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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2019-001983

THE STATE,

Respondent,

v.

JULIO ANDRES CASTILLO,

Petitioner.

INITIAL BRIEF OF RESPONDENT

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ISSUE STATEMENT

Prior bad act evidence is admissible if it logically tends to show the existence of a plan or criminal intent in the commission of charged acts. Use of the same distinctive criminal process will establish the required logical connection between otherwise unconnected acts. Evidence of Castillo's prior abuse of Lyle Witness showed he employed the same distinctive process to initiate sexual abuse against Victim. Was the evidence properly admitted?

STATEMENT OF THE CASE

A York County grand jury indicted Julio Andres Castillo for two counts of Criminal Sexual Conduct with a Minor in the Second Degree (CSC), and four counts of Lewd Act Upon a Child. On November 18–22, 2019, Castillo proceeded to jury trial before the Honorable G. Thomas Cooper, Jr. He was convicted as charged on all counts and sentenced to twelve years' incarceration. This direct appeal follows.

STATEMENT OF FACTS

This case arose from allegations of sexual abuse committed against Victim, 24 years old at time of trial, by Appellant Julio Andres Castillo. (Tr.p19). Victim met Castillo at his church in Rock Hill. (Tr.p.292). Victim began attending the church with his parents and younger brother (hereinafter "Brother") when Victim was four years old. (Tr.p.410). Victim joined the youth choir in 2002, when he was in first grade. (Tr.p.411). Castillo was an assistant choir director and youth group leader. (Tr.p.21; 294–95).

Two years later, Castillo moved into a house two doors down from Victim's family. (Tr.p.21; 417–18). Castillo developed a close relationship with the family, so much so that Victim's father was in Castillo's wedding. (Tr.p.21–22; 96). Beginning when Victim was in third or fourth grade, he and Brother would frequently visit Castillo's house, where Castillo had video games, a video projector, and a piano. (Tr.p.22; 301). Sometimes Castillo would invite only Victim to come over. (Tr.p.51, lines 8–10). Victim's mother testified it was common for Castillo to call and "ask[] if they could come over." (Tr.p.420). Castillo would also give the boys rides to choir practice and take them on other special outings. (Tr.p.35; 298). Victim testified: "I saw my parents trusted him and I trusted him and I enjoyed spending time with him. He became a friend of the family and a friend of mine as well." (Tr.p.299).

In 2005, Victim's family accompanied Castillo on a trip to Daufuskie Island. (Tr.p.23–24; 95). Victim was in third grade at the time; Brother was in second

grade. (Tr.p.39; 41). Victim testified Castillo exposed himself to him and Brother in a bedroom of the vacation home. Castillo put his penis "through the flap in his boxers," while lounging on the bed. Victim testified he believed it was intentional because Castillo "didn't quickly cover it back up like, 'oh, I'm sorry.'" (Tr.p.40–41). On cross-examination, defense counsel asserted the exposure was "inadvertent." (Tr.p.334–35). Mother testified that she remembered the trip, and that at one point she had walked in on Victim and Castillo in Castillo's bed. They were both clothed, but Mother testified she was concerned about something "possibly inappropriate." (Tr.p.426; 443). She told Castillo to "back off," but he remained a family friend. (Tr.p.442).

Physical abuse began around the same time, in the form of massages. These massages occurred during Victim's visits to Castillo's home, with the first massages occurring in Castillo's bedroom. (Tr.p.304). Victim described the massages this way:

I would lay on my stomach on the bed and he would sit on my legs and would massage my back, my arms and my legs; usually it was with clothing on. He would massage over the clothing and then at times put his hands under the clothing as to massaging direct skin touch and then he would flip me over and would massage me doing the same thing above the clothing, and then would sometimes slip his hands under the clothing, and at times when I was on my back there was inadvertent touching—or so I thought—inadvertent touching of my penis.

(Tr.p.24–25). He testified this method—Castillo massaging his back before flipping him over to massage his front—was "consistent" throughout the abuse. (Tr.p.321).

Victim testified that one day, when he was in fifth grade, the massages progressed to masturbation. (Tr.p.25; 305). The first instance occurred when

Victim asked Castillo to explain a joke he heard at school, the punch line being related to masturbation. (Tr.p.305–06). When Victim asked Castillo "what that meant," Castillo "offered to show" Victim, and proceeded to masturbate him. (Tr.p.306). Castillo would go on to perform masturbation on Victim on approximately five other occasions. (Tr.p.316). "The massage kind of turned into that," Victim explained. (Tr.p.27). Victim recalled one instance where he masturbated Castillo, but generally Castillo seemed "more interested" in masturbating Victim. (Tr.p.29).

Around this time, Castillo converted his attic into a living space. Massages began to take place on a bed in the attic. (Tr.p.28). During a pretrial hearing, Victim testified Brother would sometimes be present during the abuse, but he did not have specific memories of Castillo abusing Brother. (Tr.p.29; 45). He explained: "my specific memories of the abuse are from my point of view. I remember [Brother] being there at times and on days the trauma occurred to myself but I do not have any specific instances where I observed [Brother] that I can remember [him] being traumatized." (Tr.p.45). He also recalled an incident where he and Brother "skinny-dipped" with Castillo in Castillo's parents' hot tub. (Tr.p.58).

Victim recalled two instances where Castillo performed fellatio on him. (Tr.p.30–31). The first instance happened in Castillo's bedroom, and the second occurred at Victim's house, on the night before Castillo's wedding. (Tr.p.30–32; 313–16). During this last incident, Victim for the first time told Castillo to stop because he felt he was doing something wrong. (Tr.p.33).

Victim testified he remained close with Castillo after the abuse stopped. When asked why, he explained: "Because he was a mentor to me. Throughout my childhood he was somebody that I looked up to. That I respected. That was also a friend of mine." (Tr.p.321). During the pretrial hearing, he explained the relationship this way:

I viewed him as a friend. We had a very close relationship in that we spent a lot of time together. He was a very close family friend. I mean, he was always welcome over at the house. There would be times where he would be out and about and he would just come over and stop by and say hello. It didn't matter if my parents were home or not. He was just very close to all of us. He was like a mentor to me. I asked him to be my confirmation mentor when I was confirmed at the church. He was very close with my family and myself.

(Tr.p.35).

Lyle Evidence

Before trial began, the court conducted an extensive hearing to determine the admissibility of "prior bad act" evidence pursuant to SCRE Rule 404 and the line of cases stemming from State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The hearing was complicated by the fact that the State had also charged Castillo with CSC against Brother.

The State originally planned to try Victim's and Brother's cases together. However, the prosecutor made clear that this decision depended on trial court's ruling whether the testimony of yet another boy alleging abuse against Castillo would be admissible as Lyle evidence relating to one or both sets of charges against the brothers. This third witness, hereinafter referred to as "Lyle Witness," testified at the pretrial hearing, as did Victim and Brother.

Brother's testimony largely mirrored Victim's. He described the grooming "mentor" relationship between himself and Castillo, explaining that "the dynamics was somewhere between like my relationship with an adult and relationship with like someone my own age in the sense that he was young adult and he made efforts to be more personable than strictly speaking authority figure." (Tr.p.62). He also corroborated much of Victim's testimony regarding Castillo's escalating pattern of physical touching beginning with massages. He explained Castillo "would have me lay on the bed in his attic and he's first start massaging my legs and just moving his hands like gradually up and down my body, massaging along the way going under clothes. And there were instances where he touched my penis underneath." (Tr.p.63).

However, there were significant differences between Brother's testimony and Victim's testimony. Brother described one night when he and Victim both spent the night with Castillo. Before bed, they played a game of truth or dare that turned sexual, culminating in he and Castillo "dry-humping" each other and the three of them "giving and receiving oral sex" to each other. (Tr.p.68; 88–90). Castillo told him afterward not to tell anybody else what had happened. (Tr.p.89). Brother did not recall seeing Castillo molest Victim on any other occasion, but he did recall Victim being present during some of the massages. (Tr.p.75–76). Brother testified remembering four massages. (Tr.p.84). However, he denied that Castillo ever masturbated him during the massages. (Tr.p.86). He also recalled an occasion when Castillo exposed his penis to him during a walk in the woods. (Tr.p.76).

Lyle Witness's description of the abuse he suffered mirrored Victim's testimony more closely. Lyle Witness was the younger brother of Castillo's high school girlfriend. (Tr.p.98). Castillo met Lyle Witness when Castillo was sixteen and Lyle Witness was 8 years old. (Tr.p.582). Castillo became close with Lyle Witness's family while dating his sister. (Tr.p.458). Lyle Witness testified his parents "seemed to like" Castillo, going so far as hosting a birthday party for him, and he remained a family friend even after he and Lyle Witness's sister broke up. (Tr.p.458; 474–75). Castillo would continue to come visit, even when his sister was not home. (Tr.p.459).

Lyle Witness became close with Castillo, to the point that he would visit and spend the night at Castillo's house. (Tr.p.99). He first stayed over at Castillo's house when he was in the third grade, and did so 15–20 times between third and fifth grade. (Tr.p.460; 463). Castillo was still in high school at this point and lived with his parents. (Tr.p.461). Lyle Witness testified Castillo would "make me sleep in the same bed as him, in his water bed every single time," which he thought was "kind of strange." (Tr.p.100; 463). Around the third or fourth time Lyle Witness slept over, Castillo offered to give him a massage to help him "relax." (Tr.p.463). The massages continued at subsequent sleepovers, happening "almost every other time. . . ." (Tr.p.465).

It gradually progressed to massages in which Castillo and Lyle Witness were "both naked." (Tr.p.100; 465). He explained: "[i]t would be a full body massage. I would be laying face down. The defendant on top of me on my back. Massage back,

arms, legs, yeah." (Tr.p.100). He would then flip over. Castillo "would massage arms, down my legs. Sometimes brushing my penis or that area. Depending—I would have to then again as this went on I would have to massage the defendant or sometimes he would be kneeling next to me and I would have to hold on to his penis as he massaged me." (Tr.p.101). The massages started the third or fourth time he slept over. (Tr.p.101; 463). Castillo and Lyle Witness would sleep naked together. (Tr.p.113).

Just as in Victim's case, the massages progressed to masturbation. The first incident of masturbation was initiated in a remarkably similar fashion: with Lyle Witness asking Castillo to explain masturbation, and Castillo offering to "show" him. He explained: "it was . . . in his parents' jacuzzi tub when his parents were not there, there was—I guess I was interested at the time about what masturbation was. So there was a discussion about it and I remember bathing in a tub. Again, I was naked. He was naked. He . . . was explaining masturbation. I had to grab his penis and then masturbate him until he ejaculated." (Tr.p.102). Castillo "tried" to masturbate him as well. (Tr.p.102).

From that point on, the massages at Castillo's house led to masturbation, with Castillo typically performing the acts on Lyle Witness, although Lyle Witness would sometimes masturbate Castillo as well. (Tr.p.104). The massages typically occurred in Castillo's bedroom, though there were additional instances of mutual masturbation occurring in Castillo's parents' hot tub. (Tr.p.104; 470).

Lyle Witness testified he enjoyed "hanging out" with Castillo, who had video games and other fun activities. (Tr.p.461). He explained:

[Castillo] treated it as kind of a reward almost. So like he would have some game that I wouldn't be allowed to play until I did whatever he asked me to do and then I would get to do what I wanted to do. And so from that time on I think he also would like whenever we would travel he would bring me gifts. He built me a computer probably when I was in seventh grade when I didn't have the means to get one. He would download games for me. Taught me about computers and things like that and I think it was those things that kept the relationship going.

(Tr.p.476). He continued: "[f]or example he would start downloading a certain game . . . I would have to massage him and then after that time the game was done downloading and I would get to play it." (Tr.p.515). Despite the sexual abuse, Lyle Witness considered Castillo a friend: "we had a friendship where, you know, we can talk about pretty much anything. I knew him during a lot of times like in my life where there were a lot of changes going on and so I think that again I had a lot of questions as far as just how things worked and just—I don't know, getting older. Growing up." (Tr.p.520).

Lyle Witness explained the abuse stopped when he reached middle school and told Castillo to stop. (Tr.p.109; 465). However, Lyle Witness continued a relationship with Castillo through high school, and would even bring friends over to Castillo's house. (Tr.p.109). He had both his 16th and 17th birthday parties at Castillo's house. (Tr.p.512–13). He explained:

I think it was the manipulation that I experienced. I think overall the defendant made it seem like—well, I always wanted an older brother so the defendant I think used that against me and then I think it was more of like a relationship in which I—he rewarded me. Well, at that time he rewarded me with I guess like video games and computers and different

things and so I think that part did continue as far as just I guess those interests of mine. So I did maintain the relationship and he had already gotten in with my family. I think the main thing I was afraid of was what it would get out and I would seem like something was wrong with me. Like I was broken or just—I didn't want to have that happen, anything other than that I was just a normal kid.

(Tr.p.110–11). Castillo's abuse of Lyle Witness lasted from 1997 to 2000, when he was eight to ten years old and in the third, fourth, and fifth grades. (Tr.p.112–13).

After hearing testimony from Victim, Brother, and Lyle Witness, the State sought a ruling on the admissibility of Lyle Witness's testimony as "prior bad act" evidence to prove both sets of charges involving Victim and Brother. The State informed the court that it would seek to try the cases separately if the court found Lyle Witness's testimony admissible as to one set of charges, but not the other. (Tr.p.119).

While the prosecutor acknowledged Brother's testimony—that group sex acts occurred and that Castillo did not perform masturbation on him during massages—was an "outlier," the court agreed there was a "great deal of similarity" between the testimony of Brother and Lyle Witness. (Tr.p.119–20). While the State suggested it could offer limited testimony from Brother regarding the massages, the court noted the State "already got that with [Lyle Witness]." (Tr.p.124). Defense counsel had no objection to trying Victim and Brother's cases together, but opposed admission of testimony from Lyle Witness. (Tr.p.126).

After hearing lengthy arguments from the State and defense, the trial court announced it would allow Lyle testimony as to Victim's charges, but not as to Brother's charges. (Tr.p.134). The court invited arguments directed to the Rule 403

balancing analysis, and concluded the potential for prejudice did not substantially outweigh the probative value of the Lyle testimony. (Tr.p.137–38). Based on the court's ruling, the State opted to proceed with Victim's cases, but did not call Brother's case for trial and did not offer him as a witness.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial 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. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013).

ARGUMENT

The trial court correctly admitted evidence of Castillo's prior sexual abuse against a different victim because it showed the existence of a common plan and sexual intent.

Evidence supports the trial court's ruling admitting evidence of Castillo's prior abuse of Lyle Witness to prove the allegations of abuse of Victim. The Lyle evidence was not admitted to show Castillo possessed bad character or a general propensity to sexual misconduct. Rather, it showed that Castillo's abuse of Victim was carried out pursuant to a pre-formed plan. Furthermore, Lyle evidence was admissible to show that Castillo's massages of Victim were done with "sexual intent," as was necessary to meet the elements of the Lewd Act indictments. Accordingly, the Lyle testimony was admissible under SCRE Rule 404(B). This Court should affirm.

A. Error preservation.

Castillo's argument is not preserved for review because he did not object when the Lyle evidence was offered at trial. (Tr.p.453–82). State v. Young, Op.No. 5795 (S.C. Ct.App. filed January 28, 2021); State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) (explaining the "failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal"); State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (holding "contemporaneous objection" is required to preserve issue for appeal); State v. Wannamaker, 346 S.C. 495, 499, 552 S.S.2d 284, 286 (2001) ("An *in limine* ruling is not final and contemporaneous objection is required to preserve an issue for appeal.").

Castillo may argue that any objection would have been futile because the trial court considered the evidence in a pretrial hearing and granted the State's motion to present Lyle testimony.¹ Such an argument would invite this Court to infer Castillo's objection to the entirety of Lyle Witness's testimony. This would violate the requirement that an objection be entered on a specific ground at trial to preserve an issue for appeal. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). If Castillo had objected during Lyle Witness's trial testimony, this Court would have a record of specific objections to review, tailored to specific pieces of testimony. Instead, the Court is forced to take an all-or-nothing approach; to infer an objection to all of the Lyle testimony, or none at all.

This is not a case where admission of the evidence came directly after the court's in limine ruling. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (excusing failure to object where evidence was offered immediately after in limine ruling). Rather, the hearing and trial testimony were separated by two days, during which jury selection, opening statements and jury charge, and the testimony of four witnesses occurred. See 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 sufficient to preserve the issue where, after the in camera hearing, testimony was provided from two other witnesses, a break was taken, and then the victim's sister testified

¹ The State requested this hearing to demonstrate the occurrence of the prior bad acts by clear and convincing evidence.

without objection). Castillo should not be allowed to make arguments on appeal based on objections he failed to make at trial. Because the issue is not preserved for review, this Court should affirm.

B. Lyle evidence was admissible to show Castillo's preexisting plan and intent.

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" SCRE 404(A). In other words, evidence of prior bad acts is "not admissible to prove that an accused is a bad person" and therefore committed the alleged crime. United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973).

However, evidence of prior bad acts is admissible if it "serves some legitimate purpose" State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020), reh'g denied (June 10, 2020). SCRE Rule 404(B) gives "examples of legitimate purposes" for which evidence of prior crimes may be admitted. Perry, 430 S.C. at 30, 842 S.E.2d at 657 (2020); see also Woods, 484 F.2d at 134 (explaining "evidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime"). These legitimate purposes include: "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE 404(B). "[T]o justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose . . . South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged." Perry, 430 S.C. at 31, 842 S.E.2d at 658.

While "the appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases," Perry, 430 S.C. at 35, 842 S.E.2d at 660, commenters have noted that courts seem "particularly receptive" to admitting 404(B) evidence in sexual abuse cases. David P. Leonard, The New Wigmore. A Treatise on Evidence: Evidence of Other Misconduct and Similar Events §9.4.2 (2d. Ed. 2020 supp.); Danny R. Collins, South Carolina Evidence 328–30 (2nd Ed. 2000). While the "examples" of legitimate purposes listed in Rule 404(B) are not exclusive, the Lyle evidence in this case fits squarely within two of the enumerated purposes: "common scheme or plan" and intent.

a. Common scheme or plan.

While evidence of a "common scheme or plan" may be used to show acts were committed as part of a "linked" or "continuing course" of conduct, proof of a single continuous operation or conspiratorial scheme is not required under this exception. Rather, the common scheme or plan exception is commonly applied to "unlinked" crimes which are both carried out with the use of a distinctive, preconceived method. In this way, the "common scheme or plan" exception resembles the "identity" or "modus operandi" exception. However, evidence of "method" or "plan" is admissible in cases in which the identity of the perpetrator is not in question. "Where the very doing of the act charged is in issue and is to be evidenced, one of the evidential facts admissible . . . is the person's plan or design to do the act. Now this plan or design itself may be evidenced by his conduct, and such conduct may

consist of other similar acts so connected as to indicate a common purpose, including in its scope the act charged." David P. Leonard, The New Wigmore. A Treatise on Evidence: Evidence of Other Misconduct and Similar Events §9.1 (2d. Ed. 2020 supp.).

However, mere "[r]epetition of the same act or same crime does not equal a 'plan.'" Perry, 430 S.C. at 41, 842 S.E.2d at 663. Repetition of a similar act could just as easily result from an impulsive decision to act at a similarly opportune moment. Rather, a plan is "an idea harbored in a person's mind." Wigmore §9.2.2. Legitimate "plan" evidence will demonstrate that the actor employed a premeditated "process" in order to achieve a desired result. The previous use of the same unique "method" is admissible because it helps to prove that the perpetrator's charged conduct was in fact carried out pursuant to a plan. As the text of Rule 404(B) itself provides, the *existence of a plan*, in and of itself, carries inherent probative force because it makes it more likely that the charged acts occurred. SCRE Rule 404(B) (providing prior bad act evidence is admissible to show "the existence of" a common scheme or plan); Perry, 430 S.C. at 42, 842 S.E.2d at 663 (explaining prior bad act evidence "had a logical connection to *whether a crime was committed*") (emphasis added).

"Common scheme or plan" evidence is commonly introduced in sexual abuse cases to prove "unlinked" crimes. The trials of nationally-known figures like Bill Cosby and Harvey Weinstein provide visible contemporary examples of "plan" evidence carried out by serial sexual offenders. See Commonwealth v. Cosby, 2019

Pa. Super. 354, 224 A.3d 372, 402 (2019), appeal granted in part, 236 A.3d 1045 (Pa. 2020) (affirming use of prior bad evidence showing "a predictable pattern" of predatory behavior in unlinked sexual assault cases). The use of such evidence in sexual abuse prosecutions is well-established in South Carolina. See Perry, 430 S.C. at 34, 842 S.E.2d at 659.

For years, South Carolina courts reduced the "common scheme or plan" analysis to a "mathematical exercise where the number of similarities and dissimilarities are counted." State v. Durant, 430 S.C. 98, 105, 844 S.E.2d 49, 53 (2020), reh'g denied (July 8, 2020). Our Supreme Court overruled this analysis in Perry and its companion cases of 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). The court explained that similarity, without a logical connection, does not automatically justify the admission of prior bad act evidence. However, as was made clear in the Perry court's subsequent analysis, the degree of similarity between the prior and charged acts is a crucial component of the analysis. Perry, 430 S.C. at 44, 842 S.E.2d at 665 (noting "[s]imilarity can be important" to proving the existence of a plan and citing Durant and Cotton as examples).

In short, proof of prior acts carried out in a uniquely similar fashion tends to prove that the defendant acted pursuant to a preconceived plan when committing the alleged crime. This knowledge makes it more likely that the alleged acts actually occurred. The following facts justify admission of Lyle evidence under the "common scheme or plan" exception in this case.

i. Mentor relationship

While Castillo's distinctive method of initiating physical abuse through massages, discussed below, is the evidence that most directly brings this case within the "common plan" exception, it is important to view this specific "method" within wider context to show how Castillo used his position of influence to bring about scenarios conducive to initiating physical abuse. The massages were a part of a broader "scheme."

As the prosecutor argued, Castillo used his position as a mentor figure and family friend to "gain access" and facilitate his sexual abuse of both boys. (Tr.p.573). Both Victim and Lyle Witness testified Castillo spent a great deal of time with their families and was a regular guest at family gatherings such as birthday parties and holidays. (Tr.p.332; 473). As discussed above in the fact section (pp. 5–6; 10–11), Castillo cultivated a mentor relationship with both boys. To both, Castillo became something less than a parent, but more authoritative than a peer. They both described Castillo as a friend and confidant, someone they could talk to and get advice from. Victim described Castillo as "a mentor to me. Throughout my childhood he was somebody that I looked up to. That I respected. That was also a friend of mine." (Tr.p.321). Similarly, Lyle Witness testified they "had a friendship where, you know, we can talk about pretty much anything. I knew him during a lot of times like in my life where there were a lot of changes going on and so I think that again I had a lot of questions as far as just how things worked and just—I don't know, getting older. Growing up." (Tr.p.520).

It is true that not all of the abusive conduct can be fairly said to have been the immediate result of careful orchestration. For example, the first instances of Castillo performing masturbation on both boys came about as ostensible "teaching moments" brought on by questions from Victim and Lyle Witness, who first broached the subject with Castillo. In return, Castillo offered to "show" them how to masturbate. (Tr.p.102; 306).

But Castillo clearly cultivated the relationships and manufactured circumstances that made the abuse possible. Even giving Castillo the benefit of the doubt that his entire relationship with the boys' families was not orchestrated for the sole purpose of grooming them for sexual exploitation, it is clear that once this relationship was developed, Castillo found ways to use it to his advantage. Both Victim and Lyle Witness testified that that Castillo often invited them over to play video games and do other fun activities at his house. (Tr.p.301; 476). Both testified Castillo would often give them rides to school, take them on special outings, and invite them over for sleepovers. (Tr.p.333–34; 474). By creating circumstances conducive to abuse, Castillo was able to put his more specific plan into action.

These larger circumstances show the nature of Castillo's broader scheme: to "exercise[] his position of trust" as a mentor and family friend to facilitate sexual abuse. State v. Durant, 430 S.C. 98, 106, 844 S.E.2d 49, 53 (2020), reh'g denied (July 8, 2020). But it was Castillo's use of the same distinct method of initiating physical abuse that firmly proves his abuse of Victim was carried out according to a

plan, and most clearly brings this case within the "common scheme or plan" exception.

ii. Unique method of abuse: massages.

If Castillo's cultivation of mentor relationships with Victim and Lyle Witness was in some respects too "ad hoc" or "general" to be considered strong evidence of a carefully orchestrated method of abuse, the testimony regarding his mode of initiating physical abuse directly reveals the existence of a particular plan. Both Victim and Lyle Witness testified to Castillo's unique method of gradually escalating physical conduct beginning with massages. They described the massages in remarkably consistent detail. Both boys were in approximately third grade when the massages began. (Tr.p.340; 641). They both testified that the massages began with them lying face down, with Castillo massaging the back side of their body. (Tr.p.304; 464). Castillo would then flip them over and massage the front side of their bodies. They both testified that there were multiple times—before the massages progressed to masturbation—where Castillo's hands would "brush" against their penis, so that it seemed "inadvertent." (Tr.p.305; 464). They both testified that this desensitizing process went on for some time before finally progressing to overtly sexual acts. Victim testified Castillo used the "same process" each time he massaged him. (Tr.p.304). This continued for an extended time before the abuse turned explicitly sexual.

These facts are similar to those of State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013). There, the evidence showed Scott's sexual abuse of his daughters

bore a striking similarity to his previous, unconnected abuse of his girlfriend's cousin. The primary link was Scott's employment of massages carried out in a consistent pattern:

[M]uch of 404(b) Witness April's testimony coincided with the Victims' specific allegations: abuse occurred when she spent the night at Appellant's residence; abuse occurred when Appellant was the only supervising adult; abuse occurred at bath time; Appellant would dry her off after a bath, focusing on her buttocks and genitalia, despite her being self-sufficient; Appellant rubbed lotion on her entire body; Appellant played hide and seek, whereby one child was separated from the other(s) for an extended period of time; Appellant climbed into her bed and placed his hands in her panties and rubbed her genitals; and abuse first occurred when she was approximately eight years old. Because these similarities were shared between the four Victims' collective testimony and April's testimony, the evidence was highly probative.

State v. Scott, 405 S.C. 489, 507, 748 S.E.2d 236, 246 (Ct. App. 2013). Like Scott, Castillo employed a specific, consistent method of initiating sexual abuse that proves he was acting according to a plan.

The facts also resemble those of State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). There, the Supreme Court explained that prior bad act evidence was properly admitted because the defendant used a common "method of attack" to sexually abuse his three daughters. McClellan "developed a particularized plan for sexually assaulting his children," including the recitation of a bible verse and an explanation that he was "teaching them how to be with their husbands." McClellan, 283 S.C. at 391, 323 S.E.2d at 773; Perry, 430 S.C. at 42, 842 S.E.2d at 663 (discussing McClellan). Like McClellan's actions, Castillo's conduct exemplifies the sort of obviously premeditated conduct admissible under Rule 404(B). His rationalization of his conduct as merely "showing" Victim and Lyle Witness also

mirrors the purported "teaching moments" that McClellan used to justify his abuse. McClellan, 283 S.C. at 391, 323 S.E.2d at 773. See also State v. Durant, 430 S.C. 98, 106, 844 S.E.2d 49, 53 (2020), reh'g denied (July 8, 2020) (affirming admittance of evidence that pastor used his position of trust to groom child victims employing same distinctive process to initiate abuse).

The facts of this case raise a clear inference that Castillo's course of massages performed on Victim closely mirrored the method he used to facilitate and normalize his sexual abuse of Lyle Witness. Accordingly, Lyle Witness's testimony proved the "existence of a plan." See Rule 404(B). Because this evidence supports a finding that Castillo's abuse of Victim was carried out according to a plan, the trial court did not abuse its discretion by admitting the evidence.

iii. Perry distinguished.

Castillo devotes much of his brief to complaining that the trial court's analysis focused on the Wallace test, which centered around the similarities between the prior acts and charged conduct. Of course, neither the trial court nor the attorneys had any way of knowing the Supreme Court would overrule Wallace and re-establish the test emphasizing "logical relevancy." But the question on appeal is not whether the trial court's stated reasoning is flawless, or even correct. Thomas v. 5 Star Transp., 412 S.C. 1, 16, 770 S.E.2d 183, 191 (Ct. App. 2015) (explaining the "reasoning adopted by the trial court is not binding upon this court if the record discloses a correct result"). The question is whether its ruling

admitting the evidence is supported by the record, when analyzed according to Perry. See Scott, 405 S.C. at 497, 748 S.E.2d at 241. As discussed above, it is.

Furthermore, even though Perry abandoned the Wallace test, which employed a "mathematical" analysis which merely weighed the similarities and dissimilarities between the prior and charged conduct, the Perry court made clear that the degree of similarity is still an important part in the analysis. Perry, 430 S.C. at 44, 842 S.E.2d at 665. As the court's opinions in Durant and Cotton further illustrate, similarity is still a major factor in determining whether the evidence is sufficient to prove the existence of a plan.

Finally, Perry can be distinguished on its facts. In Perry, the defendant molested his daughters and stepdaughters on various occasions when the girls were in his custody for parental visitation. There was no indication that Perry orchestrated the girls' presence, or took any special steps to prepare for or facilitate his abuse. Instead, the evidence indicated Perry merely took advantage of the favorable circumstances—mandatory visitation with his daughters. Likewise, there was no clear indication Perry engaged in any sort of distinctive ritual or methodology, as was the case in McClellan, Scott, Durant, and the present case.

Lyle Witness's testimony showed that Castillo's system of abuse against Victim was carried out according to a plan. Accordingly, it was admissible under the "common scheme or plan" provision of Rule 404(B). This Court should affirm.

b. Intent

Evidence of Castillo's sexual abuse of Lyle Witness was also admissible under the "intent" provision of Rule 404(B). "It is frequently said that evidence of other crimes is admissible *to rebut a possible inference of innocent intention*, or rebut a defense based on evidence, tending to show an absence of guilty knowledge or intent." State v. Owens, 124 S.C. 220, 117 S.E. 536, 537 (1922) (emphasis added). Such was the case here, where the jury could have found Castillo's massages of Victim were done without sexual intent.

The crime of Lewd Act (now re-codified as CSC 3rd degree) makes it unlawful to "wilfully and lewdly commit[] or attempt[] to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, *with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child.*" S.C. Code Ann. § 16-3-655(C) (emphasis added). Castillo was charged with four counts of Lewd Act. Of particular interest to this appeal are indictments #2198 and #2196. Indictment #2196 alleges Castillo "massaged the victim's body" (Indictment). Indictment #2198 alleges Castillo "massaged the Victim's body and/or masturbated the Victim" (Indictment) (emphasis added). Accordingly, these two indictments were sustainable if the jurors found Castillo's massages of Victim were done with the intent to gratify his sexual urges.

Sexual intent is not an element of CSC, and was not in question in those indictments. However, sexual intent is the crucial element of Lewd Act and was necessarily at issue for the indictments alleging massages without accompanying

sexual battery. Accordingly, Lyle evidence was highly probative to rebut the conclusion that the massages were innocent or non-sexual in nature.

This is particularly true in this case because there was testimony from which jurors could have concluded the massages were not sexual. State v. Nelson, 331 S.C. 1, 11, 501 S.E.2d 716, 721 (1998) (discussing intent exception and explaining it may apply where "intent of the actor is at issue because the nature of the contact is subject to varying interpretations"). For example, defense counsel questioned whether the massages were "sexual in nature," to which Victim responded that he didn't have a "full understanding of sexuality" at that age and didn't think there was "anything wrong with it" at the time. (Tr.pp.337–38). Victim testified there was a period of two years where there were massages but no masturbation. (Tr.p.344). Accordingly, the conduct alleged in these two Lewd Act indictments was susceptible to an inference of innocent intention, justifying admission of intent evidence. Cf. State v. Fonseca, 383 S.C. 640, 643, 681 S.E.2d 1, 2 (Ct. App. 2009), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011) (intent exception not applicable where allegations were that defendant "pushed Victim down and proceeded to rub himself in a sexual manner against her; and an earlier incident in 2001, in which Appellant allegedly lay beside Victim in bed and touched her beneath her underwear, rubbing her vagina, as well as exposing his penis to her" because sexual nature of acts was obvious and defense was denial).

Furthermore, as discussed above, there was testimony suggesting Castillo's touching of Victim was done to "teach" him about sexuality. Victim recounted one

occasion Castillo told him "he talked to my parents and . . . told them that there was some things that he had shown me that they wouldn't necessarily approve of." (Tr.p.317). Defense counsel's assertion during cross-examination that Castillo's relationship with Lyle Witness was like that of a "brother," and that "the activities you did were things that probably brothers do," further suggested that the sexual touching was merely some unconventional form of sex education. (Tr.p.501). This implication was arguably supported by testimony by both Victim and Lyle Witness that they sought advice from Castillo regarding masturbation. When asked how the massages progressed to full-on masturbation, Lyle Witness responded: "I asked about masturbation or he brought up masturbation and then went on to explain it to me." (Tr.p.466). Likewise, Victim described an incident where he asked Castillo about a joke he heard at school with a punchline related to masturbation. He explained: "I didn't know what that meant and he offered to show me and proceeded to masturbate me." (Tr.p.306). The prosecutor described this as an ostensible "teaching moment" where Castillo took advantage of a situation to "explain to him what masturbation is." (Tr.p.692). Of course, the State alleged this conduct constituted a lewd act because Castillo acted with "sexual intent," i.e. to gratify his sexual desires. S.C. Code Ann. § 16-3-655(C). Naturally, intent was a crucial issue.

There was also a question whether Castillo intentionally touched Victim's penis during the early massages, before they progressed to masturbation. Both Victim and Lyle witness testified that early on in their respective abuse, when the physical touching consisted only of massages, Castillo's conduct escalated through

what seemed at the time to be "inadvertent" brushing against their penises during a massage. Victim testified that the first time Castillo touched his penis during the massage, "it almost seemed inadvertent. He would have his hand over my pants and kind of go up my leg and go against it. It seemed like almost inadvertent at the time." (Tr.p.305). Lyle Witness testified that in early massages, "as he was going like by my private parts," Castillo would "brush" against his genitals. (Tr.p.464). This testimony regarding seemingly "inadvertent" touching directly raises the issue of intent, and also implicates Rule 404(B)'s "absence of mistake" exception.

Castillo may argue that the evidence of Castillo's subsequent sexual acts against Victim was sufficient to show his sexual intent during the massages that preceded the masturbation and fellatio. But this argument does not account for the possibility that jurors may have believed Victim's testimony regarding the massages, but disbelieved his testimony regarding masturbation and fellatio. Alternatively, jurors could have believed the massages referenced in Lewd Act indictment #2196 began innocently, and the sexual dimension developed later. While Castillo ultimately testified and denied altogether that any massages occurred, the State had no way of knowing he would testify that way. Defense counsel's cross-examination of the State's witnesses to that point seemed to suggest there would be some attempt to explain the massages as non-sexual. The State would have been justified in assuming that Castillo would admit to some of the conduct, explaining it as an innocent massage, while denying any sexual touching occurred. See People v. Lisenba, 14 Cal. 2d 403, 428, 94 P.2d 569, 582 (1939) (in

murder prosecution against defendant who allegedly murdered a former wife in the same manner, explaining that "where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, *or where there is room for such an inference*, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain") (emphasis added).

Accordingly, Castillo's "sexual intent" was in question, and the Lyle evidence was highly probative to show his massages of Victim were done with the "intent of arousing" his "sexual desires." § 16-3-655 (C). The trial court correctly admitted the evidence pursuant to SCRE Rule 404(B). This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm the decision of the court of appeals.

Respectfully submitted,

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February 3, 2020

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Feb 03 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court Of General Sessions
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2019-001983

THE STATE,

Respondent,

v.

JULIO ANDRES CASTILLO

Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

1. Trial transcript dated November 18-22, 2019, pages 1-156 and 242-781


To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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February 3, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
G. Thomas Cooper, Jr. Circuit Court Judge

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THE STATE,

Respondent,

v.

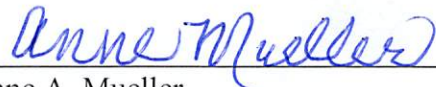
JULIO ANDRES CASTILLO,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief of Respondent and Designation of Matter on Tricia A. Blanchette, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 3rd day of February, 2021.



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RECEIVED

Feb 03 2021

SC Court of Appeals

From: [Anne Mueller](#)
To: blanchettelaw@gmail.com
Cc: [Victim Services](#); [Josh Edwards](#); [William Blitch](#); [Anne Mueller](#)
Subject: State v. Julio Andres Castillo, 2019-001983
Date: Wednesday, February 3, 2021 3:04:46 PM
Attachments: [Castillo Julio - Cover letter for IBOR-DOM \(02481830xD2C78\).PDF](#)
[Castillo Julio - Initial Brief of Respondent and Designation of Matter \(02481827xD2C78\).PDF](#)

Good afternoon, Ms. Blanchette.

Attached to this email is the State's cover letter and its Initial Brief of Respondent. The initial brief and designation will be electronically filed with the Court later today.

If you will, please confirm your receipt of this email and the attachments by return email.

Thank you.

Sincerely,

Anne Mueller, Legal Assistant for Joshua A. Edwards, Assistant Attorney General.