STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Respondent,

vs.

Guadalupe Guzman Morales, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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PROCEDURAL STATEMENT

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

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

This Court, after briefing, affirmed the convictions and sentences. See State v. Morales, Op. No. 2020-UP-001 (S.C. Ct. App. filed Jan. 8, 2020). Appellant petitioned to the South Carolina Supreme Court arguing the trial court erred in its application of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). The Supreme Court granted certiorari, dispensed with further briefing, reversed the decision of this Court, and remanded for "reconsideration of the substantive and procedural issues in light of [the Supreme Court's] decision in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020)."

On October 7, 2020, this Court sent a letter in light of the remand requesting the parties provide a memorandum addressing the impact of Perry on this appeal. This supplemental brief follows.

ARGUMENT

I. First, the issue is not properly preserved for review on appeal and pursuant to the Supreme Court's remand this Court should consider the procedural bar. Second, even though not preserved, the Court should affirm the trial court's decision to admit the testimony of the second victim because it meets the requirements of either Wallace or Perry.

While Appellant's trial counsel initially objected to the testimony as not meeting Rule 404(b), SCRE, at a pre-trial hearing, once testimony was presented at trial he waived his objection and admitted the testimony was similar. Instead of continuing to maintain the testimony was inadmissible under Rule 404(b), he argued the testimony constituted impermissible bolstering based on the similarity of the testimony. As a result, any issue regarding application of 404(b) is waived and not preserved for review on appeal. Additionally, he never maintained State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), should be overruled or was not the applicable case law. Additionally, the testimony properly meets the requirements set forth in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020), especially when considered in light of both Perry and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020).

WAIVER/PRESERVATION

As the Supreme Court's remand allows for the raising and consideration of procedural bars, the State submits this Court should consider the previously raised procedural bars and find the issue not properly preserved for review on appeal. Appellant's trial counsel waived any issue regarding the admission of the second victim's testimony pursuant to Rule 404(b). While counsel did raise an objection to the second victim testifying at a pre-trial hearing, arguing the testimony was inadmissible under Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), he waived this ruling at trial.

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

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

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

> But the consortium of witnesses **that are saying the same thing for the same reason**. . . . But now after hearing Jessica's testimony it appears to be clear that's what it is. So we think that the testimony of Lisa is -- will be improper bolstering of Jessica's testimony.

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

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

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

review, it must have been raised to and ruled upon by the trial court); see also, S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) ("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.") (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). As the Supreme Court explained:

> The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him. For the guidance of the bar we restate the holding made by this court in many cases heretofore: This court will not grant relief on alleged error asserted for the first time on appeal.

Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970). This Court should not address an issue never raised to or ruled on by the trial court. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (" 'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.' " (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))); State v. Morgan, 282 S.C. 409, 412, 319 S.E.2d 335, 337 (1984) ("Inasmuch as the trial judge had no opportunity to pass upon the issue, the question will not be considered on appeal.").

This Court should find the issue presented related to Rule 404(b) to be blatantly not preserved and refuse to address the merits of any claim regarding Rule 404(b), Wallace, or Perry.

MERITS

Even if this Court overlooks the fact the issue is not properly preserves and does not consider the procedural bar, the testimony of the second victim was properly admitted by the trial

court under the newly issued Perry standard. In Perry the Supreme Court required more than just similarities. The Court stated: "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." State v. Perry, 430 S.C. 24, 41, 842 S.E.2d 654, 663 (2020). In the instant case, there is something more; there is a logical connection that makes the victim in this case and the testimony of victim two unique and more than just propensity evidence.

In Perry, the Supreme Court explained:

> The question for a trial court, and for this Court on appeal from Perry's conviction, is whether the evidence also serves some legitimate purpose that is not prohibited by Rule 404(b). The rule provides examples of legitimate purposes, stating evidence of other crimes "may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

Perry, 430 S.C. at 30–31, 842 S.E.2d at 657. The Court continued:

> Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged.

Id. at 31, 842 S.E.2d at 658.

The primary question to be resolved in this case is whether a logical connection or logical relevancy exists between the testimony of the two victims to establish the common scheme or plan. The Perry Court provided some guidance by indicating: "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." Perry, 430 S.C. at 41, 842 S.E.2d at 663. The Court then discussed several cases in which the logical connection was developed including: State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d

772, 774 (1984), State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020), and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020).

In both McClellan and Durant, the logical connection was established through a "particularly unique method of committing his attacks" which involved using the Bible or spiritual healing as a means of being able to abuse the girls. The Court explained: "The fact he carried out his plan in its unique detail when assaulting all three children warranted the admission of the uncharged crimes into evidence. The evidence had a logical connection to whether a crime was committed and to who committed it." Perry, 430 S.C. 24, 42, 842 S.E.2d 654, 663 (2020) (discussing McClellan).

The more apropos comparison in the instant case is with the Supreme Court's holding and analysis in Cotton. In Cotton, the Court explained: "the trial court admitted testimony from a second victim (another young woman) who had suffered an **essentially identical assault** at Petitioner's hands." Cotton, 430 S.C. at 114, 844 S.E.2d at 57 (emphasis added). The Court then explained many of these similarities and noted that in both cases the victim tried to persuade the defendant not to rape her, but he did anyway. In Cotton, it was not the "unique method" like what occurred in both McClellan and Durant, but instead very similar facts and a circumstance that occurred in both which created a stronger indication of who attacked the women.

In the instant case, the testimonies of the two victims were very similar.[1] They both indicated the abuse began when they were very young, three and four years old. They both testified Appellant began by touching them under their clothes. Both victims indicated the abuse generally happened at home when the mom was either not home or occupied and their sisters were not in the same room. The extent of the abuse against the victim—which included intercourse—was worse

[1] The State craves reference to its Final Brief of Respondent for a detailed discussion of the facts and the testimony of the two victims.

than the abuse against the second victim—which only included Appellant placing his penis against her buttocks. However, this is likely only because of the disclosure by the victim which ended the opportunity of Appellant to do more to the second victim. Most significantly, and similar to Cotton's circumstance where it was not a common occurrence, both victims believed Appellant was their dad at the time of the abuse, but later learned he was not their father. Both girls testified that they always believed Appellant to be their dad, but only after the abuse did they learn that he was not actually their biological father. Appellant took advantage of this relationship for his sexual gratification, and this false "relationship" also is a prime factor in the failure to disclose and the failure to resist the abuse that was occurring. The fact he allowed both girls to believe he was their biological father, when he was not, and relied on that "relationship" to be able to abuse the girls is the logical connection required to allow admission of the testimony under Cotton and Perry.

This Court should consider the procedural bars and find the issue not preserved for review on appeal. Even if a challenge to admissibility under Rule 404 was preserved, Appellant never asserted Wallace was the inappropriate standard and so the State and trial court properly analyzed the facts under the standard as articulated by the South Carolina Supreme Court at the time and the trial court was never asked to consider a different standard so there should be no issue on which to reverse the admission of the evidence. Finally, even on the merits the circumstances of this case, much like the circumstances in Cotton, demonstrate the second victim's testimony was properly admitted.

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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November 6, 2020

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Supplemental Brief of Respondent on Appellant by emailing a copy to his counsel of record, Kathrine H. Hudgins, at the email address provided for in the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 6th day of November, 2020.

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Caroline Collins

From: Caroline Collins
Sent: Friday, November 6, 2020 4:50 PM
To: Hudgins, Kathrine
Cc: 'Stock, Chris'; William Blitch
Subject: The State v. Guadalupe Guzman Morales (2017-001796)
Attachments: MORALES Guadalupe - Supplemental Brief of Respondent - 2017-001796 (02421863xD2C78).PDF

Follow Up Flag: Worldox

Good Afternoon Ms. Hudgins,

Attached please find the Supplemental Brief of Respondent in The State v. Guadalupe Guzman Morales (2017-001796). This Brief will be submitted to the Court of Appeals via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

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