However, both crimes almost always involve secret sexual abuse that typically results in delayed disclosure. "Time and place" corroboration evidence is equally probative in both cases. It is not the particular charge that is brought that justifies the rule—it is the underlying evidentiary issues germane to that type of case.

Lewd Act with a Minor and CSC with a Minor are both sex crimes. State v. McGaha, 404 S.C. 289, 297, 744 S.E.2d 602, 606 (Ct. App. 2013) (describing Lewd Act and CSC with a Minor as "of the same general nature"). Our appellate courts have repeatedly characterized Lewd Act as a sexual crime. See State v. Grace, 350 S.C. 19, 23–24, 564 S.E.2d 331, 333 (Ct.App.2002) (finding three charges of criminal sexual conduct with a minor and one charge of lewd act upon a child were of the same general nature because they "were all sexual misconduct crimes"); State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 5 (Ct. App. 2009), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011) (describing Lewd Act as a "sexual offense"). In fact, the "**same conduct** is now classified as criminal sexual conduct with a minor in the third degree." State v. White, 416 S.C. 135, 136, 784 S.E.2d 695, 695 (Ct. App. 2016) (emphasis added).

In State v. Whisonant, this Court applied the "time and place" rule in a Lewd Act case, stating matter-of-factly that Lewd Act is a "sexual offense." State v. Whisonant, 335 S.C. 148, 154, 515 S.E.2d 768, 771 (Ct. App. 1999) (applying Rule 801(d)(1)(D), SCRE in a Lewd Act case, but finding testimony went beyond "time and place"). The Whisonant court recognized the obvious—there is no logical reason why "time and place" corroboration evidence should be admissible in a CSC with a Minor case, but inadmissible a Lewd Act against a Minor case.

The soundness of this conclusion is illustrated by the facts of this case. The victim testified to two incidents of abuse by Sherley. Both occurred in her home when the victim was either 10 or 11 years old. One incident involved digital penetration, the other involved over-the-clothes groping. Both incidents resulted in significantly delayed disclosure. Why should corroboration evidence be admissible for one allegation but not the other?

Sherley's superficial argument—that the answer lies solely in the caption of the subsection under which he was charged—does not provide an acceptable answer. His argument would result in an incongruous, illogical result that would contravene the purpose of the rule. SCRE 103 provides that the rules of evidence "shall be construed to . . . promot[e] growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Rule 102, SCRE. Sherley's interpretation fails on both counts. Not only would it hinder the truth-ascertaining purpose of a trial, it would move the development of the rules of evidence backwards. Rather than a rule based on logic and facilitative of the

ascertainment of truth, we would be left with a vapid, superficial rule that would change meanings with nominal changes to the criminal code. See also State v. Morgan, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct. App. 2002) (explaining rule of statutory construction that a "statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers").

Taken to its logical extreme, Sherley's argument reveals its shortcomings. If the only measure of the rule's applicability is an exact titular symmetry, what other sex crimes would fall outside of the rule's purview? After all, Rule 801 speaks to "criminal sexual conduct" cases—it makes no mention of criminal sexual conduct **with a minor**," a separate offense. Compare S.C. Code §16-3-652 with §16-3-655. What about the crime of Spousal Sexual Abuse or Sexual Battery of a Student? S.C. Code §16-3-615; S.C. Code §16-3-755. These are undoubtedly sexual crimes, yet are not styled as "criminal sexual conduct" in the code. Are not the evidentiary issues likely to arise in a prosecution for Sexual Battery of a Student the same as those for CSC with a Minor? See Rule 412, SCRE (disallowing rape trauma evidence in "criminal sexual conduct" cases to the same extent as S.C. Code §16-3-659.1, which applies to the offense of "Spousal Sexual Battery").

Similarly, Sherley's interpretation would exclude corroboration evidence in Lewd Act cases occurring before June 2012, yet admit corroboration evidence in CSC with a Minor 3rd Degree cases occurring in July 2012, even though the crimes cover the

exact same conduct. See State v. White, 416 S.C. 135, 136, 784 S.E.2d 695, 695 (Ct. App. 2016). Sherley's interpretation would thus lead to an arbitrary result.

The better approach, and one more consistent with Rule 103's statement of purpose and construction, is to interpret the Rule so as to give effect to the purpose of the "time and place" corroboration rule, which predates the Rules of Evidence. The rule is succinctly stated in State v. Barrett:

> Ordinarily, when a witness has not been impeached, evidence of prior consistent statements is inadmissible. To this rule is an exception in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible as corroboration of the incident; however, the evidence must be limited to the time and place of the assault, and may not include particulars or details.

State v. Barrett, 299 S.C. 485, 486–87, 386 S.E.2d 242, 243 (1989) (internal citations omitted).

The phrase "criminal sexual conduct" is not a magic phrase. Courts have used the phrase interchangeably with other synonymous phrases in applying the "time and place" corroboration rule. See State v. Jeffcoat, 350 S.C. 392, 395–96, 565 S.E.2d 321, 323 (Ct. App. 2002) (explaining "[i]n South Carolina, a **sexual assault victim**'s prior consistent statements limited to the time and place of the alleged incident are not hearsay . . . .") (emphasis added); In re Robert M., 294 S.C. 69, 71, 362 S.E.2d 639, 641 (1987) (describing the rule as encompassing "complaints or reports of **sexual misconduct**") (emphasis added); State v. Cox, 274 S.C. 624, 626, 266 S.E.2d 784, 785 (1980) (describing rule as admitting evidence "corroborative of the **sexual battery victim's testimony**") (emphasis added).

Recognition of the uniquely probative nature of corroboration in sexual assault cases, and acceptance of a limited hearsay exception to allow its introduction at trial, goes back more than one hundred years in South Carolina. See State v. Sudduth, 52 S.C. 488, 30 S.E. 408, 408 (1898). However, the general acceptance of—and demand for—corroboration is as applicable today as ever. See "The sexual allegations against Joe Biden: the Corroborators," Glenn Kessler, The Washington Post, April 29, 2020, available at https://www.washingtonpost.com/opinions/metoo-is-on-the-democratic-foot-what-does-that-mean-for-november/2020/04/28/87734be8-8997-11ea-9dfd-990f9dcc71fc_story.html, last visited May 8, 2020 (explaining the probative value and need for corroboration in investigative journalism of sexual assault allegations against public figures). The logic and force of the rule does not depend on the name of the statute under which the defendant is charged. It depends on the substance of the allegations. See People v. Brown, 192 Cal. App. 4th 1222, 1225, 121 Cal. Rptr. 3d 828, 829 (2011) (holding murder prosecution involving romantic couple was an "offense involving domestic violence" within meaning of evidence rule even though defendant was not charged under domestic violence statute).

The "time and place" corroboration exception to the hearsay rule applies equally to all sexual assault crimes. Sherley's superficial interpretation of Rule 801 should be rejected because it would lead to an arbitrary application of the rule. The trial court correctly admitted the evidence. This Court should affirm.

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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May 18, 2020

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS, and by depositing one copy of the same in the United States mail, postage prepaid, addressed to David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served. This 18th day of May, 2020.

Anne Mueller

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Attachments:	Sherley William - Cover letter to David Alexander for IBOR-DOM (02280581xD2C78).PDF Sherley William - IBOR-DOM (02280582xD2C78).PDF

Dear Mr. Alexander,
Attached are copies of our cover letter and the State's Initial Brief of Respondent and Designation of Matter. This brief and designation will be filed with the Court today through AIS One Drive.

Please acknowledge receipt of this email and the attachments by return email.
Thank you,
Anne Mueller
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