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**Feb 16 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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Appellate Case No: 2019-001983

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THE STATE,

RESPONDENT,

v.

JULIO ANDRES CASTILLO,

APPELLANT.

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REPLY BRIEF

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## ARGUMENT IN REPLY

- I. Respondent's argument that the issue presented is not preserved for this Court's review is based upon an incomplete review of the record and is not supported by the law.

Respondent's argument regarding error preservation is based upon an incomplete review of the record. Contained in the Brief of Appellant is a detailed account of the hearing on the State's Motion pursuant to Rule 404(b), SCRE. Brief of Appellant pp. 2-21. At the conclusion of the hearing, the trial court ruled on the testimony at issue, as follows: "Well, I am ready to rule, I'm going to allow it." Tr. p. 138, Ins. 1-2.

After several brief motions, the trial began with the selection and the swearing of the jury. Trial pp. 156-241. During the course of the trial, victim one and witness one were called to the stand and testified. Trial pp. 286, 454. As the record reflects, counsel did not make a motion *in limine* or enter a contemporaneous objection at the start or during witness one's testimony, but the record also reflects that the matter was addressed on and off the record.<sup>1</sup> Trial p. 656. After the defense rested and renewed all prior motions, the following was put on the record:

Trial Counsel: The other I believe I brought to the Court's attention is on –

Court: Well, let me – at the beginning of the trial there was a motion to allow 404(b) evidence which I granted. During the trial – well, even at the beginning of the trial and/or during the trial there was no motion *in limine* to exclude that testimony. I believe that the fact that I ruled on the 404(b) issue on the merits would have prevented me from limiting – from granting a motion *in limine*. So my 404(b) ruling I think was adequately articulated and I feel that had a motion *in limine* been made it would have been denied.

I think the 404(b) ruling was a much more substantive ruling than an *in limine* would have – could have resulted in. So, I stand by my ruling and for the record had the motion *in limine* been made it would have been denied.

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<sup>1</sup> Additionally, Appellant submits it would not have been appropriate to object to portions of witness one's testimony since Appellant argued and the trial court ruled on his testimony in total.

Trial Counsel: And Your Honor, that would be considered, **we agree, was a final ruling.**

Court: **That was a final ruling, yes, sir.**

Tr. p. 656, ln. 11 – p. 657, ln. 6 (emphasis added). The State’s argument that does not reference this portion of the record amounts to a misinterpretation of the record made by the trial court. The State did not disagree when counsel stated on the record, we agree – that would be considered a final ruling, yet the State is trying to now argue against this agreement.

Since the trial court made it clear that his ruling was final, Appellant agrees with the State: “This is not a case where admission of the evidence came directly after the court’s *in limine* ruling.” Brief of Respondent p. 15. As a result, Appellant submits that the case law relied upon by the State is not applicable to the record in this case. Here, the State’s argument that the *in limine* ruling was too remote from the admission of the testimony is not applicable since it simply was not an *in limine* ruling.

Nevertheless, if this Court chooses to ignore the parties’ agreement and the trial court’s clear holding that it was a final ruling, the South Carolina Supreme Court has allowed exception to the requirement for a contemporaneous objection following an *in limine* ruling when the motion is made prior to introduction of the evidence at issue. *State v. Wiles*, 383 S.C. 151, 679 S.E.2d 172 (2009), *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). In *State v. Wiles*, the South Carolina Supreme Court explained: “This exception is based on the fact that when the trial court’s ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew an objection.” 679 S.E.2d at 175; *See also Forrester*, 541 S.E.2d at 840, *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995). This exception is analogous to the instant case whereby a motion *in limine* and/or objection was not made since the ruling was clearly final.

Here, the State is asking this Court to go against the basic tenets of issue preservation and find that an issue raised and ruled upon by the trial court is not properly before this Court and affirm Appellant's conviction on this erroneous basis. It is well established that in order for an issue to be preserved for this Court's review, the issue must have been raised and ruled upon by the trial court, if not, it will not be considered. *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001), *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003), *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005). Appellant asks this Court to find the State's argument on preservation is in error and reach the merits of the issue before this Court.

- II. Respondent's *post hoc* rationalizations for the admission of the improperly admitted testimony are flawed and were not presented to or ruled upon by the lower court. Nevertheless, these *post hoc* rationalizations and the interpretation of *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), *State v. Cotton*, 430 S.C. 112, 844 S.E.2d 56 (2020), and *State v. Durant*, 430 S.C. 98, 844 S.E.2d 49 (2020) demonstrate the need for the appellate court to address the application of *Perry* here forward.

Interestingly, the Brief of Respondent states: "Castillo devotes a majority of his brief to complaining that the trial court's analysis focused on the *Wallace* test, which centered around the similarities between the prior bad acts and the charge conduct."<sup>1</sup> Brief of Respondent p. 24. Appellant would submit that what Respondent deems complaining is Appellant addressing the actual record before this Court, which Respondent wants to divert this Court away from for good reason discussed herein and in the Brief of Appellant. In actuality, Appellant's Brief addresses the testimony, arguments and rulings made in the record regarding the admission of the *Lyle* testimony and also addresses the recent decisions in *Perry*, *Cotton* and *Durant*.<sup>2</sup> In contrast, Respondent's arguments, specifically those regarding intent, stray from the record and/or rely

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<sup>1</sup> *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

<sup>2</sup> *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923), *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), *State v. Cotton*, 430 S.C. 112, 844 S.E.2d 56 (2020), *State v. Durant*, 430 S.C. 98, 844 S.E.2d 49 (2020).

upon portions of the record that take place after the court's final ruling on the admission of the *Lyle* testimony. Furthermore, the State's Brief has carefully couched how the State's decision to not go forward on the charges involving victim two or call him as a witness after his *in camera* testimony is addressed. Brief of Respondent pp. 6-7.

In reliance on *Thomas v. 5 Star Transp.*, 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015), the State argues that the "question on appeal is not whether the trial court's stated reasoning is flawless, or even correct." Brief of Respondent p. 24. Appellant submits that this proposition is not flawless, especially when the procedural posture and standard of review in *Thomas* is considered. Obviously, the instant case comes to the Court by way of an appeal from a criminal conviction. Whereas, *Thomas* was a workers' compensation appeal reviewing the decision of an Appellate Panel of the Worker's Compensation Commission. Here, the State is asking this Court to apply the substantial evidence rule, which is the applicable standard of review in a workers' compensation appeal as explained in *Thomas*:

The substantial evidence rule ... governs the standard of review in a [w]orkers' compensation decision." *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005).

*Thomas*, 770 S.E.2d at 187, 412 S.C. at 8. Appellant submits that following the standard urged by the State would be error.

Here, the timing of the trial and the issuance of the *Perry* decision overruling *Wallace* requires analysis as is discussed in Appellant's Brief and herein, but it does not require the appellate court to completely ignore the errors made by the trial court as the State urges this Court to do. In so doing, this Court would simply compound the errors of law committed by the trial court. As this argument is submitted in reply, Appellant will address the matters raised in the

Brief of Respondent, but Appellant relies upon the arguments set forth in Appellant's Brief regarding the multiple errors committed by the trial court that exceed the application of *Wallace* and admission of the evidence based solely upon similarities.

As discussed above, it is well settled that issues not raised and ruled upon by the trial court will not be considered on appeal. *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001), *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003), *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005). Additionally, a party may not argue one ground at trial and an alternate ground on appeal. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694, *State v. Prioleau*, 345 S.C. 404, 548 S.E.2d 213 (2001), *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) (Argued one ground at trial in support of circumstantial evidence charge and another ground in support of the charge on appeal). Incredulously following an argument on error preservation, Respondent's Brief urges this Court to be diverted into a *post hoc* rationalization for the admission of the evidence based upon arguments that were not made by the State prior to the admission of the testimony nor were the arguments considered by the lower court. This diversion is clearly been put in place to convince this Court to ignore the clear errors committed by the trial court that require the granting of a new trial.

As fully detailed in the Brief of Appellant, the State moved to admit the testimony at issue based upon similarities and the factors set forth in *Wallace* not based upon the unpreserved post trial arguments that Respondent has now made.<sup>4</sup> It is rather disingenuous for the State to

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<sup>4</sup> Appellant crafted the issue on appeal from the Assistant Solicitor's statement that the testimony was being offered under Rule 404(b), SCRE, but the Assistant Solicitor only argued and the Court addressed similarities and the *Wallace* factors. Therefore, the Brief of Appellant does not address every basis on which the State could have offered the testimony, but the Brief details how the testimony was offered, arguments made and rulings of the lower court, with an emphasis on the errors committed by the trial court. Appellant submits that the State should not be allowed to make arguments that were not made at the trial level nor ruled upon by the trial court to attempt to clean up the errors under which the testimony was admitted at trial. Appellant submits the Brief of Respondent exceeds the scope of addressing additional sustaining grounds and actually demonstrates the need for the trial to be set aside, so proper arguments can be made and rulings entered at the trial level.

argue that the issue of the admission of the testimony is not preserved for appeal and then embark upon arguments that are presented for the first time on appeal. The arguments regarding the mentor relationship, unique method and intent rely upon inferences and conjecture since these arguments were not made to or ruled upon by the lower court nor are such arguments grounded in the record before this Court. What does appear in the record is, which makes this case factually unique, is the absolute manipulation of Rule 404(b), SCRE, to get a conviction. As is addressed in detail in the Brief of Appellant, the State recognized that the testimony of the two brothers (victim one and victim two) were not similar enough to meet the *Wallace* test nor consistent enough for a jury to believe, so they chose to go forward with victim one and only call witness one to make the testimony similar enough to meet the common scheme or plan exception in the eyes of the trial court. Brief of Appellant pp. 2-3, 14, 19. As argued in the Brief and herein, Appellant submits that the testimony was not admissible and the additional *post hoc* rationalizations by the State further demonstrate the need to manipulate the evidence to get and attempt to affirm a conviction.

Appellant submits that the recitation of the testimony set forth in the Brief of Appellant fully demonstrates the scope of the testimony presented to the trial court prior to finding witness one's testimony admissible at trial; whereas, Respondent utilized minimal portions of the pre-trial and trial record to support the newly crafted arguments that the testimony was admissible for reasons not argued by the State at trial. It is abundantly clear why the State's Brief largely ignores the admission that victim two was an "outlier" and voluntary exclusion of his testimony since the State is now arguing that the testimony of witness one was admissible to show the common scheme or plan as a "mentor. Tr. pp. 118-119, 122-124, 131. When the trial court was offered the testimony of all three witnesses, he did not hone in on a common scheme or plan of

Appellant as a mentor nor did the State offer the argument now espoused. What did happen was an analysis of similarities that is analogous to *State v. Scott*, which is relied upon by the State despite *Scott* strictly following a *Wallace* analysis. *Scott*, 405 S.C. 489, 503, 748 S.E.2d 236, 244 (Ct. App. 2013) (Holding the similarities outweigh the dissimilarities; thus, the trial court did not err in finding the close degree of similarity required to admit evidence under Rule 404(b), SCRE, existed.).

Furthermore, the argument that “Castillo used his position of influence to bring about scenarios conducive to initiating physical abuse” would be more plausible if the State was arguing about Appellant’s relationship with the two brothers, but it is not plausible in the context of the drastically different relationship Appellant had with victim one and witness one. Respondent’s Brief p. 20. As the record reflects and Appellant’s Brief addresses, victim one testified regarding a relationship with Appellant that stemmed from Appellant’s adult friendship with his parents; whereas witness one described his brotherly relationship that developed with Appellant when Appellant was a teenager dating his sister. Additionally, victim one described how the abuse ceased when he refused the night before Appellant’s wedding; whereas witness one testified that the abuse stopped, and he remained friends with Appellant for the remainder of his childhood and high school years. It must be noted that the State relies upon witness one’s trial testimony, which also addressed the time period after the alleged conduct ceased, in support of the mentor argument. Actually, the testimony of witness one begs the question: How was the mentor relationship the distinctive way in which Appellant perpetrated the abuse if he did not abuse witness one during the time period from approximately fifth grade to college when their friendship (“mentor relationship”) continued? Tr. pp. 475, 507-513, 519-522. The common sense take away is if the relationship stayed the same with no allegations of improper conduct, then,

the “mentor relationship” was not the distinctive method of initiating the improper conduct as argued by the State. Respondent’s Brief p. 20.

Additionally, Respondent’s utilization of *State v. McClellan* in support of the argument that the testimony demonstrated a unique method of abuse is a finding the lower court did not make nor is it supported by the record.<sup>4</sup> Brief of Respondent pp. 23-24. Again, the record demonstrates that the testimony offered was so far from unique that the State chose to not pursue the charges or testimony of victim two regarding essentially the same time period and events as victim one. Appellant submits that *McClellan* is not analogous to the facts of the instant case. Brief of Appellant pp. 36-37. Here, there was no evidence presented in the pre-trial hearing of indoctrination, teaching or utilization of religion to control the alleged victims.<sup>5</sup> At most, the references made by the State to the record and argument submitted are *post hoc* rationalizations for the misuse of Rule 404(b), SCRE, to manipulate the evidence presented to the jury to secure a conviction. Simply put, the instant case contains reversible error, and Appellant’s conviction is not justice.

Turning to the State’s unpreserved post trial argument regarding intent, it is hard to provide a response since it is a red herring based upon speculation and conjecture. Since the State did not move to admit the testimony to establish intent on the lewd act indictments, all the arguments made by the State were obviously not made to or ruled upon by the trial court. Additionally, it appears the State contends that the testimony would have been admissible in rebuttal, which again is not the way in which the testimony was offered and admitted in the record before this Court. If the venture is going to be made into speculation; then, it could be

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<sup>4</sup> *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984).

<sup>5</sup> The Brief of Appellant contains a detailed summary of the testimony presented during the hearing regarding the admission of the evidence pursuant to Rule 404(b), SCRE.

speculated that trial counsel could have conceded intent under the reasoning that if the indicted acts were committed the acts were committed with the requisite intent. This speculation can be derived from Appellant's trial testimony denying the allegations in total and absence of any justification that the massages took place and were merely innocent.<sup>6</sup> Respondent's Brief p. 29.

Finally, the issuance of *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020), *State v. Cotton*, 430 S.C. 112, 844 S.E.2d 56 (2020), and *State v. Durant*, 430 S.C. 98, 844 S.E.2d 49 (2020) creates a unique dynamic in the instant case that requires further acknowledgement following Respondent's Brief. Primarily, Appellant must urge this Court to address the errors of the lower court and grant a new trial, yet Appellant must also acknowledge the inconsistent application of *Perry* by the parties to this appeal. Appellant submits that this inconsistency is bred from the *Perry* decision itself, its immediate application in *Cotton* and *Durant*, and a history of cases interpreting Rule 404(b), SCRE, and expanding *Lyle* as it relates the common scheme or plan exception. See e.g., *State v. Patrick*, 316 S.C. 31, 457 S.E.2d 632 (Ct. App. 1995), *State v. Blanton*, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994), *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (1993), *State v. Wingo*, 304 S.C. 173, 403 S.E.2d 322 (1991), *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989), *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984). Therefore, Appellant respectfully requests that this Court take the opportunity to further clarify the reasoning and holdings set forth in *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020)

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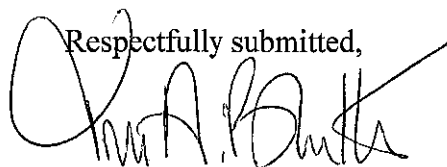
<sup>6</sup> It appears the State acknowledges that Appellant's testimony directly refutes the argument for the admission under intent, but the State does not concede and offers the justification that "the State had no way of knowing what he would testify to." Brief of Respondent p. 29.

## CONCLUSION

Based upon the foregoing and Appellant's Brief, Appellant urges this Court to not overlook the clear errors of the trial court as the State's Brief urges. Appellant also asks this Court to recognize that the State fails to respond to the arguments made regarding the trial court's findings or lack thereof regarding the clear and convincing standard, relevance and the Rule 403, SCRE, balancing test. Additionally, Appellant urges this Court to not be persuaded by the argument regarding a common scheme or plan that is given in the vacuum the State created by manipulating the trial testimony, to exclude the charges and/or testimony of the "outlier," to get a conviction. Appellant also urges this Court to find that the arguments regarding intent are not preserved for appellate review and require pure speculation and conjecture to address.

Finally, Appellant must acknowledge that based upon the parties application of *State v. Perry* two different outcome are warranted, which is typical in an appeal. Yet, here, the different application of *Perry* is compounded by the *Perry* decision itself, as well as its immediate application in *Cotton* and *Durant*. As argued above, this is not a problem simply created by the decision in *Perry*. As the Court recognized in *Perry*, South Carolina case law has taken many twists and turns since *Lyle* and Appellant respectfully asks for the Court to address these matters before more inconsistent case law is created.

Respectfully submitted,



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

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

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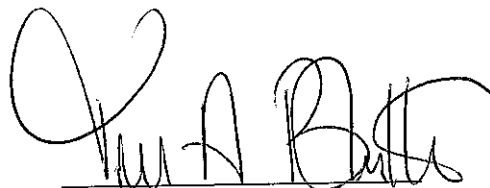
APPELLANT.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Reply Brief has been served on opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Josh Edwards, Esquire  
JEdwards@scag.gov

This 16<sup>th</sup> day of February 2021.



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February 16, 2021



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**Julio Castillo v. State; Reply Brief**

1 message

Tricia Blanchette <blanchettelaw@gmail.com>  
To: Josh Edwards <JEdwards@scag.gov>

Tue, Feb 16, 2021 at 10:27 AM

Josh:

Attached please find your copy of the letter, Reply Brief and Certificate of Service that I will be uploading to the Court of Appeals after sending this email. If you have any problems with the attachment, please let me know.

Thanks,

Tricia

--  
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**Feb 16 2021**

**SC Court of Appeals**

February 16, 2021

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

RE: State v. Julio Andres Castillo; Appellate Case No.: 2019-001983

Dear Madam Clerk:

Submitted electronically with this letter for filing in the above referenced appeal, please find the Reply Brief and Certificate of Service. I will also upload a copy of the email of service.

I appreciate your assistance with this matter. Please notify me if anything further is needed at this time.

Yours truly,



Tricia A. Blanchette  
Attorney at Law

cc: Josh Edwards, Esquire  
Julio Andres Castillo