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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No: 2019-001983

THE STATE, RESPONDENT,

v.

JULIO ANDRES CASTILLO, APPELLANT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the lower court err by determining that the testimony of witness one was admissible at trial?

STATEMENT OF THE CASE

During the July 2016 term of the York County Grand Jury, Julio Andres Castillo (Appellant) was indicted as follows: Criminal Sexual Conduct with a Minor, Second Degree (2016-GS-46-2193), Criminal Sexual Conduct with a Minor, Second Degree (2016-GS-46-2195), Lewd Act Upon a Child (2016-GS-46-2196), Lewd Act Upon a Child (2016-GS-46-2197), Lewd Act Upon a Child (2016-GS-46-2198), and Lewd Act Upon a Child (2016-GS-46-2199). On November 18, 2019, Appellant appeared for trial in front of the Honorable G. Thomas Cooper, Jr., in the York County Court of General Sessions. Appellant was represented by Jack Swerling, Esquire, and Melissa Wilson, Esquire. The State was represented by Erin Joyner, Esquire, and Mathew Sheldon, Esquire.

At the close of the five day trial, the jury returned a verdict of guilty on all charges. The Honorable G. Thomas Cooper, Jr., sentenced Appellant to a concurrent term of twelve (12) years on all charges. Thereafter, a timely Notice of Appeal was filed, from which this Brief follows.

ARGUMENT

I. The lower court erred by determining the testimony of witness one was admissible at trial.

A. Standard of Review

The trial court has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent an abuse of discretion. *State v. Brazwell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016); *see also State v. Douglas*, 411 S.C. 307, 316, 768

S.E.2d 232, 237 (Ct. App. 2014) ("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." (quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007)).

B. Summary of the Relevant Facts

On November 18, 2019, Appellant appeared in front of the Honorable G. Thomas Cooper, Jr., in the York County Court of General Sessions. Appellant was represented by Jack Swerling, Esquire, and Melissa Wilson, Esquire. The State was represented by Erin Joyner, Esquire, and Mathew Sheldon, Esquire. Prior to jury selection, the lower court undertook pre-trial matters. R. p. 6. Referencing an in chambers meeting, Ms. Joyner explained that the first issue "will ultimately determine which charges are presented to the jury for trial." R. p. 6, lns. 14-17. Ms. Joyner informed the lower court that there were six charges as to victim one and two charges as to victim two. R. pp. 6-7. She referenced a "Memo in Support of Joinder" that contained a chart of all the charges, and she provided a copy to the court. R. p. 7, lns. 16-24, p. 715. She indicated to the court that it was her understanding the defense was not "fighting joinder any longer," and the defense concurred. R. p. 7, lns. 16-20, p. 8, lns. 8.

Thereafter, Ms. Joyner proceeded with a motion under Rule 404(b), SCRE, for the stated purpose of introducing the testimony of witness one R. p. 8. She explained:

> Okay, as we discussed in chambers, Your Honor, it is the State's belief that witness one's testimony is incredibly important to the case. And we would seek a findings as to admissibility of his testimony as to each of the brothers, victim one and victim two and depending on the Court's testimony we may only be calling victim one's trial today or tomorrow.

R. p. 9, lns. 14-21. She further explained:

> In the event that Your Honor were to determine that witness one's testimony could not be introduced in a case or trial in which victim two's charges were also being presented to the jury, the State would want to pull or sever victim two's case and still offer victim two as a 404(b) witness in victim one's case.

R. p. 10, lns. 13-19.

In response, Mr. Swerling informed the court that the defense was not objecting to the joinder of the cases. He further informed the court that the defense was not aware that the State intended to offer testimony on the *Lyle*[1] issue that day as he was only aware of "proffers and briefs." R. p. 11, lns. 7-11. When asked about the defense's reference to briefs, the State handed "it" up to the court. R. p. 11, lns. 12-15, p. 722. Ms. Joyner explained that she intended to offer live testimony due to the required "clear and convincing finding." R. p. 12, lns. 15-21. The court determined that the testimony would start the following morning and asked if the defense had anything for the court to review. R. p. 13-14. The defense provided a brief with the clarification that it was prepared in response to the State's filing and did not address all of the current issues. R. p. 14, lns. 15-22, p. 730.

The following morning, the State called victim one as their first witness in support of the Rule 404(b) motion. When victim one took the stand, he acknowledged that he was currently twenty-four years old and victim two was his younger brother by twenty months. R. pp. 19-20. He explained that he knew Appellant growing up, and Appellant served as his assistant choir director prior to Appellant buying a home two doors down from his childhood home. R. p. 21. He recalled being in the third or fourth grade when he began going over to Appellant's home and that his brother would sometimes go with him. R. p. 22.

Throughout his testimony, he described the close relationship he had with Appellant. R. pp. 21, 34-35, 55-56. He explained that Appellant was close with his entire family. R. pp. 21, 34-35, 55-56. He confirmed that Appellant served as his confirmation mentor, youth group

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[1] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

volunteer in high school and youth choir mentor during his elementary years. R. pp. 34-35, 55-56. He also recalled Appellant attending his sporting events, being involved in his chess club and taking him and his brother on special outings. R. pp. 34, 55-56. He agreed that his close relationship with Appellant continued even after the last incident on the night before Appellant's wedding. R. pp. 35, 55.

Victim one recalled a trip whereby Appellant took his family to stay at Appellant's aunt's home on Dafuskie Island during his third grade year. R. pp. 22, 39. When asked if anything "noteworthy" happened, he recounted Appellant exposing his penis to him and his brother in bed one morning, and Appellant explaining that it looked different because it was uncircumcised. R. p. 22, ln. 22 – p. 23. ln. 11. On cross examination, he was asked if Appellant was walking around when it happened and he responded:

> No, in the morning he was in his bedroom that was separate from ours and he had been staying in there. Victim two and I went to go see him. It was just like hey, good morning, kind of thing and we were hanging out in the bedroom with him and he was laying on the bed when he exposed himself.

R. p. 40, lns. 7-13. He further stated that Appellant's actions appeared intentional. R. p. 40, ln. 19-20.

When asked to generally describe what happened after the Dafuskie trip, he stated:

> There were massages that would happen in his bedroom at his house when he had moved closer to us into our neighborhood. There was masturbation that happened in his bedroom. There was massages and masturbation that happened in the attic upstairs at his house and there was oral sex or fellatio that he performed on me both once in his bedroom and once in a bedroom in our house the day before his wedding. The night before his wedding.

R. p. 23, lns. 17-23. He further added that there was another time in the attic when Appellant hogtied him. R. p. 24, ln. 9-10. He explained the incident during which his brother was present, and he admitted it was not sexual in nature. R. pp. 36-37, 48.

He explained that nothing happened before the Dafuskie trip and the inappropriate conduct began with massaging. R. p. 24. When asked to explain what he meant by massaging, he stated:

> 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.

R. p. 24, ln. 22 – p. 25, ln. 5. On cross examination, he explained that clothes were kept on, but Appellant would go under his clothes at times. R. p. 44. He also explained what was meant by "alongside massage." R. p. 50, lns. 4-10.

After being asked when the nature of the massages turned from inadvertent touching to masturbation, he recalled a time when he asked Appellant about a joke he heard in the fifth grade that dealt with masturbation. R. pp. 25-26. After explaining the joke to him, Appellant masturbated him on Appellant's waterbed in Appellant's home. R. p. 26. He explained how it took place and acknowledged that it was not to completion. R. pp. 26 -27.

Thereafter, he recalled that the massages would turn into masturbation. He further recalled that these incidents took place in Appellant's bedroom and converted attic space on a bed. R. pp. 27-28. He estimated that there were five to six incidents. R. p. 37. He recalled Appellant utilizing baby oil as lubricant a couple of times. R. p. 36. When asked if his state of dress would change, he responded: "He would just like unzip my pants and pull them down." R. p. 38, lns. 18-22. On cross examination, he agreed that neither of them would be fully naked and clothes were on to "varying degrees." R. p. 49, lns. 7-22. He explained that it was typically Appellant massaging and masturbating him, but he did recall one instance when he touched

Appellant, as follows: "There was one instance that I can remember that he had been masturbating me and the I – that was paused and he had me touch him and massage him as well, but then it switched back to him masturbating me. It seemed like he was more interested in that." R. p. 29, lns. 18-23. He affirmed that it was the only instance where he touched Appellant. R. pp. 29-30.

When asked about the two instances of fellatio, he recalled the instances occurred in two locations. He could not recall specific details from the instance in Appellant's home, but he detailed the second instance that occurred the night before Appellant's wedding in his home. R. pp. 30-33. Regarding the second instance, he recalled that it ended because he told Appellant that it "needed to stop." R. p. 33, lns. 9-12. He affirmed that he had not previously told Appellant to stop, but he did in this instance knowing it was "somewhat wrong" since it was occurring in his parent's home and the night before Appellant's wedding. R. p. 33, lns. 13-24.

When asked on cross examination why he continued to interact with Appellant when these incidents were occurring, he explained that it did not occur to him that it was wrong or that he should suspect Appellant would do anything to hurt him. R. p. 53. He further responded that he knew it was wrong enough that he should not tell his parents. R. p. 53. He also detailed the continued close relationship he and his family had with Appellant after the final incident. R. pp. 55-57.

On redirect examination, he detailed an event involving nudity that occurred at Appellant's parent's home with just his brother, himself and Appellant present. R. p. 57. He explained that they went skinny dipping in the pool and hot tub. R. p. 57. On recross examination, he agreed nothing sexual happened that he could remember during that incident. R. p. 59. On redirect, he also acknowledged there was another incident of playing truth or dare with

his brother present, but he could not remember seeing anything specifically happen to his brother. R. p. 58, lns. 15-23.

As to when these events occurred, he explained that he would spend the night at Appellant's with his brother, go over to Appellant's with his brother and would go over to Appellant's alone. After being specifically asked if his brother was present during the events he had described, he responded: "My memories of the events in specific detail are of what happened to me but I do recall him being there in the general time frame of some of the abuses." R. p. 29, lns. 9-13. On cross examination, he reiterated that he did not have a memory of anything occurring to victim two in his presence, but he did recall that victim two was present during the hogtying incident and an additional time when the three were in bed together up in the attic. R. pp. 45-46. He recalled Appellant being in his twenties, owning a home in his neighborhood and living alone until his wife moved in. R. p. 38. On cross examination, he explained that he never just wandered over or stopped by Appellant's home, but he would receive an invitation to come over, which was typically communicated in various ways. R. pp. 50-51.

On cross examination, he agreed that he told law enforcement during his first interview that he had put it all out of his mind and moved on. R. p. 42, lns. 4-9. He also agreed it was not on his mind during his teenage years or into his adult life, and he did not try to recall these things until his brother came forward. R. p. 42, lns. 10-116. He explained that his brother did not discuss going to law enforcement with him, but his brother called him and his parents to tell them he was going to the police. R. p. 42, lns. 17-23.

Following the testimony of victim one, the State called victim two to the stand. R. p. 60. Victim two testified that he was twenty-two years of age and he graduated high school one year after his brother (victim one). R. pp. 60-61. He recalled knowing Appellant since he was about

five and explained that he first knew him as the associate leader of the church youth choir and later as a neighbor living two doors down from his family. R. p. 61. When asked about his relationship with Appellant, he described him as an "authority figure" and explained that "he [Appellant] was a young adult and he made efforts to be more personable than strictly an authority figure." R. p. 62, lns. 4-11. He acknowledged that Appellant was a friend to his parents and his brother. R. p. 62.

When asked if anything inappropriate happened during a trip his family took with Appellant to Dafuskie Island, he remembered an incident but explained that he did not have the perspective to say if it was "inappropriate." R. p. 62, ln. 17 – p. 63, ln. 7. He remembered Appellant was reading the brothers a book on a bed, and he could see the indentation of his penis through his boxers. R. p. 62, ln. 17- p. 63, ln. 7.

Following the Dafuskie trip, he recalled Appellant giving him massages, as follows: "He would have me lay on the bed in his attic and he'd 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 incidents where he also touched my penis underneath." R. p. 63, lns. 17-21. When asked more specific questions, he responded that he would be on his back and stomach during the massages, that Appellant would straddle and be beside him and both he and Appellant would have on their clothes. R. pp. 64-65. On cross examination, he explained that Appellant did not straddle him but he was on the side of him during the massages. R. pp. 82-83.

Victim two approximated that there were four massages, and he testified about the details of what occurred. R. pp. 64-67, 84. As to the first one, he confirmed that it involved "fondling" of his penis, but he explained: "So, it wasn't strictly speaking masturbation. It was just playing with it like pushing it to the side." R. p. 66, lns. 24-25. In response to whether the nature of the

touching changed from the first to the last massage, he responded – "No." R. p. 67, lns. 3-5. On direct, he testified that all the massages took place in the attic of Appellant's home, but on cross he stated mostly in the attic. R. p. 67, lns. 9-10, p. 84, lns. 15-19.

He recalled his brother being present during the some of the massages but "usually nothing happened." R. p. 75, lns. 20-24, p. 76. Other than the night where they played truth or dare, he did not recall seeing anything happen between victim one and Appellant. R. p. 75. On cross examination, he testified that no masturbation occurred during the massages, but he did masturbate Appellant during truth or dare. R. p. 86. On cross examination, he stated that he went to Appellant's home with and without his brother. R. p. 83.

After being asked to explain "another instance," victim two detailed a day where he and his brother had spent a considerable amount of time with Appellant and stayed overnight at his house. R. p. 67, lns. 21-25. They watched a movie and a game of truth or dare was initiated that became "sexual in nature with the dares" before going to bed. R. p. 67, ln. 25 – p. 68, ln. 4. He recounted dares involving "dry humping" and giving and receiving oral sex. R. p. 67, lns. 2-9, p. 88. He detailed the dares involving oral sex and recalled all three of them performing and receiving the acts, to include him and his brother on each other. R. pp. 69-70. He recalled Appellant being uncircumcised. R. p. 70. After the game, he recalled the three of them went to bed together, and Appellant spooned them.[2] R. p. 68-69. On cross examination, he dated this event as happening before the massages when he was eight years old. R. pp. 78-80. He further added that masturbation occurred and he saw his brother be masturbated by Appellant, but he was unsure if he saw oral sex performed on his brother. R. pp. 89, 91. He also stated that they were all naked, and Appellant instructed both of them to not talk about it. R. pp. 89-90.

[2] When asked by the lower court, he detailed what was meant by spoon. R. p. 68, ln. 12 – p. 69, ln. 1.

When asked about Appellant's attic, victim two explained it was not converted into a living space when they first began going over to Appellant's house. R. p. 71. He recalled the attic conversion not being complete on the night they played truth or dare and testified again that the truth or dare night was prior to the massages. R. pp. 71-72.

He also recalled a time in Appellant's attic where Appellant showed them how to hogtie someone by demonstrating it on each of them. R. p. 74. He recalled nothing sexual happening during that instance and no other instances involving ropes in the attic. R. p. 74.

Victim two testified about Appellant teaching him to play chess and he and his brother being involved in chess club during his fifth grade year. He recalled Appellant being involved in the school chess club and throwing a party in his attic to celebrate the end of a tournament. R. p. 72. On cross examination, he was asked about a chess club picture from 2008, and he wavered on whether the massages occurred before or after the picture. R. pp. 77-79.

To conclude his direct testimony, he recalled an instance where he was walking with Appellant and his brother in the forest behind their subdivision when Appellant sat down and revealed his penis. He remembered picking up an ant, putting it on Appellant's penis and it biting Appellant. R. p. 76. He could not recall anything inappropriate occurring after Appellant's wedding. R. pp. 70, 93.

On cross examination, he was asked if he ever recalled being naked with Appellant, and he responded that there was one instance of skinny dipping at Appellant's parent's house. R. p. 84. He recalled Appellant's parents not being home, his brother being present and going back and forth between the pool and Jacuzzi. R. pp. 84-85.

Following victim two's testimony, the State called the victims' mother to clear up some dates. R. p. 94. She recalled that her family took a trip to Dafuskie Island with Appellant in June

2005. R. p. 95, lns. 1-5. She testified that her sons spent time at Appellant's residence following the Dafuskie trip. Tr. p. 95. She also recalled providing Appellant carpet while he was redoing his attic in 2007, and Appellant hosting a chess party for the boys in May of 2008. R. pp. 95-96. Finally, she testified that her husband was in Appellant's wedding on July 25, 2009, and she recalled Appellant staying at their house the night before. R. pp. 96-97.

As their final witness for the motion hearing, the State called witness one. R. p. 97. Witness one acknowledged that he was thirty years old, and he met Appellant when Appellant dated his sister in high school. R. pp. 97-98. He explained that his sister was seven years older than him, and she graduated high school in 2000. He recalled Appellant graduating in 1999. R. pp. 97-98.

When asked, he agreed that Appellant became close with his entire family, which included frequent visits at their home, spending holidays together and witness one going over to Appellant's family's home. R. pp. 98-99. On cross examination, he confirmed that the he had described Appellant as the older brother he had always wanted. R. pp. 111-112. He agreed that there were occasions where he would spend the night with Appellant. R. p. 99. He also agreed that there was a point in time when something inappropriate happened. R. p. 99, lns. 19-21. When asked to generally explain, he stated:

> So, the first thing that occurred to me that was strange was when I would spent the night at the defendant's house. He would make me sleep in the same bed as him, in his water bed every single time.
>
> It gradually progressed to massages in which we were both naked and then from there there were incidents in his parent's Jacuzzi tub where I was forced to masturbate the defendant, yeah.

R. p. 99, ln. 22 – p. 100, ln. 7.

Specifically, he was asked what he meant by massages. R. p. 100. He stated: "So it was basically full body massage. I would be laying face down. The defendant on top of me on my back. Massage back, arms, legs, yeah." R. p. 100, lns. 19-21. He recalled he would flip over during the massage. R. p. 100, lns. 22-23. He further explained:

> Again, so it was a full body massage. So the defendant 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.

R. p. 100, ln. 25 – p. 101, ln. 5. He further explained that Appellant would grab his penis during massages and Appellant would expect massages and masturbation in return. R. pp. 104, 107. He recalled that the massages always occurred in Appellant's bedroom, and that they were typically naked. R. pp. 104, 107.

When he was asked about the progression of the massages, he recalled he slept over three to four times before the massages started. R. p. 101. He testified that the initial massages did not involve masturbation, but it was possible that Appellant would "brush it." R. p. 101, lns. 16-22.

Thereafter, he was asked how masturbation was introduced, and he recalled an incident when they were naked in Appellant's parent's Jacuzzi tub. He guessed he was interested in masturbation, so they discussed it. R. p. 102, lns. 2-10. Then, Appellant had him "grab his penis and then masturbate him until he ejaculated." R. p. 102, lns. 9-10. He recalled Appellant also "grabbed his penis and moved it up and down." R. p. 102, lns. 14-17. After this incident, he testified that the massages would involve masturbation. R. p. 103, lns. 13-22, pp. 105, 107 . He also recalled repeating this behavior in the Jacuzzi tub several times, but it would typically be

witness one "masturbating him [Appellant] to ejaculation."[3] R. p. 105, lns. 12-18. He indicated that Appellant masturbating him in the Jacuzzi tub was less frequent. R. p. 105, lns. 19-24.

Regarding the Jacuzzi incidents, he recalled Appellant's parents would not be home. R. pp. 105-106. He did recall Appellant's parents being home for the incidents in Appellant's bedroom and when they would shower together. R. p. 106. But, he acknowledged no touching or anything sexual happened when they would shower together. R. p. 106, lns. 22-24, p. 114, lns. 8-10.

Despite initially reporting that it began in second grade, he testified that it began in third grade. R. p. 108. He recalled inappropriate behavior occurring from third to fifth grade and estimated ten to twenty times. R. p. 108. He recalled the behavior stopping when he was in middle school and began telling Appellant to "stop and get off." R. p. 108, lns. 21-24. He explained prior to that Appellant would cuddle him with an erect penis while in bed. R. pp. 108-109. After telling him to stop, it tapered off even though they still slept in the same bed. R. p. 108, lns. 6-8. He recalled Appellant getting angry when he began protesting, but the behavior stopped. R. p. 109, lns. 12-15.

Thereafter, he recalled remaining friends with Appellant. R. pp. 109-110. He recalled visiting Appellant's home that he purchased in the victims' neighborhood when he was in high school. R. pp. 109-110. He remembered bringing high school friends to Appellant's home before his graduation in 2007. R. pp. 109-110.

When asked why he continued a relationship with Appellant after the conduct stopped, he stated: "I think it was the manipulation that I experienced." R. p. 110, lns. 16-19. He explained that he always wanted an older brother and Appellant created a "relationship in which I – he

[3] He later stated this conduct only took place in the Jacuzzi. R. p. 107, ln. 22 – p. 108, ln. 4, p. 114.

rewarded me."[4] R. p. 110, lns. 20-22. He also explained that he was concerned if it got out, people would think there was something wrong with him. R. p. 111, lns. 1-5. He also confirmed that his parents maintained a relationship with Appellant. R. p. 111, lns. 6-8.

On cross examination, he recalled taking trips with Appellant, including a trip to Dafuskie Island, and he recalled nothing inappropriate happened on those trips. R. p. 112. He stated his age during the conduct would have been eight to ten years old. R. p. 112. He also agreed that no oral sex took place. R. p. 113.

At the conclusion of the testimony, the State asked the court to analyze witness one's testimony as to each victim, which resulted in the following discussion with the court:

> Ms. Joyner: But I believe it's appropriate to analyze his testimony separately as to each, both victim one and victim two for similarity.
>
> Court: Okay. I don't see much similarity. That's the thing.
>
> Ms. Joyner: Well, that is the more difficult case. Yes, sir, Your Honor.
>
> Court: I didn't say it was difficult.
>
> Ms. Joyner: Victim two does seem to be the outlier in terms of the testimony between victim one.
>
> Court: I would agree with that.

R. p. 118, ln. 12- p. 119, ln. 9.

Following that discussion, the State launched into an argument that there was a great deal of similarity between victim one and witness one and began addressing the *Wallace*[5] factors.[6] R.

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[4] On cross examination, he further addressed the reward system. R. pp. 116-117. He explained that he would have to do a massage before getting the reward he wanted like wrestling or playing a certain game. R. p. 116. He also recalled Appellant buying him souvenirs and electronics, but some of the electronics were at a later time. R. p. 117.

[5] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009) (*overruled by State v. Perry*, Op. No. 27963 (S.C. Sup.Ct. filed May 6, 2020) (Shearouse Adv.Sh. No. 18 at 12).

[6] In response to the State's assertion that there was a great deal of similarity, the lower court responded: "I agree." R. p. 120, ln. 1.

pp. 119-120. Ms. Joyner asserted that approximate age, location, and relationship to the defendant were sufficiently similar, and the court agreed that the factors "were common." R. p. 120, ln. 3-8. Ms. Joyner further argued: "I believe when we get to it is the fourth *Wallace* factor, neither of these young men recalls feeling threatened, which was one of the factors in *State versus Wallace* and I think their manner of occurrence is very, very similar." R. p. 120, lns. 9-13. Specifically, she argued that there was similarity in how both described the beginning of the conduct as massages, and she concluded that the only difference was in their description of their "state of dress." R. p. 120, lns. 14-23. She further argued that the progression to masturbation occurred during a similar timeframe and format. R. pp. 120-121. She acknowledged the progression to "oral" for victim one was unlike witness one, but she argued the difference in "that progression is not problematic under the case law." R. p. 121, lns. 21-23. In conclusion, she argued: "So I would submit that in both cases the boy had to masturbate the defendant. In the instance it was only one time. In the instance of witness one it was more than one time but that is similarity in their abuse and I think it tracks very, very closely to the factors of *State versus Wallace*. R. p. 121, ln. 23 – p. 122, ln. 3.

Then, the court asked the State to compare victim one and victim two. R. p. 122, ln. 4. In response, Ms. Joyner noted several differences in the testimony regarding the massages, the lack of memory of the truth or dare event by victim one and problematic differences in the testimony regarding fellatio. R. pp. 122-124. Thereafter, the following discussion took place:

Court: Well, you certainly can try the defendant as to victim two in a standalone trial.

Ms. Joyner: Yes.

Court: No question about that. The question obviously is whether that testimony in a trial just involving victim two would be admissible and it would. But as 404 issue I am not convinced at this point.

R. p. 124, lns. 4-11. Thereafter, Ms. Joyner proposed a redaction of some of victim two's testimony, but the court noted that what the State wanted to introduce they already had with the testimony of witness one. R. p. 124. In response, the court asked to hear from the defense. R. p. 124, ln. 24.

To begin, the defense asserted that the trials of victim one and victim two should be joined as the State had originally requested. R. p. 125. The defense addressed the factor of judicial efficiency and argued that the stories of the two victims were "inner-connected." R. p. 125. Ms. Wilson explained:

> The State did originally ask for the trial to – for victim two and victim one to be joined. She noticed it for trial this week and so we find that if she can't get witness one's testimony in because of inconsistencies with victim two to sever them and get it in any way seems like she's sliding it in the backdoor when it otherwise wouldn't be admissible.

R. p. 125, lns. 6-12. The court responded that the "indictments certainly sever." R. p. 126, ln. 7. He further responded that he could not make the decision about the indictments the State called for trial and that the "choice of which case to go forward on unfortunately belongs to the State." R. p. 126, lns. 7-13.

After acknowledging that she understood the court's position, defense counsel asserted that if the trials were not joined the defense position was the testimony of victim two and witness one should not be admitted in the trial involving victim one. R. p. 126, lns. 14-18. She began by noting that to admit the evidence, the State must show that it was relevant and admissible under Rule 404(b), SCRE. R. p. 126. She acknowledged that the State was trying to admit the testimony as evidence of common scheme or plan and even if admissible under Rule 403, SCRE, the evidence also must be more probative than prejudicial. R. p.126.

Regarding relevance, she argued that the testimony offered by witness one was not relevant to victim one. R. p. 127. In support of this argument, she explained that it had its own unique fact pattern and was separate in time and place. R. p. 127. She noted it happened ten years prior and occurred in a separate location. R. p. 127. She also argued that the testimony did not make the allegations by the victim more or less probable. R. p. 127. Specifically, she stated: "The State is seeking to admit it to just show propensity for child molestation." R. p. 127, lns. 11-12.

Turning to Rule 404(b), she argued that the State failed to meet the clear and convincing standard. R. p. 127. Simply put, she argued that the testimony offered was "inconsistent with itself." R. p. 127, lns. 15-20. She also argued that the State failed to show that there was a close degree of similarity to the crimes being charged. R. p. 127, lns. 21-22. In support of this argument, she noted that the allegations involved a completely different party and were not part of a continuing course of conduct. R. p. 128.

Regarding the factors set forth in *Wallace*, Ms. Wilson addressed the first factor and conceded the boys were approximately the same age at the time. R. p. 128. As to the second factor, she asserted that "they have very different relationships." R. p. 128, lns. 6-8. She explained that witness one was closer in age and more like brothers with Appellant. Whereas, with the victims he was more like an authority figure, there was an age gap and they were able to ride with and go places with Appellant. R. p. 128. She further argued that Appellant's relationships with the two families were different. R. pp. 128-129. With the witness's family, Appellant was more like a son, but he was more like a peer or friend with the victims' family. R. p. 129.

As to the third factor, Ms. Wilson argued that the places were separate.

R. p. 129. She noted that the testimony placed the events in Appellant's own home versus his parent's home. She also noted that the places where the events took place within the homes were different and that victim one and victim two made allegations involving different locations and incidents that were unique from each other and from witness one. R. p. 129.

Turning to the fourth factor, Ms. Wilson argued that only victim two testified that he was threatened and told not to tell anyone. R. p. 129. She noted the complete difference from witness one's testimony that he continued the relationship due to treats and rewards. R. p. 129, lns. 17-19.

Regarding the last factor "the difference in the sexual abuse" she argued that "there is a lot of difference here." R. p. 129, ln. 24 – p. 130, ln. 1. She addressed the specific testimony offered by the victims that was different from each other and she also noted that "none of that happened" with witness one. R. p. 130 – p. 131, ln. 17. Beyond the difference in the alleged acts, she also noted that witness one testified about an aspect of control over him by Appellant that was absent from the victims' testimony but would be expected when he was ten years older with the victims. R. p. 130.

Ms. Wilson asserted that under the case law there were other factors to consider, and she addressed the factors she identified. R. p. 130. She noted that witness one testified that he knew it was wrong and that the victims' didn't seem to make that claim. R. p. 130, lns. 24-25. She also noted that victim two did not "bury his abuse" but the other two did. R. p. 131, lns. 1-3.

Finally, she argued that if the Court got through all those factors in the favor of the State, the prejudice highly outweighed the probative value. R. p. 131, lns. 2-4. She explained:

> I think it is to[o] remote a time period. It's a different victim. Different allegation. The abuse alleged is very different. And I think there's a large – a large concern for confusing the jury with all these separated victims and charges and what he's

> on trial for and what he is not on trial for. So, you know, it's our position that this evidence shouldn't come in under *Lyle* and that it should be excluded.

R. p. 131, lns. 5-12.

In her initial response, Ms. Joyner stated: "I know victim two was mentioned and to the extent that I was not clear earlier, I am willing to kind of just cut victim two out of the scenario and only look at the similarities between witness one and victim one." R. p. 131, lns. 19-23. She continued by stating:

> I do think this type of evidence is relevant. It's not simply propensity of evidence. There is multiple cases which allow this type of evidence to come in.
>
> I think even under *State versus Wallace* they say Rule 404(b) allows the admission of common scheme or plan, such evidence is relevant because proof of one is shown proof of the other.

R. p. 131, ln. 23 – p. 132, ln. 5. In response, the court indicated that he had *Wallace* in front of him. R. p. 132, ln. 7.

Ms. Joyner continued by arguing that the testimony of witness one was highly relevant since the case was going to come down to the credibility of the victim R. p. 132. She argued: "I think there is a very clear aspect to the sexual abuse. I think that it is very relevant evidence that there has been this pattern of conduct in the past." R. p. 132, lns. 12-15.

In addressing Rule 404(b), she noted that it has historically been applied to "continuous elicit intercourse," but she argued that the instant case was similar to *Wallace* in that it involved a different victim. R. p. 132, ln. 16 – p. 133, ln.2.

After referencing the "*Wallace* factors," Ms. Joyner argued that there was not a significant difference in the relationship. R. pp. 132-33. Regarding location, she stated: "I would submit the difference between residences is distinction without difference." R. p. 133, lns. 11-13. She further asserted that the other differences pointed out by the defense regarding how the boys

responded to abuse did not go to "any similarity or dissimilarity because we're looking at what the common scheme or plan was and the similarity or dissimilarity." R. p. 133, lns. 14-20. She also asserted:

> The fact there is oral in victim one's case and ropes in victim one's case and not in witness one is not issue because witness one is a *Lyle* witness, therefore he's not testifying to things beyond what the charged victim testifies to.

R. p. 133, ln. 21-25.

As she began addressing other differences raised by the defense, the lower court cut her off and indicated that "I think I am going to grant your motion." R. p. 134, lns. 11-13. He reasoned that he "could point to at least four of the five *Wallace* factors that are very similar." R. p. 134, lns. 15-17. Without addressing those particular factors, he noted that there were also "other factors that set forth by the State that make me believe that the 404 evidence should come in." R. p. 135, lns. 1-3. Then, he asked the State to address the "403 analysis." R. p. 135, ln. 6.

Ms. Joyner began by submitting that "under the 403 analysis the Court should again weigh the similarities versus dissimilarities." R. p. 135, lns. 7-9. She argued that Rule 403, SCRE, is often misstated and again urged the Court to weigh the similarities when weighing the probative value. R. pp. 135-6.

In response, the defense argued that admission of the testimony of witness one would be highly prejudicial to Appellant. R. p. 136. While noting it was not a completely dispositive factor, Ms. Wilson argued that it was very remote, as it occurred twenty years ago, and the remoteness made it not very probative while still being highly prejudicial. R. pp. 136-137. She further argued that the alleged conduct was different and the factor of control was unique to witness one's allegations. R. p. 137, lns. 9-15.

Thereafter, the court ruled:

I understand. That's the problem in a lot of these cases it is prejudicial. There no question about it. But the State has the burden of proving beyond a reasonable doubt. And they believe the evidence is probative. I think it is probative. They don't tell us to weigh the difference – the probative versus prejudicial factor under Rule 403 but at least we've considered it and—

Well I'm ready to rule, I'm going to allow it.

R. p. 137, ln. 6 – p. 138, ln. 2.

C. Discussion of the Law

As a threshold matter, the lower court must first determine if the proffered evidence is relevant. Rule 402, South Carolina Rules of Evidence, provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.

Rule 401, South Carolina Rules of Evidence, defines relevant evidence "as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even if the evidence is deemed relevant, it also must meet Rule 404(b), South Carolina Rules of Evidence, which provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Recently, in *State v. Perry*, Op. No. 27963 (S.C. Sup.Ct. filed May 6, 2020) (Shearouse Adv.Sh. No. 18 at 12, 16-17), a majority of the South Carolina Supreme Court addressed Rule 404(b), SCRE, as follows:

> The rule is often stated in terms of "propensity."

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.
>
> *Michelson v. United States*, 335 U.S. 469, 475, 69 S. Ct. 213, 218, 93 L. Ed. 168, 173-74 (1948); *see also* 3 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (8th ed. 2018) (stating "evidence of the commission of crimes, wrongs or other acts by [the defendant] is inadmissible for the purpose of showing a disposition or propensity to commit crimes"); James F. Dreher, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 35 (South Carolina Bar 1967) ("It is in criminal cases that the law must be the most sternly on guard against allowing the doing of an act to be proved by a propensity to do it."); *State v. Fletcher*, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (Toal, C.J., dissenting) (stating "evidence of other crimes, wrongs, or acts is not admissible for purposes of proving that the defendant possesses a criminal character or has a propensity to commit the charged crime"). Thus, Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial.
>
> In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity. In the words of Rule 404(b), it "prove[s] the character of [the] person" and "shows[s] action in conformity" with that character. We discussed this tendency in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). We stated, "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty," and, "Its effect is to predispose the mind of the juror to believe the prisoner guilty." 125 S.C. at 416, 118 S.E. at 807. We described this type of evidence as having "the inevitable tendency . . . to raise a legally spurious presumption of guilt in the minds of the jurors." 125 S.C. at 417, 118 S.E. at 807; *see also* 125 S.C. at 420, 118 S.E. at 808 (stating "such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter"). Thus, evidence of a defendant's other crimes serves the prohibited purpose of showing he has a propensity to engage in criminal behavior.

Thereafter, the majority of the Supreme Court reasoned:

> 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. To the extent a trial court finds evidence of "other crimes" does serve these dual purposes, the court must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose. This determination is bound up in the trial court's duty to balance - pursuant to Rule 403 - the probative value of the evidence for its legitimate purpose against the unfair prejudice that results from its tendency to serve the improper purpose. *See State v. Clasby*, 385 S.C. 148, 155-56, 682 S.E.2d 892, 896 (2009) ("Even if prior bad act evidence . . . falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)) (citing Rule 403, SCRE)).
>
> 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. *See, e.g., Gaines*, 380 S.C. at 29, 667 S.E.2d at 731 ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000) ("If the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807)).

Id. at 17.

The majority in *Perry*, identified *Lyle* as "the classic South Carolina case for understanding admissibility of a defendant's other crimes." *Id.* at 18. In *Lyle*, the Court held that "if the [trial] [c]ourt does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused shall be given the benefit of the doubt and the evidence should be rejected." *Lyle*, 125 S.C. at 417, 118 S.E. at 807. In *Perry*, the majority of the Court addressed the logical connection standard that followed from *Lyle* and explained:

> For over eighty years after our decision in Lyle, this Court consistently adhered to its narrow "acid test" of "logical relevancy" or "logical connection" for admissibility of other crimes. *See, e.g., State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (citing *Lyle* for the proposition the other crimes "must logically relate to the crime with which the defendant has been charged"); *State v.*

> *King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused."); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (finding no connection between the other crime and the crime charged as required by *Lyle*, reasoning "the present facts only support a general similarity, and thus are insufficient to support the common scheme or plan exception"); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) ("It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence."); *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes."); 279 S.C. at 192- 93, 304 S.E.2d at 814-15 (finding the trial judge erred in admitting testimony from a witness who speculated the defendant intended to rape her because there was no connection made between the other act and the act for which the defendant was charged); *State v. Rivers*, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979) ("Unable to clearly perceive the connection between the acts as required by *Lyle*, . . . we conclude that the testimony [of the defendant's other acts of sexual misconduct] should have been excluded."); *State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (allowing testimony of an "unnatural" sexual act perpetrated against the same victim some hours after the offense charged because the subsequent sex act explained why a doctor did not find any sperm during his medical examination).

Perry, at 20-21.

In the instant case, both parties argued and the lower court clearly applied *Wallace*, which has now been overruled by *Perry.* As a result of the lower court's reliance on *Wallace*, it is important to address *Wallace* to properly consider the error of the lower court in both narrowly applying *Wallace* and in finding the testimony was similar enough to be admitted. After addressing the interplay between Rule 401, 402 and 404(b), SCRE, the Court in *Wallace* reasoned:

> Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Wallace, 683 S.E.2d at 278.

To aid in the close degree of similarity analysis, the Court set forth the following list of factors that were argued in the instant case and utilized here by the lower court: 1) the age of the victims when the abuse occurred; 2) the relationship between the victims and the perpetrator; 3) the location where the abuse occurred; 4) the use of coercion or threats; 5) the manner of occurrence, for example, the type of sexual battery. *Id.* The Court emphasized that the factors were not all inclusive and were set forth in guidance. Then, the majority of the divided Court held:

> A close degree of similarity establishes the required connection between the two acts and no further "connection" must be shown for admissibility. Here, the similarities between the acts include petitioner's relationship to the victims (his stepdaughters), abuse beginning at about the same age, abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe it. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity. We find the Court of Appeals erred in ruling that Sister's testimony was improperly admitted under Rule 404(b).

Id.

In *Perry*, the majority of the Court rejected the *Wallace* similarity test and held:

> As we said in *Lyle*, "Whether evidence of other . . . crimes properly falls within any of the recognized exceptions . . . is often a difficult matter to determine." 125 S.C. at 416-17, 118 S.E. at 807. Rule 404(b) of our Rules of Evidence provides, "Evidence of other crimes, wrongs, or acts... may... be admissible to show... the existence of a common scheme or plan..." The trial court's standard for making this determination is the *Lyle* "logical connection" test. The State must demonstrate to the trial court that there is in fact a scheme or plan common to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged.
>
> Similarity can be important to meeting that burden, but as we held in *Lyle* and in all our decisions for over eighty years afterward, there must be more. The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes "reasonably tends to prove a material fact

> in issue." 125 S.C. at 417, 118 S.E. at 807. The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden "should be subjected by the courts to rigid scrutiny," considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

Perry, at 29-30.

On May 6, 2020, after issuing the *Perry* opinion setting forth the proper framework for the analysis of Rule 404(b) evidence and overruling *Wallace*, the South Carolina Supreme Court also issued opinions in *State v. Durant,* Op. No. 27964 (S.C. Sup.Ct. filed May 6, 2020) (Shearouse Adv.Sh. No. 18 at 64), and *State v. Cotton*, Op. No. 27965 (S.C. Sup.Ct. filed May 6, 2020) (Shearouse Adv.Sh. No. 18 at 75), applying the *Perry* framework. In *Durant,* after noting Court's opinion in *Perry* that overruled *Wallace* and setting forth a proper analysis for determining whether prior acts are admissible pursuant to the common scheme or plan exception, the Court explained:

> The Court emphasized *Lyle's* "logical connection" test, whereby "[t]he State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *Id.* at 30 (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807). To prove a sufficient connection, the State must demonstrate that there is "something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *Id.* at 27. This requirement filters permissible evidence of prior acts against veiled attempts to introduce propensity evidence. When the State seeks to present this evidence, its burden is a high one, as trial courts must employ "rigid scrutiny." *Id.* at 30. However, while the proper framework no longer reduces a Rule 404(b) analysis to mathematical exercise where the number of similarities and dissimilarities are counted, the common scheme or plan exception remains viable.
>
> Accordingly, the question then becomes whether the admission of the other three girls' testimony can nonetheless be upheld under *Perry*. While the trial was conducted under *Wallace*—the parties argued for and against admissibility using that test and the trial court based its decision on it—we now determine whether

> the evidence would have been admissible under the framework in *Perry*. In answering this question, case law guides our analysis.
>
> In *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984), this Court determined the trial court properly admitted evidence that a defendant had committed previous acts of sexual abuse because the State showed a particularly unique method of committing the attacks. The Court explained:
>
> > All three daughters testified concerning the pattern of this and prior attacks. According to them, these attacks commenced about their twelfth birthday, at which time Appellant began entering their bedroom late at night, waking them, and taking one of them to his bedroom. There he would explain the Biblical verse that children are to "Honor thy Father," and would also indicate he was teaching them how to be with their husbands. The method of attack was common to all three daughters.
>
> 283 S.C. at 391, 323 S.E.2d at 773. The Court concluded, "It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence." *Id.* at 392, 323 S.E.2d at 774.
>
> Because *McClellan* remains good law, we believe the prior acts here are admissible. Durant had a particularly unique method of committing his attacks common to all the girls. While there were differences in their ages and the type of sex act, the method of his attack was more than just similar; instead, evidence of the prior acts "reasonably tend[ed] to prove a material fact in issue." *Lyle*, 125 S.C. at 417, 118 S.E. at 807. Durant exercised his position of trust, authority, and spiritual leadership to hold private prayer meetings with teen girls who had grown up in his church. He told them he was praying for their health and good fortune, and represented that part of this process was touching them sexually and having intercourse. Durant then warned the girls of misfortune if they refused or told anyone. Moreover, he used scripture as a means of grooming the children into performing sex acts, a striking parallel to the defendant in *McClellan*. Indeed, the trial court noted it was one of the more compelling cases of common scheme or plan evidence it had ever seen, and we agree. These facts demonstrate the requisite logical connection between the prior acts of sexual abuse and the one forming the basis of the crime charged.

Durant, at 68-69.

In *Cotton*, an undivided Supreme Court acknowledged the decision in *Perry* that set forth the requirement to satisfy the common scheme or plan exception and the decision in *Durant* that "affirmed a pastor's criminal sexual conduct conviction in a case where the abuse of the victim

was done in a method so unusual to be unique." *Cotton*, at 76. In addressing the facts, the Court explained:

> In this case, Petitioner met a young woman (the victim) online, picked her up in his car to take her on a date, and quickly became aggressive, forcing her to perform oral sex on him in the car. He then drove to a secluded location in the woods, threatened to shoot the victim, raped her outside the car, and drove her home. Petitioner was indicted for kidnapping and criminal sexual conduct in the first degree. Over Petitioner's objections at trial, and pursuant to the common scheme or plan exception to Rule 404(b), SCRE, the trial court admitted testimony from a second victim (another young woman) who had suffered an essentially identical assault at Petitioner's hands. According to the second victim, Petitioner met her online, picked her up in his car to take her on a date, and quickly became aggressive, hitting her and forcing her to perform oral sex on him in the car. He then drove to a secluded location in the woods, raped the second victim outside the car, and drove her home. Notably, during the assaults, both victims attempted to dissuade Petitioner from raping them by offering excuses as to why intercourse with them would be undesirable: one claimed she was menstruating, and the other claimed she was already pregnant and had a sexually transmitted disease. In both cases, Petitioner stated he did not care and would "fix that," putting on a condom and continuing with the rape.

Cotton, at 76.

After noting Cotton's conviction and the decision of the Court of Appeals, the Supreme Court provided the following brief analysis and holding:

> Using the new framework set forth in *Perry*, we find the admission of the second victim's testimony satisfied the requirements of Rules 404(b) and 403, SCRE. Because there was no abuse of discretion in the admission of the second victim's testimony, we affirm Petitioner's convictions and sentence.

Cotton, at 77.

D. Analysis of the Case

It is clear from the record that the State failed to establish and the court failed to properly analyze whether the proffered and admitted testimony was relevant, properly fell within a Rule 404(b), SCRE, exception and was more probative than prejudicial. Even though the defense argued for an expanded analysis, all the State argued and court cited to without specificity were

weak similarities that simply showed propensity not a particularly unique set of facts that made the charged crimes more likely to have occurred. Pursuant to the longstanding precedent of *Lyle* and the clarification set forth in *Perry,* Appellant urges this Court to find that the lower court erred by admitting testimony of other alleged sexual conduct as requested by the State under Rule 404(b), SCRE.

As is referenced above and set forth in detail in the summary of facts, the State asked the court to analyze witness one's testimony as to each victim following the testimony offered, which resulted in the following discussion with the court:

> Ms. Joyner: But I believe it's appropriate to analyze his testimony separately as to each, both victim one and victim two for similarity.
>
> Court: Okay. I don't see much similarity. That's the thing.
>
> Ms. Joyner: Well, that is the more difficult case. Yes, sir, Your Honor.
>
> Court: I didn't say it was difficult.
>
> Ms. Joyner: Victim two does seem to be the outlier in terms of the testimony between victim one.
>
> Court: I would agree with that.

R. p. 118, ln. 12- p. 119, ln. 9. When considering the lower court's statement, it can be deduced that he originally failed to see much similarity when considering the testimony offered as a whole.

Following this discussion and argument by the defense, the State conceded there were problematic differences with victim two's testimony and agreed to not proceed with the charges regarding victim two or calling him as a witness. In response, the defense argued that the charges should be joined as the State originally noticed, but the defense indicated they understood the court's position when the court responded that the State had the discretion of which case to call

and that the indictments were severable. This concession by the State and findings by the court make the instant case factually distinguishable and more troubling than the recent decisions handed down by the Court. As the defense argued, the opportunity to sever the indictments and/or ability choose which case to call following the pre-trial hearing allowed the State to clean up their case and remove the testimony that demonstrated that none of the Rule 404(b) testimony met the rigid scrutiny requirement that the court should have subjected it to prior to ruling it could be presented to the jury.

Turning back to victim one and witness one, the State argued that there were great similarities between the two. The State referenced the *Wallace* factors and argued that the age, location and relationship factors were similar. In response, the court noted that the factors were "common." R. p. 120, lns. 3-8. The State further argued regarding the fourth factor that the neither young man recalled feeling threatened and the manner of occurrence was "very, very similar." R. p. 120, lns. 9-13. In support of this argument, the State submitted that the progression from massage to masturbation was similar and that the difference in the progression to oral sex was "not problematic under the case law." R. p. 121, lns. 21-23. In conclusion, she argued: "So I would submit that in both cases the boy had to masturbate the defendant. In the instance it was only one time. In the instance of witness one it was more than one time but that is similarity in their abuse and I think it tracks very, very closely to the factors of *State versus Wallace*. R. p. 121, ln. 23 – p. 122, ln. 3.

In response and more in line with the proper analysis than the State's argument focused solely on the *Wallace* factors, the defense argued that to admit the evidence the State must show that it was relevant, admissible under Rule 404(b), SCRE, and more probative than prejudicial under Rule 403, SCRE. R. p. 126. Regarding relevance, counsel argued that the testimony

offered by witness one was not relevant to victim one. R. p. 127. In support of this argument, she explained that it had its own unique fact pattern and was separate in time and place. R. p. 127. She noted it happened ten years prior and occurred in a separate location. R. p. 127. She also argued that the testimony did not make the allegations by the victim more or less probable. R. p. 127. Specifically, she stated: "The State is seeking to admit it to just show propensity for child molestation." R. p. 127, lns. 11-12.

Turning to Rule 404(b), defense counsel argued that the State failed to meet the clear and convincing standard. R. p. 127. She noted that the testimony offered was "inconsistent with itself." R. p. 127, lns. 15-20. She also argued that the State failed to show that there was a close degree of similarity to the crimes being charged. R. p. 127, lns. 21-22. In support of this argument, she noted that the allegations involved a completely different party and were not part of a continuing course of conduct. R. p. 128.

Regarding the factors set forth in *Wallace*, defense counsel addressed the first factor and conceded the boys were approximately the same age at the time. R. p. 128. As to the second factor, she asserted that "they have very different relationships." R. p. 128, lns. 6-8. She explained that witness one was closer in age and more like brothers with Appellant. Whereas, with the victims he was more like an authority figure, there was an age gap and they were able to ride with and go places with Appellant. R. p. 128. She further argued that Appellant's relationships with the two families was different. R. pp. 128-129. With the witness's family, Appellant was more like a son, but he was more like a peer or friend with the victims' family. R. p. 129.

As to the third factor, counsel argued that the places were separate. R. p. 129. She noted that the testimony placed the events in Appellant's own home versus his parent's home.[7] She also noted that the places where the events took place within the homes were different and that victim one and victim two made allegations involving different locations and incidents that were unique from each other and from witness one. R. p. 129.

Turning to the fourth factor, defense counsel argued that the matter of being threatened was different. R. p. 129. She also noted the complete difference from witness one's testimony that he continued the relationship due to treats and rewards. R. p. 129, lns. 17-19.

Regarding the last factor "the difference in the sexual abuse" she argued that "there is a lot of difference here." R. p. 129, ln. 24 – p. 130, ln. 1. She addressed the specific testimony offered by the victims that were different from each other and she also noted that "none of that happened" with witness one. R. p. 130, lns. 1-10, p. 131, lns. 13-17. Beyond the difference in the alleged acts, she also noted that witness one testified about an aspect of control over him by Appellant that was absent from the victims' testimony but would be expected when he was ten years older with the victims. R. p. 130.

Defense counsel asserted that under the case law there were other factors to consider, and she addressed the factors she identified. R. p. 130. She noted that witness one testified that he knew it was wrong and that the victims' didn't seem to make that claim. R. p. 130, lns. 24-25. She also noted that victim two did not "bury his abuse" but the other two did. R. p. 131, lns. 1-3.

Finally, she argued that if the court got through all those factors in the favor of the State, the prejudice highly outweighed the probative value. R. p. 131, lns. 2-4. She explained:

> I think it is to[o] remote a time period. It's a different victim. Different allegation. The abuse alleged is very different. And I think there's a large – a large concern

[7] It also should be noted that the only conduct reported by the victim as occurring in Appellant's parent's home was classified as not sexual in nature; whereas, all the sexual conduct alleged by witness one occurred in that home.

> for confusing the jury with all these separated victims and charges and what he's on trial for and what he is not on trial for. So, you know, it's our position that this evidence shouldn't come in under *Lyle* and that it should be excluded.

R. p. 131, lns. 5-12.

In response, the State argued that the evidence was relevant because the case was going to come down the credibility of the victim; therefore, she argued it was relevant to show there was "this pattern of conduct in the past." R. p. 132. Regarding Rule 404(b), she acknowledged that the exception has typically been applied in cases involving "continuous elicit intercourse," but she argued the instant case was similar to *Wallace,* which involved multiple victims. R. p. 132, ln. 6 – p. 133, ln. 2. After referencing the *Wallace* factors, she focused her argument on addressing the differences argued by the defense and argued that the other factors noted by the defense did not go to the analysis of similarities versus dissimilarities. R. pp. 132-133.

While the State was still arguing regarding similarities, the lower court cut her off and indicated: "I think I am going to grant your motion." R. p. 134, lns. 11-13. He reasoned that he "could point to at least four of the five *Wallace* factors that are very similar." R. p. 134, lns. 15-17. Without addressing those particular factors, he noted that there were also "other factors that set forth by the State that make me believe that the 404 evidence should come in." R. p. 135, lns. 1-3.

After finding the evidence admissible under Rule 404 (b), SCRE, the lower court asked the State to address the "403 analysis." R. p. 135, ln. 6. The State responded that "under the 403 analysis the Court should again weigh the similarities versus dissimilarities." R. p. 135, lns. 7-9. She argued that Rule 403, SCRE, is often misstated and again urged the lower court to weigh the similarities when weighing the probative value. R. pp. 135-6.

In response, the defense argued that admission of the testimony would be highly prejudicial. R. p. 136. While noting it was not a completely dispositive factor, counsel argued that it was very remote, as it occurred twenty years ago, and the remoteness made it not very probative while still being highly prejudicial. R. pp. 136-137. She further argued that the alleged conduct was different and the factor of control was unique to witness one's allegations. R. p. 137, lns. 9-15.

Thereafter, the court ruled:

> I understand. That's the problem in a lot of these cases it is prejudicial. There no question about it. But the State has the burden of proving beyond a reasonable doubt. And they believe the evidence is probative. I think it is probative. They don't tell us to weigh the difference – the probative versus prejudicial factor under Rule 403 but at least we've considered it and—
>
> Well I'm ready to rule, I'm going to allow it.

R. p. 137, ln. 6 – p. 138, ln. 2.

As was argued by the defense, the testimony offered pretrial and subsequently admitted in front of the jury failed to meet the rigid scrutiny it should have been subjected to by the lower court. Instead of properly exercising the discretionary power vested in the lower court, the court failed to make a ruling on the paramount issue of relevance. As is addressed above and contained in the record, both parties argued regarding relevance, but the court failed to make specific findings. Appellant urges this Court to not be persuaded by the State's argument that evidence was relevant because it bolstered victim's credibility, but would ask this Court to find, as the defense argued, that the testimony was inconsistent with itself and the factors of remoteness and lack of logical connection made the evidence lacking in relevancy. Furthermore, Appellant would urge this Court to find that the lower court abused his discretion by not properly addressing the threshold matter of relevancy.

Turning to the common scheme or plan exception under Rule 404(b), the lower court failed to find that the conduct alleged in the witness's testimony met the clear and convincing standard for admissibility. "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. *Id*; *State v. Clasby*, 682 S.E.2d 892, 385 S.C. 148 (S.C. 2009).

Here, Appellant cannot address the lower court's findings regarding the clear and convincing standard since no findings were made. Appellant submits that due to the inconsistency argued by the defense and due to the lower court's failure to make the necessary ruling, the lower court must be reversed for failing to find the testimony of witness one, which was not the subject of a conviction, met the clear and convincing standard. Furthermore, Appellant would submit that it would be in error and set dangerous precedent for this Court to infer that the Court found the evidence met the clear and convincing standard.

Directly in line with *Perry* and as is discussed in *Durant*, here, the State offered no argument that the witness's testimony served a legitimate purpose or that a logical connection existed between Appellant's alleged conduct with witness one and his current charges. *Perry*, at 12. As discussed as error in *Perry,* the State argued the similarities outweighed the dissimilarities; therefore, the evidence was not only admissible under *Wallace* but also more probative than prejudicial. Here, the State failed to "show a logical connection between the other

crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *Perry*, at 30 (quoting *Lyle,* 125 S.C. 417, 118 S.E. at 807). Additionally, the lower court failed to undertake the proper analysis abusing the discretion vested in the lower court by committing an error of law.

Here, the uniqueness between the allegations and crimes charged is not that of *McClellan* or *Durant*, as discussed above, where the conduct was found to be so compellingly unique as to be admissible. What is unique here is that the State began with joinder of charges involving the two victims and after offering the testimony in support of the Rule 404(b) motion agreed with the lower court that the testimony of the two brothers and witness one was so inconsistent and dissimilar that the State chose to not join the charges as originally planned and chose to not call victim one's brother as a Rule 404(b) witness at trial. From their choice to sever the charges and to not call victim two as a Rule 404(b) witness, the State itself demonstrated how the testimony failed to be logically connected to the crime charged and was simply being offered to show propensity and prejudice Appellant in the eyes of the jury. Here, the testimony was not offered because it properly fell within the Rule 404(b) exception by demonstrating an illicit continuing course of conduct or showing a particularly unique method of committing crimes, but the record demonstrates that the evidence served no legitimate purpose but for bolstering credibility of victim one, which would have been clearly impugned by calling victim two. Furthermore, the evidence in no way established a criminal process that logically connected the alleged conduct to the crime charged. Clearly, the testimony was offered to show propensity without it also having a proper purpose.

Additionally, the focus on the *Wallace* factors by the State and argument offered by both sides demonstrate how inconsistent and not logically connected the testimony was to the crimes

charged. In support of this position, Appellant would rely upon the detailed argument by the defense set forth above and the lower court's ruling. Additionally, it also must be noted that the State began addressing the clear differences argued by the defense when the court cut her off to make his ruling. Yet, prior to being cut off, the State made some erroneous arguments, which can be summarized, as follows: 1) the difference in location was distinction without difference, 2) how the boys responded to the abuse did not go to "any similarity or dissimilarity because we're looking at what the common scheme or plan was and the similarity or dissimilarity," and 3) the factors of "oral" and "ropes" in victim one's case that were absent in witness one's case did not matter since he was a *Lyle* witness. R. p. 133, lns. 11-25. After cutting her off, the lower court simply noted he found "four of the five *Wallace* factors that are very similar" and there "other factors" that convinced him the evidence was admissible. R. pp. 134-135. Despite the court noting "other factors" beyond *Wallace*, it is clear that the State argued and the court relied upon *Wallace* in his decision, which is of concern considering the overruling of *Wallace*. Even if *Wallace* was not overruled, Appellant submits that a meritorious argument exists that the lower court abused his discretion in making this brief and unsupported finding. Simply put, the ruling was an error under *Wallace* and is clearly error under *Lyle* and the framework set forth in *Perry*.

As discussed, the lower court did not require the State to establish nor did the court rule on whether a logical connection existed between the alleged conduct and current charges. Additionally, the court also failed to require the State to establish that the evidence served a legitimate purpose beyond showing propensity when he failed to properly conduct a Rule 403, SCRE, balancing test. After arguing that Rule 403, SCRE, is often misstated, the State made an egregious misstatement when she argued "under the 403 analysis the Court should again weigh

the similarities versus dissimilarities." R. p. 135, lns. 7-9. Instead of correcting her error and conducting the proper balancing test, the court reasoned:

> I understand. That's the problem in a lot of these cases it is prejudicial. There no question about it. But the State has the burden of proving beyond a reasonable doubt. And they believe the evidence is probative. I think it is probative. They don't tell us how to weigh the difference – the probative versus prejudicial factor under Rule 403 but at least we've considered it and—
>
> Well I'm ready to rule, I'm going to allow it.

R. p. 137, ln. 6 – p. 138, ln. 2.

In complete contrast in *Perry*, a majority of the Court held:

> The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes "reasonably tends to prove a material fact in issue." 125 S.C. at 417, 118 S.E. at 807. The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden "should be subjected by the courts to rigid scrutiny," considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

Perry, at 19. Here, the lower court's ruling amounts to an abuse of discretion in that he failed to conduct the proper balancing test with the facts before him and made an erroneous application of the clear standing law when he surmised, "they don't tell us how to weigh the difference." R. p. 137, ln. 21. Interestingly, he deemed the evidence probative, yet the State never offered a legitimate purpose to balance against the prejudice noted by the lower court. Furthermore, the only purpose eluded to in the State's arguments boil down to showing propensity to commit the type of crime charged and to bolster the credibility of the victim.

"The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). Here, the prejudice of the Rule 404(b) evidence is made even

more apparent from the trial testimony of witness one and victim. The pretrial testimony of victim one and witness one is detailed above, but the trial testimony of witness one was much lengthier and provided even more prejudicial information to the jury than the lower court heard pretrial. R. pp. 368-438.

In closing argument, the State informed the jury "this is the case that comes down to credibility," which is reminiscent of her argument pretrial that the evidence was relevant since the case was going to come down to the credibility of victim one. R. p. 132, ln. 9-12, p. 686, lns. 18-19. Yet, in closing the State went further than utilizing the testimony of witness one to bolster the credibility of victim one, when the State also referenced witness one to bolster the expert testimony offered regarding delayed disclosure and grooming. R. pp. 600-601.

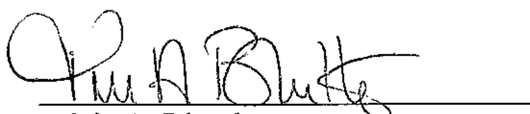
Before diving into the testimony of witness one as argument in support of finding Appellant guilty, the State explained to the jury that the purpose of calling victim one was to address "incredibly similar sexual abuse" and demonstrate the "modus operandi of the defendant". R. p. 606, ln. 24 –p. 607, ln. 5, pp. 606-609. As is argued herein, the actual purpose of calling witness one was show to simply show propensity without establishing a proper purpose and to prejudicially bolster the testimony of the State's witness and discredit the testimony of Appellant, whereby he denied any misconduct with witness one or victim one.

Clearly, the testimony of witness one was more prejudicial than probative, yet the Court failed to make such a finding in applying the State's flawed analysis and by offering a flawed ruling. As was argued by the defense, allowing the jury to hear the testimony of witness one essentially put Appellant on trial for the conduct addressed by witness one and allowed for confusion and ultimately prejudice that requires a new trial.

CONCLUSION

Based upon the facts and arguments contained herein and based upon the record before this Court, Appellant would respectfully ask this Court to find that the lower court erred by allowing the testimony of witness one to be presented to the jury. In line with the relief granted in *Perry*, Appellant would urge this Court to reverse and remand for a new trial.

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No: 2019-001983

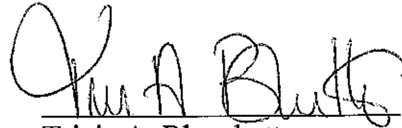
THE STATE, RESPONDENT,

v.

JULIO ANDRES CASTILLO, APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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