STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lancaster County
Honorable Roger E. Henderson, Circuit Court Judge

THE STATE,

PETITIONER,

V.

GUADALUPE GUZMAN MORALES,

RESPONDENT

APPELLATE CASE NO. 2021-000622

BRIEF OF RESPONDENT

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The issue addressed by the Court of Appeals was not preserved for review on appeal and was waived and conceded at trial by Respondent's counsel. As a result, the Court of Appeals erred by addressing it on the merits. Further, the evidence and testimony of the second victim was properly admitted as a common scheme or plan whether under the standard that existed at the time or under the standard articulated in State v. Perry, 430 S.C. 24, 824 S.E.2d 654 (2020) and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020).

RESPONDENT'S QUESTIONS PRESENTED

1. Did the Court of Appeals correctly find that the alleged prior bad act evidence testified to by a younger sister, Witness B, did not meet the common scheme or plan exception of Rule 404(b) because the evidence was not sufficiently logically connected to the indicted conduct such that evidence of one tended to prove a material fact in issue?

2. Did the Court of Appeals correctly find that the Rule 404(b) issue was preserved for appellate review and was not waived and not conceded?

STATEMENT

In October of 2002, Respondent, Guadalupe Guzman Morales, was arrested for two counts of criminal sexual conduct with a minor second degree and one count of attempted criminal sexual conduct with a minor second degree, arrest warrants #H-067093, 94, 95. In 2016, fourteen years later, the Lancaster County Grand Jury indicted Morales for criminal sexual conduct with a minor first degree, criminal sexual conduct with a minor second degree and assault with intent to commit criminal sexual conduct with a minor, indictments #2016-GS-29-559, 564, 565. (App .pp. 406-411). On May 26, 2017, Morales appeared before the Honorable Brian Gibbons and moved to quash the indictment based on pre-indictment delay as a due process violation. (App. pp. 5- 79). Ned Gregory represented Morales. Megan Burchstead with the South Carolina Attorney General's Office represented the State. The State argued that Morales was indicted in 2003, but the indictments were not available because of a fire in the Lancaster Courthouse in 2008. (App. p. 10, line 6 – p. 11, lines 1-25). Judge Gibbons denied the motion to quash the indictment and instead treated the motion as a speedy trial motion.[1] Judge Gibbons did not dismiss the indictment for violation of Morales's speedy trial rights but scheduled the trial for August 21, 2017. (App. pp. 72-78).

On August 21, 2017, Morales proceeded to jury trial before the Honorable Roger E. Henderson. Ned Gregory again represented Morales. Megan Burchstead and Joel Kazak represented the State. The jury returned verdicts of guilty as indicted. Judge Henderson sentenced Morales to thirty (30) years for criminal sexual conduct first degree, ten (10) years consecutive for assault with intent to commit criminal sexual conduct with a minor and ten (10) years concurrent for criminal sexual conduct with a minor second degree. A timely notice of intent to appeal was

[1] Counsel for Morales stated that he did not want a speedy trial (App. p. 67, lines 7-16).

served on August 25, 2017. On direct appeal Morales raised two issues. Morales first argued that the trial judge erred in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, when the dissimilarities between Witness B's testimony and the testimony of Witness A, the prosecuting witness, outweighed the similarities and the prejudicial effect of the testimony substantially outweighed its probative value. Morales argued in issue two that the trial judge erred in admitting the testimony of Witness B., finding that the similarities to Witness A's testimony outweighed the dissimilarities, pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when such a finding is contrary to Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and the holding in Wallace should be overturned. On January 8, 2020, the South Carolina Court of Appeals filed an unpublished opinion addressing the issues and affirming the convictions and sentence. State v. Morales, Op. No. 2020-UP-1796 (S.C. Ct.APP. filed January 8, 2020). A timely petition for rehearing was filed on January 23, 2020. The petition for rehearing was denied on February 20, 2020.

On March 17, 2020, Morales filed a petition for writ of certiorari with this Court. In the petition Morales again raised two issues. Morales first argued that the Court of Appeals erred in finding that the trial judge properly exercised his discretion in admitting the testimony of Witness B as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), when the judge made no specific findings as to any purported similarities between Witness B's testimony and the prosecuting witness, Witness A's testimony, the record reflects that the dissimilarities outweighed the similarities and the probative value of Witness B's testimony was substantially outweighed by the danger of unfair prejudice. Morales argued in issue two that the Court of Appeals erred in declining to recognize that the Wallace similarities analysis used by the trial judge is inconsistent with the traditional interpretation of Rule

404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and failing to find that the testimony of Witness B should have been excluded pursuant to Lyle and Rule 404(b).

On September 23, 2020, this Court granted the petition for writ of certiorari, reversed the decision of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of the substantive and procedural issues in light of the decision in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). State v. Morales, Op. No. 2020-MO-009 (S.C. Filed September 23, 2020). (Supp. App. pp. 115-116). On October 7, 2020, the Court of Appeals requested memoranda from both parties addressing the impact of the Perry opinion. On November 6, 2020, Morales filed a memorandum addressing the impact of the Perry opinion. (App. pp. 416-430). In the memorandum Morales argued that the trial judge abused his discretion in admitting the testimony of Witness B about alleged prior bad acts as evidence of a common scheme or plan pursuant to Rule 404(b), SCRE, when the State failed to meet its burden under rigid scrutiny to show a logical connection between the other alleged prior bad acts and the crime charged.

The Court of Appeals heard oral argument on February 9, 2021, and on April 7, 2021, reversed the convictions and remanded the case for a new trial. State v. Morales, 433 S.C. 196, 857 S.E.2d 383 (Ct. App. 2021). (App. pp. 443-451). The State filed a petition for rehearing on April 22, 2021, that was denied on May 13, 2021. (App. pp. 452-462). The State filed a petition for writ of certiorari on June 14, 2021. Respondent filed a return on July 21, 2021. On December 10, 2021, this Court granted the petition for writ of certiorari. The State filed a brief of petitioner on January 28, 2022. This brief of respondent follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

FACTS

Between December of 1999, and September of 2001, Witness A, her sister, Witness B, and another younger sister lived with their mother and Respondent. During this time Witness A believed that Respondent was her biological father but was later told he was not. (App. p. 143, lines 6-19). Witness B also believed that Respondent was her father but at the time of trial it was unclear if Respondent is Witness B's biological father. (App. p. 278, line 21 – p. 279, lines 1-25). At the time of trial in 2017, fifteen years after arrest warrants issued, Witness A was twenty-eight years of age. (App.p. 140, lines 10-11). At the time of trial Witness B was twenty- five years of age. (App .p. 271, lines 15-16).

At trial Witness A testified that in 2002, when she was thirteen years of age, she went to live with her uncle and his girlfriend and his two daughters because her mother "kicked her out of the house." (App. p. 141, lines 7-11; p. 163, lines 14-21). Witness A testified that after living with her uncle for about a month, upon questioning by the uncle's girlfriend Michelle, she told Michelle that Respondent had been touching her. (App. p. 155, line 4- p. 156, lines 1-2). As a result of the disclosure by Witness A, the maternal grandmother questioned Witness B and the younger sister. (App. p. 276, lines 15-18). Upon questioning by the maternal grandmother, Witness B told "what happened." (App. p. 276, lines 11-18). At trial Witness B admitted that she later recanted the accusation against Respondent. (App. p. 273, lines 17-19).

Testimony of Witness A.

At trial Witness A testified that when she was four years old Respondent rubbed his groin area against her groin area on the outside of her clothing. (App. p. 147, line 23 – p. 148, lines 1-14). Witness A testified that when she was in first grade digital penetration took place on a daily basis. (App. p. 149, lines 12-19). She said the digital penetration took place mainly at home but

also in the car and at the river. (App. p. 149, lines 20-23). Witness A testified that her mom was usually not home when the touching took place and if she was home she was in the shower. (App. p. 150, lines 2-5). Sometimes her sisters would be at home and other times they would not be at home. (App. p. 150, lines 6-9).

Witness A testified that Respondent had intercourse with her on her eleventh birthday in the bedroom Respondent shared with Witness A's mother. (App. p. 144, line 17 – p. 145, 146, lines 1-18). According to Witness A, the whole family was going to Carowinds for her birthday and Respondent threatened not to take them to Carowinds unless she got in bed with him. (App. p. 145, line 2 – p. 146, lines 1-2). Witness A testified that at the time her sisters were getting ready in the room they shared and her mother was in the shower. (App. p. 146, lines 11-14). According to Witness A, Respondent continued to have sex with her after her eleventh birthday. (App. p. 146, lines 17-19).

Witness A testified that Respondent had sex with her in her room in the summer after she turned eleven years old. (App. p. 152, line 15 – p. 153, lines 1-3). Witness A testified that, at the time, she was in trouble, confined to her room and her mom had taken her sisters to Walmart. (App. p. 152, lines 15-21). Witness A also testified that one time when she was at home from school because she was sick Respondent asked her to lie on the couch with him and he put his hands down her pants. (App. p. 153, lines 9-25). According to Witness A, Respondent told her that if she told her mother, her mother would kill her. (App. p. 154, lines 16-19).

Testimony of Witness B.

On July 26, 2017, prior to trial, the State moved before Judge Henderson for a conditional ruling on the admission of testimony from Witness B, during the trial for charges involving Witness A. (APP.pp.80-118). The State argued that the testimony from Witness B should be

admitted as the common scheme or plan exception contained in Rule 404(b). (App. p. 85, lines 8-19). At the pre-trial hearing Witness B testified that beginning when she was three years old until the third grade Respondent touched her in a sexual way three times. (App. p. 92, lines 1-10). She testified that the incidents took place only inside the home. (App. p. 92, lines 11-16; p. 96, lines 13-25). Witness B testified that the touching stopped when she was in the third grade. (App. p. 93, lines 19-23). According to Witness B, the last time it happened she was unable to sleep and Respondent told her to come in the room with him and watch television. (App. p. 86, lines 11-18). Witness B testified that while they were laying down on the bed he pulled her pants and underwear down and she felt his penis touch her butt. (App. p. 90, line 23 – p. 91, lines 1-14). Witness B testified that her sisters were asleep in another room. (App. p. 92, lines 21-24). According to Witness B, her mother was working when the incident took place. (App. p. 93, lines 3-10).

Witness B testified that the other two times she was sitting on Respondent's lap and he would put his hands down her pants but there was no digital penetration. (App. p. 91, lines 15-25). She testified that when these other two incidents occurred her sisters were home but in a different room. She testified that her mother was not home. (App. p. 92, line 25 -p. 89, lines 1-18). Later, when Witness B was in the fifth grade, her grandmother questioned her, after Witness A alleged abuse, and Witness B disclosed the incidents to her grandmother. (App. p. 94, line 24 - p. 95, lines 1-15). Witness A did not testify at the pre-trial hearing.

ARGUMENTS

1. **The Court of Appeals correctly found that the alleged prior bad act evidence testified to by a younger sister, Witness B, did not meet the common scheme or plan exception of Rule 404(b) because the evidence was not sufficiently logically connected to the indicted conduct such that evidence of one tended to prove a material fact in issue.**

Pre-trial.

On July 26, 2017, prior to trial, the State moved before the trial judge for a ruling on the admission of testimony from Witness B, a younger sister, during the trial for charges involving Witness A, the older sister. (App. pp.80-118). Witness A did not testify at the pre-trial hearing. After Witness B testified at the pre-trial hearing, the State argued that Witness B's testimony was admissible pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); 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); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App.1994); State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App.1998) and State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. APP.1993). (App. pp. 105 – 109). The State argued that there were strong similarities between Witness B's testimony and the testimony the State expected from Witness A at trial. (App. .p. 109, lines 15-25). Counsel for Respondent argued that Rule 404(b) prohibited admission of the testimony from Witness B and cited State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (App. p. 110, line 5- p. 111, 112, lines 1-24). The attorney for the State replied, "I don't believe I actually printed Lyle. We've all heard Lyle so much and to be candid I haven't read it in awhile." (App. p. 110, lines 16-18).

After the pre-trial hearing the judge ruled, "Again it is a conditional ruling but at this point in time I find that it would follow the guidelines set forth in Lyle's [sic] and the other cases that have come since then. So, therefore, at least at this point, I would find it to could be admissible as

common scheme or plan." (App. p. 117, lines 15-21). It is unclear how the judge concluded that the testimony from Witness B was admissible as common scheme or plan without hearing the testimony from Witness A.

Trial.

After Witness A testified at trial, the State sought a final ruling on the admission of testimony from Witness B. (App p. 215, line 21 – p. 216, 217, lines 1-2). The State argued that the similarities outweighed the dissimilarities. (App. p. 216, lines 17-21). Respondent objected to the testimony from Witness B. (App .p. 217, lines 4-21). The judge ruled the testimony of Witness B admissible stating:

> Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales.
>
> The fact that the grandmother and you contend that the grandmother may have something to do this. That is something you can certainly argue to the jury if you want to when the time comes. But with regards to the actual offering of Witness B as a witness, I'm going to find her testimony will be admissible and I will allow her to testify tomorrow.

(App. p. 217, line 22 – p. 218, lines 1-12). The judge failed to make specific findings about how the testimony from Witness B was similar to the testimony from Witness A. The judge made no finding that the allegations were logically connected. The judge failed to conduct a Rule 403, SCRE, analysis. The judge erred in admitting the testimony of Witness B during the trial for charges involving Witness A.

Court of Appeals Decision on Remand.

On remand from this Court the Court of Appeals correctly applied the logical connection test for Rule 404(b), SCRE, established in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and confirmed in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), writing:

> Because this court relied on Wallace in originally deciding Morales's appeal, we must now re-examine it under the analytical framework set forth in Perry. In Perry, the court rejected the test adopted in Wallace that determined whether prior bad acts established a common scheme or plan based exclusively on the similarities between the prior acts and the pending charges. 430 S.C. at 35-37, 842 S.E.2d at 660-61. According to Perry's majority opinion, a similarities-only test abandoned the long-standing "logical connection" test established in the seminal prior bad act case, Lyle. Id.

State v. Morales, 433 S.C. 196, 201–02, 857 S.E.2d 383, 386 (Ct. App. 2021).

In note 5 in the brief of petitioner the State argues, "The State maintains the Wallace standard is the standard to be applied because Respondent never requested, or even articulated, any other standard for the trial court to apply." (BOP p. 16). By basing the objection on Lyle, Respondent relied on the trial judge to apply the Lyle standard. As discussed in issue two addressing preservation below, the Court of Appeals properly utilized the "logical connection" test of Lyle and Perry rather than the "close degree of similarity" test of Wallace because Wallace was based on a misunderstanding of Lyle, Lyle was also the law at the time of Respondent's trial and remains the law, and Respondent objected to the testimony of witness B based on Lyle.

The Court of Appeals, addressing the merits, discussed Perry, State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984), and two cases decided on the same day as Perry, State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020), and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020) and then wrote:

> With all these cases in mind, we now return to Morales's case. The manner in which the abuse began was similar for both girls. Victim and Sister testified the abuse began with sexual touching at around the same age. Morales was a father-figure to

> both girls. The abusive events as to Sister occurred when her mother was not present in the home. Some of Victim's abuse occurred in the home when mother was absent but other abusive episodes occurred outside the home. It is impossible to predict what would have occurred had Morales's alleged abuse of Sister continued, and we cannot speculate. Overall, in keeping with the analysis employed in McClellan, Durant, and Cotton, we conclude the prior bad act evidence in this case was not sufficiently logically connected to the indicted conduct such that proof of one tended to prove the other. .Rather, the prior bad act evidence veered more into the inadmissible propensity evidence cautioned against by precedent and Rule 404(b).

Morales, 433 S.C. at 204–05, 857 S.E.2d at 387.

Under the analytical framework of Perry, Lyle and the traditional interpretation of Rule 404(b), the testimony of Witness B about alleged prior bad acts did not meet the common scheme or plan exception to Rule 404(b) because the evidence was not logically connected to the crime charged such that the testimony reasonably proved a material fact in issue. The testimony of witness B did not serve a legitimate purpose. The Court of Appeals correctly found that the testimony of witness B did not meet the common scheme or plan exception of Rule 404(b).

As noted by this Court in Perry, while similarities between the other acts and the crimes charged may be important for the State to show in order to meet its burden for admission pursuant to Rule 404(b), the State must show more than similarities. In the present case the allegations made by Witness B were substantially different from the allegations made by Witness A and would not have met the similarities test purportedly allowed by Wallace and overruled by Perry. Witness B testified that between the time she was three years old to when she was in the third grade Respondent touched her in a sexual way "maybe three times." (App. p. 92, lines 8-10). Witness B testified that Respondent put his hands under her panties and touched her vaginal parts but there was no digital penetration. (App. p. 91, line 15 – p. 92, line 1). Witness B did not allege intercourse. Witness B did not testify about threats.

In contrast, Witness A testified that when she was four years old Respondent rubbed his groin area against her groin area on the outside of her clothing. (App. p. 147, line 23 – p. 148, lines 1-14). Witness A testified that starting in the first- grade digital penetration took place almost on a daily basis. (App. p. 149, lines 5-19). Witness A testified that Respondent had intercourse with her on her eleventh birthday. (App. p. 144, line 17 – p. 145, 146, lines 1-16). Witness A testified that Respondent continued to have sex with her after her eleventh birthday. (App. p. 146, lines 17-19). According to Witness A, Respondent told her that if she told her mother, her mother would kill her. (App. p. 154, lines 16-19).

Witness B testified that the three touching incidents took place only inside the home. (App. p. 92, lines 11-16; p. 96, lines 13-25). Witness A testified that the digital penetration took place mainly at home but also in the car and at the river. (App. p. 149, lines 20-23). Witness B testified that her mother was not at home when the three touching incidents took place. (App. p. 93, lines 3-15). Witness A, however, testified that her mother was in the shower when sexual intercourse took place on her eleventh birthday. (App. p. 146, lines 3-14).

The three instances of sexual touching between the time she was three years old until the third grade alleged by Witness B never progressed to digital penetration, there was no sexual intercourse, no threats and the three alleged touching instances only took place in the home when the mother was away. Witness A alleged digital penetration, starting when she was in first grade, on an almost daily basis that progressed to instances of sexual intercourse beginning when she was eleven years old. The incidents took place mainly in the home, one time when mother was in the shower, but also in the car and at the river. Witness A alleged a threat. The allegations of Witness A and Witness B have very few similarities and no logical connection.

Witness B testified that the abuse ended when she was in the third grade. (App. p. 93, lines 19-23). Witness B testified that she was questioned about abuse by her grandmother when she was in the fifth grade, after Witness A made allegations. (App. p. 94, line 9 – p. 95, lines 1-15). Witness A testified that in 2002, when she was thirteen years of age, she went to live with her uncle and his girlfriend and his two daughters because her mother "kicked her out of the house." (App. p. 141, lines 7-11; p. 163, lines 14-21). Witness A testified that after living with her uncle for about a month, upon questioning by the uncle's girlfriend Michelle, she told Michelle that Respondent had been touching her. (App. p. 155, line 4- p. 156, lines 1-2). While both witnesses alleged the abuse began when they were young, three or four years old, and Respondent was a father figure to both, the types of alleged abuse, the frequency, and the circumstances surrounding the allegations and ways in which the allegations were disclosured were not similar and would not have met the similarities test purportedly allowed by Wallace and overturned by Perry.

This Court wrote in Perry, "Certainly, there are similarities. In addition to the general similarities discussed above, the State emphasized the specific similarity that Perry was the only father figure in the lives of each victim. There is nothing in this record, however, that amounts to "a close degree of similarity," as Wallace purports to permit. Wallace, 384 S.C. at 434, 683 S.E.2d at 278." Perry, 430 S.C. at 39, 842 S.E.2d at 662. As in Perry, there is nothing in the record of this case that amounts to a close degree of similarity allowed under the now overruled similarities test of Wallace. A father figure with abuse starting at an early age is not sufficient. As the Court wrote in Perry, "Rather, in our significant collective experience dealing with crimes of this nature, a very high percentage of sexual crimes against children are committed just like Perry's alleged crimes: by father figures, in the home, in a bedroom, beginning in the pre-pubescent years. The fact Perry's

crimes fit this general pattern does not give Perry a 'monopoly' on his criminal method." Perry, 430 S.C. at 40, 842 S.E.2d at 662. There were even fewer similarities between the acts alleged by witness B and the crimes charged in the present case than the acts alleged by the step-daughter and the crimes charged in Perry.

Applying the analytical framework of Lyle and Perry, the State failed to show a logical connection between the acts alleged by Witness B and the crimes charged involving Witness A, as required by Perry. "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." Perry, 430 S.C. at 44, 842 S.E.2d at 665. As the Court clarified in Perry, citing the concurrence in State v. Perez, 423 S.C. 491, 502, 816 S.E.2d 550, 556 (2018):

> It is not enough to meet the "logical connection" standard for admission of other crimes under the common scheme or plan exception to Rule 404(b) that the defendant previously committed the same crime. "Repetition of the same act or same crime does not equal a 'plan.'" Perez, 423 S.C. at 502, 816 S.E.2d at 556 (Hearn, J., concurring) (quoting Daggett v. State, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005)). When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again. See United States v. Krezdorn, 639 F.2d 1327, 1331 (5th Ct. App.1981) (reversing the district court's admission into evidence of similar forgery crimes because they "would, at best, merely demonstrate the repetition of similar criminal acts, thus indicating [the defendant]'s propensity to commit this crime. Evidence of other crimes is not admissible for this purpose"). Quoting Justice Hearn one final time from her concurrence in Perez, "the repeated commission of the same criminal offense [is] offered obliquely to show bad character and conduct in conformity with that bad character." 423 S.C. at 502, 816 S.E.2d at 556 (Hearn, J., concurring) (quoting Daggett, 187 S.W.3d at 452).

Perry, 430 S.C. at 41, 842 S.E.2d at 663.

In the present case, the admission of the testimony of Witness B, based solely on vague and general similarities, allowed the jury to convict based on the improper inference of propensity.

The State failed to show a logical connection between the acts alleged by Witness B and the charged crimes. The State failed to meet its burden to show that the testimony of Witness B met the common scheme or plan exception of Rule 404(b). "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." Perry, 430 S.C. at 44, 842 S.E.2d at 665. The State failed to show that the testimony of witness B served a legitimate purpose.

As mentioned above, on the same day the Court decided the Perry case the Court also decided State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020), and State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020). In Durant, the Court citing State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984), wrote:

> 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, 430 S.C. at 106–07, 844 S.E.2d at 53 (emphasis added).

The present case is easily distinguished from Durant and McClellan. There was no particularly unique method used in the present case to show a common scheme or plan as used by

the defendants in both Durant and McClellan. Again, there was nothing unique or even very similar about the acts alleged by witness B and the crimes charged.

The present case is also easily distinguished from Cotton. The Court in Perry, discussing Cotton wrote:

> We affirmed the admission of the evidence under the common scheme or plan exception. The similarities between the two incidents were extensive. The trial court discussed these similarities at length in its pre-trial ruling. But the "other crimes" evidence in Cotton had more than just similarity. As the State argued in its brief in that case, "Even if the similarities alone are not sufficient for admission of the testimony, the testimony clearly establishes a logical relevance to the underlying crime." Brief for Resp't at 18, State v. Cotton, 430 S.C. 112, 844 S.E.2d 56. The State went on to explain its theory of a logical connection to a specific, disputed fact. In addition, the trial court in Cotton conducted an extensive, on-the-record analysis of the balance between the unfair prejudice that would result from the evidence against the probative value in the logical connection. "Using the new framework set forth in [this case], we [found] the admission of the second victim's testimony satisfied the requirements of Rules 404(b) and 403, SCRE," and we affirmed. Cotton, 430 S.C. at 114, 844 S.E.2d at 57.

Perry, 430 S.C. at 43–44, 842 S.E.2d at 664 (n. #9 omitted).

As discussed above, the allegations made by Witness B were substantially different from the allegations made by Witness A. The general limited similarities in the present case, a father figure with abuse starting at an early age, were not extensive and were not discussed at length during the pre-trial hearing because the judge only heard from Witness B and not Witness A during the pre-trial hearing. At trial the judge generally discussed the similarities stating, "I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. .Morales." (App. p. 217, line 22 – p. 218, lines 1-5). The judge, however, failed to make specific findings about how the testimony from Witness B was similar to the testimony from Witness A. In contrast, as the Court of Appeals noted, the two incidents in

Cotton were "remarkedly similar" and had "extensive" similarities. The Court of Appeals wrote in a footnote, "In Cotton, both victims met the defendant online. Cotton, 430 S.C. at 113-14, 844 S.E.2d at 57. He picked them up for a date, forced them both to perform oral sex, drove each to a secluded location, and raped them. Id. Additionally, each victim attempted to dissuade Cotton from raping them with a fabricated story and he indicated he would simply "fix" the fictitious problems by putting on a condom. Id. at 114, 844 S.E.2d at 57." State v. Morales, 433 S.C. at 204, 857 S.E.2d at 387, n. #5. The similarities between the testimony of Witness A and the testimony of Witness B in the present case were few, general, vague and were not extensive like the similarities in Cotton.

Importantly, in the present case the State failed to establish a logical connection of the alleged other acts to a specific disputed fact. In Cotton identity was a disputed fact in issue making the prior incident logically relevant. In the present case witness B's testimony was not logically relevant to a fact at issue. Finally, the judge in the present case failed to conduct an analysis pursuant to Rule 403, SCRE, as the judge did in Cotton.

Respondent submits that the analysis ends when, as here, the State failed to show that the alleged other act testimony served some legitimate purpose. If, however, the analysis continues, pursuant to Rule 403, SCRE, the probative value of Witness B's testimony is substantially outweighed by the danger of unfair prejudice. "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." Perry, 430 S.C. at 44, 842 S.E.2d at 665. The State again failed to meet its burden pursuant to Rule 403.

The Court of Appeals correctly found that the testimony of witness B did not meet the common scheme or plan exception of Rule 404(b). The testimony was not sufficiently connected to the indicted conduct such that evidence of one tended to prove a material fact in issue. The State failed to demonstrate that there was in fact a scheme or plan common to both alleged crimes and that the testimony of Witness B served some purpose other than using Respondent's character to show his propensity to commit the crime charged. The error in admitting the testimony of Witness B requires reversal.

Conceding differences between the allegations made by Witness A and the allegations made by Witness B, Petitioner asserts that the reason for the differences is likely because the disclosure ended the opportunity for more abuse against Witness B. (BOP p. 18). It appears, however, that the disclosures in 2002, were made two years after Witness B testified that the alleged abuse ended. Witness B testified that the abuse ended when she was in the third grade. (App. p. 93, lines 19-23). Witness B disclosed the alleged abuse when she was in the fifth grade, (App. p. 94, lines 9-11). Witness B disclosed after being questioned by her grandmother following disclosure by Witness A. Witness A disclosed alleged abuse in 2002, when she was thirteen years of age. Witness A testified that Witness B is two or three years younger. (App. p. 142, lines 4-7). If Witness B is two to three years younger than Witness A, and Witness A was thirteen in 2002, then Witness B, who was in the fifth grade in 2002, would have been ten to eleven years of age in 2002. The alleged abuse by witness B ended two years before the disclosures.

The State failed to establish the required logical connection between the allegations by Witness A and the allegations by Witness B. Petitioner asserts that, "Both girls testified that they always believed Respondent to be their dad, but only after the abuse did they learn that he was not actually their biological father." (BOP p. 18). Petitioner further asserts, "The fact he allowed both

girls to believe he was their biological father, when he was not, and relied on that false "relationship" to be able to abuse the girls is the logical connection required, coupled with the "essentially identical assault," to allow admission of the testimony under Cotton and Perry." (BOP pp. 18-19). First, at the time of trial it was unclear if Respondent was the biological father of Witness B. (App. p. 278, line 21 – p. 279, lines 1-25; p. 308, line 23 – p. 309, lines 1-17). Second, as discussed above, the allegations were far from "essentially identical." The acts alleged, the frequency and the circumstances surrounding the allegations and disclosures were not essentially identical or even very similar. Under the analytical framework of Perry, Lyle and the traditional interpretation of Rule 404(b), the testimony of Witness B about alleged prior bad acts did not meet the common scheme or plan exception to Rule 404(b) because the evidence was not logically connected to the crime charged. The Court of Appeals, applying the correct standard, found that the prior bad act testimony from Witness B was not sufficiently logically connected to the indicted conduct such that proof of one tended to prove the other. The prior bad act testimony from Witness B was inadmissible propensity evidence. The error in admitting the testimony of Witness B requires reversal.

2. The Court of Appeals correctly found that the Rule 404(b) issue was preserved for appellate review and was not waived and not conceded.

Pre-trial.

On July 26, 2017, prior to trial, the State moved before the trial judge for a ruling on the admission of testimony from Witness B, a younger sister, during the trial for charges involving Witness A, the older sister. (App. pp.80-118). Witness A did not testify at the pre-trial hearing. After Witness B testified at the pre-trial hearing, the State argued that Witness B's testimony was admissible pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); 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); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. APP.1994); State v. Adams, 332 S.C. 139, 143, 504 S.E.2d 124, 126 (Ct. App.1998) and State v. Henry, 313 S.C. 106, 108–09, 432 S.E.2d 489, 491 (Ct. APP.1993). (App. pp. 105 – 109). The State argued that there were strong similarities between Witness B's testimony and the testimony the State expected from Witness A at trial. (App. p. 109, lines 15-25). Counsel for Respondent argued that Rule 404(b) prohibited admission of the testimony from Witness B and cited State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (App. p. 110, line 5- p. 111, 112, lines 1-24). The attorney for the State replied, "I don't believe I actually printed Lyle. We've all heard Lyle so much and to be candid I haven't read it in awhile." (App .p. 110, lines 16-18).

After the pre-trial hearing the judge ruled, "Again it is a conditional ruling but at this point in time I find that it would follow the guidelines set forth in Lyle's [sic] and the other cases that have come since then. So, therefore, at least at this point, I would find it to could be admissible as common scheme or plan." (App. p. 117, lines 15-21). It is unclear how the judge concluded that the testimony from Witness B was admissible as common scheme or plan without hearing the testimony from Witness A.

Trial.

After Witness A testified at trial, the State moved to admit the testimony of Witness B under the common scheme or plan exception to Rule 404(b) arguing that the similarities outweighed the dissimilarities. (App. p. 211, line 21 – p. 212, p. 213, lines 1-2). Counsel for Respondent again objected and stated:

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

think that now I'm seeing a pattern of – I'm seeing a pattern of conspiracy. And I don't really want to call it that because it's not really legal conspiracy. But the consortium of witnesses that are saying the same thing for the same reason. We believe it's vindication. We believe it came from – it's stemming from the grandmother. But now after hearing Witness A's testimony it appears to be clear what it is. So we think that the testimony of Witness B is – will be improper bolstering of Witness A's testimony. We think it is improper and should not be allowed.

(App. p. 217, lines 4-21).

The judge ruled the testimony of Witness B admissible stating:

Okay. Well, I heard the testimony. I heard the testimony from Witness B at the hearing in Chesterfield and now that I've heard Witness A's testimony, everything else aside their testimony does have a number of similarities and I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. .Morales.

The fact that the grandmother and you contend that the grandmother may have something to do this. That is something you can certainly argue to the jury if you want to when the time comes. But with regards to the actual offering of Witness B as a witness, I'm going to find her testimony will be admissible and I will allow her to testify tomorrow.

(App. 217, line 22 – p. 218, lines 1-12).

Court of Appeals Decision.

The Court of Appeals correctly found that the Rule 404(b) issue was not waived and was preserved for appellate review writing in a footnote:

As an initial matter, the State argues Morales's argument is unpreserved because he conceded similarities between the Victim's and Sister's testimonies when he stated:

It appears to me that it is becoming a little bit more clear as to where the conspiracy is, if that's what you want to call it; the pattern. And I think that now I'm seeing a pattern of ... conspiracy .... So we think that the testimony of [Sister] ... will be improper bolstering of [Victim's] testimony. We think it is improper and should not be allowed.

The State contends Morales's improper bolstering language is evidence he changed his objection and waived the Rule 404(b) issue. However, the trial court understood Morales was still arguing against the admission of Sister's testimony as prior bad act evidence and ruled, "I do find that the similarities outweigh the dissimilarities

> and taking their testimony would tend to show a common scheme or plan by Mr. Morales." Consequently, the issue is preserved. See State v. Hopkins, 431 S.C. 560, 569, 848 S.E.2d 368, 372 (Ct. App.2020) ("The failure to raise specific grounds for an objection will not prevent the appellate court from addressing an issue when the record indicates that the trial court and the State understood the basis for the objection." (quoting State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App.2019))).

State v. Morales, 433 S.C. at 201, 857 S.E.2d at 385, n. #4. The Court of Appeals correctly found that the issue is preserved for appellate review. The Court of Appeals correctly found that Respondent did not change the basis for the Rule 404(b) objection and did not waive the objection. The Court of Appeals correctly addressed the merits of the Rule 404(b) issue. The Court of Appeals correctly found that the testimony of Witness B did not meet the common plan or scheme exception to Rule 404(b) and the admission of that testimony requires reversal.

Petitioner first argues that the issue is not preserved because the State, not the Respondent, asked for a final ruling on the 404(b) issue. (BOP p. 9). The parties litigated the 404(b) issue pre-trial and the fact that the State asked for the final ruling on the 404(b) issue at trial does not deem the issue unpreserved. Respondent objected to the admission of testimony from Witness B at trial and, as the Court of Appeals correctly noted, "[T]he trial court understood Morales was still arguing against the admission of Sister's testimony as prior bad act evidence and ruled, 'I do find that the similarities outweigh the dissimilarities and taking their testimony would tend to show a common scheme or plan by Mr. Morales.' Consequently, the issue is preserved." State v. Morales, 433 S.C. at 201, 857 S.E.2d at 385, n. #4.

Petitioner's reliance on Tupper v. Dorchester Cty., 326 S.C. 318, 487 S.E.2d 187 (1997), is misplaced. One of the co-defendants in Tupper, Suggs, argued on appeal that there was no writing memorializing the easement sufficient to satisfy the statute of frauds. The Court held that, "Suggs neither raised this issue, nor was it ruled on by the trial court; it is therefore not preserved

for review. Turbeville v. Gordon, 233 S.C. 75, 103 S.E.2d 521 (1958)(statute of frauds may not be raised for first time on appeal).[3]" Tupper ., 326 S.C. at 324, 487 S.E.2d at 190. In footnote three the Court noted that although the statute of frauds issue was raised by another co-defendant, "appellant cannot bootstrap an issue for appeal by way of a codefendant's objection." In the present case Respondent did not seek to "bootstrap" the 404(b) issue by way of a codefendant's objection. Instead, the 404(b) issue was raised pre-trial, the State sought a final ruling on the 404(b) issue at trial and the judge ruled on the 404(b) issue. Unlike in Tupper, the 404(b) issue in the present case is preserved for review.

The same is true as to Petitioner's reliance on State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, (1977), where the Court wrote, "The second point is not before this Court because appellant's counsel made no objection on this point at trial. While appellant's co-defendant did object, the appellant may not utilize the objection of another defendant to gain review. 4 C.J.S. Appeal and Error s 251 (1957)." In contrast, in the present case Respondent objected to the State's use of Witness B's testimony at trial and was not attempting to utilize the objection of another defendant to gain appellate review.

Second, Petitioner argues that Respondent argued a different issue on appeal than the issue raised at trial to the admission of Witness B's testimony. (BOP p. 11). In an attempt to create a procedural bar to the 404(b) objection Petitioner, however, overemphasizes trial counsel's use of the words, "improper bolstering," when he objected saying, "So we think that the testimony of Witness B is – will be improper bolstering of Witness A's testimony. We think it is improper and should not be allowed." (App. p. 217, lines 4-21). Petitioner overlooks the fact that the objection continued pursuant to 404(b) and the trial judge's ruling was based on Rule 404(b). The admission of improper propensity evidence often constitutes improper bolstering. In this case the use of the words improper bolstering in the objection did not change the 404(b) objection.

Third, Petitioner argues that Respondent never challenged application of the Wallace similarities standard. (BOP p. 12). Respondent challenged application of the Wallace similarities standard by basing the objection on Lyle not Wallace. By basing the objection on Lyle, Respondent relied on the trial judge to apply the Lyle standard.

In reversing Wallace this Court in Perry wrote:

> For the first time in our jurisprudence, contrary to over eighty years of interpretation of Rule 404(b) and its pre-Rules predecessor Lyle, the Court stated, "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." 384 S.C. at 436, 683 S.E.2d at 279; see (Pleicones, J., dissenting) ("We have repeatedly held in non-sexual offense cases that, 'the mere presence of similarity only serves to enhance the potential for prejudice,' yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases." (citations omitted)); State v. Perez, 423 S.C. 491, 502, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring) (calling the majority opinion in Wallace "a marked departure from earlier case law requiring some connection between crimes beyond mere similarity"). We find this statement from—and the reasoning and holding in—our opinion in Wallace is based on a misunderstanding of Rule 404(b) and our cases interpreting it, particularly the "seminal" case Lyle. The decision in Wallace effectively created a new rule of evidence, and rendered meaningless the restrictive application of the common scheme or plan exception that is so deeply embedded in our precedent. Concurring in Perez, Justice Hearn challenged, "the Court should ... overturn ... State v. Wallace ... [because it] so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule." 423 S.C. at 501, 816 S.E.2d at 556 (Hearn, J., concurring). We now overrule Wallace.

430 S.C. at 35–37, 842 S.E.2d at 660–61, n. #3, #4 and #5 omitted. While Perry was decided after Respondent's trial, the Court of Appeals properly utilized the "logical connection" test of Lyle rather than the "close degree of similarity"[2] test of Wallace because Wallace was based on a misunderstanding of Lyle, Lyle was also the law at the time of Respondent's trial and remains the

[2] As noted above, there was not a close degree of similarity between the testimony of witness B and the charged crimes and the testimony was inadmissible under the now overruled Wallace similarities test.

law, and Respondent objected to the testimony of witness B based on Lyle. While Respondent did not specifically challenge the application of the Wallace similarities standard and did not specifically request application of the Lyle "logical connection" standard in objecting to the admission of Witness B's testimony, Respondent cited Lyle. (App.p. 110, line 5- p. 111, 112, lines 1-24). The Court of Appeals properly utilized the "logical connection" test of Lyle and Perry rather than the "close degree of similarity" test of Wallace.

Petitioner argues that the analytical framework used in Perry should not apply to the present case because, citing Pantovich v. State, 427 S.C. 555, 563, 832 S.E.2d 596, 600 (2019)(n. #3 omitted):

> Just as we do not require attorneys to be clairvoyant in anticipating changes to the law, we do not hold the PCR court erred in the face of what was—at the relevant time—clear and binding authority as expressed in Lee-Grigg and Green: a jury instruction on good character was warranted when a defendant introduced evidence thereof at trial. We cannot expect our circuit courts to divine future refinements in appellate jurisdiction – only to apply the prevailing law to the facts of a case before them.

(BOP p .13). Petitioner's reliance on Pantovich is misplaced because Perry was not a "future refinement in appellate jurisdiction." Instead, Perry confirmed the traditional "logical connection" test for Rule 404(b), SCRE, established in Lyle. At the time of Respondent's trial Lyle was clear and binding authority. The framework established by Perry applies to the present case because Perry corrected the inconsistency between the similarity test Wallace purported to permit and the traditional logical connection test established by Lyle.

Additionally, Pantovich is procedurally distinct from the present case. The present case is a direct appeal case. Pantovich was a post-conviction relief [PCR] case in which this Court affirmed the PCR judge's finding that appellate counsel was ineffective for failing to raise on direct appeal the trial judge's refusal to instruct the jury on good character evidence. In PCR cases this

Court affords deference to a PCR court's findings of fact, but reviews questions of law de novo. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). In reviewing a trial court's ruling on the admissibility of evidence on direct appeal appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "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." Whitner, 399 S.C. at 557, 732 S.E.2d at 866. The trial judge in Pantovich committed an error of law based on the clear and binding authority of State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982), and State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). There were no cases with holdings inconsistent with Green and Lee-Grigg. The majority in Pantovich correctly agreed with the PCR judge and found that appellate counsel was ineffective in failing to raise on direct appeal the trial judge's refusal to instruct the jury on good character evidence. Based on the clear and binding authority of the "logical connection" test of Lyle, the trial judge in the present case abused his discretion in admitting the testimony of Witness B. Perry corrected the inconsistency between Lyle and Wallace.

Addressing the modern trend of prohibiting jury charges that instruct the jury on how to interpret and use evidence, the majority in Pantovich wrote:

> The State asks us to hold the "good character alone" charge is similarly impermissible because it is an unconstitutional comment on the facts. While we agree that this charge is improper, we do not reverse given this case's procedural posture. Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. **This is especially true in a retrospective PCR analysis under *Strickland*, which seeks to determine whether counsel was ineffective *at the time of the alleged error*.**

427 S.C. at 562–63, 832 S.E.2d at 600 (emphasis added) (n. #2 omitted). The analysis in the present case is not bound by the retrospective PCR analysis under Strickland as in Pantovich. One additional factor to note in Pantovich is that the trial judge not only refused to instruct the jury with the "good character evidence alone" charge which is now improper, the trial judge also refused to instruct the jury with a more balanced and general good character charge as requested by the State. The Pantovich case does not prohibit use of the analytical framework of Perry to the present case.

In Perry this Court wrote:

> 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.

430 S.C. at 44, 842 S.E.2d at 664–65. Lyle remained the law after Wallace and was the law at the time of Respondent's trial. Respondent based his objection on Lyle. The judge understood the objection as pursuant to Lyle, Rule 404(b), and ruled accordingly. Asking the judge to apply the "logical connection" standard of Lyle, binding precedent at the time of trial, does not create a "gotcha" moment as suggested by Petitioner. (BOP p. 13).

Fourth, Petitioner argues that trial counsel waived or conceded the 404(b) issue at trial. (BOP pp. 14-15). Petitioner relies on trial counsel's specific use of the words, "a pattern" and "saying the same thing," in an attempt to show a concession to the existence of a common scheme or plan and waiver of the 404(b) objection. (BOP p. 14). Counsel, however, never stated that the testimony of Witness B was sufficiently similar to the testimony of Witness A to establish a common scheme or plan. Counsel never agreed that the State established a common scheme or

plan pursuant to Rule 404(b), SCRE. Instead, counsel's reference to a pattern of saying the same thing referenced both girls making general allegations against Respondent as vindication and under the influence of the grandmother, a theme of the defense throughout the trial, not a concession to the existence of a common scheme or plan pursuant to Rule 404(b). Counsel never stated that there was a logical connection between the testimony of Witness A and the testimony of Witness B. While counsel did not restate the objection as specifically based on Lyle, Rule 404(b), counsel objected on these grounds pre-trial and at trial additionally objected as improper and bolstering. The judge understood the objection as pursuant to Lyle, Rule 404(b), and ruled accordingly. The ruling, however, admitting the testimony of Witness B as the common scheme or plan exception of Rule 404(b) was error. Respondent did not waive the Rule 404(b) issue. Respondent did not concede the Rule 404(b) issue. The issue is preserved for appellate review.

The fact that the State rather than Respondent asked for a final ruling on the 404(b) issue does not render the issue unpreserved. The objection to Witness B's testimony was and continued to be based on Lyle and Rule 404(b). Trial counsel did not change the pre-trial objection at trial. The Court of Appeals properly utilized the "logical connection" test of Lyle and Perry rather than the "close degree of similarity" test of Wallace. Trial counsel did not waive or concede the 404(b) issue. The Court of Appeals correctly found that the 404(b) issue was preserved for appellate review and not waived. The Court of Appeals correctly found that the testimony of Witness B did not meet the common plan or scheme exception to Rule 404(b) and the admission of that testimony requires reversal.

CONCLUSION

Based on the above arguments, the decision by the Court of Appeals should be affirmed.

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ATTORNEY FOR RESPONDENT

This 18th day of February, 2022.