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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRADLEY MARK CORLEW,

APPELLANT

APPELLATE CASE NO. 2021-000989

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. Did the trial judge err by admitting into evidence a purported medical questionnaire in which the alleged victim of sexual abuse identified Appellant as her abuser where the danger of unfair prejudice substantially outweighed any probative value and where the evidence was needlessly cumulative due to its corroborative nature of the alleged victim's trial testimony?

III. Did the trial judge err by allowing an expert witness to describe the contents of photographs allegedly found on Appellant's phone, specifically of an erect penis, pornographic images involving bondage downloaded from the internet, and pornographic "photographs of very young women" downloaded from the internet, where the judge concluded the danger of unfair prejudice from the photographs themselves outweighed any probative value offered by the photographs?

IV. In violation of Appellant's federal and state constitutional right to confrontation, did the trial judge err when he placed Appellant in a position in the courtroom so that two witnesses could not see Appellant when the witnesses testified, without any evidence to support the necessity of moving Appellant?

STATEMENT OF THE CASE

On December 17, 2019, a Chester County grand jury indicted Appellant for criminal sexual conduct with a minor in the first degree and criminal sexual conduct with a minor in the second degree. R. *(indictments). On October 27, 2020, a Chester County grand jury indicted Appellant for incest. R. *(indictment). The state, represented by Candice Lively and Kaitlyn Easler, called the case to trial before the Honorable Brian M. Gibbons and a jury on August 30, 2021 – September 2, 2021. Tr. 1. William Frick and Kay Boulware represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 457, ll. 1-10. Judge Gibbons sentenced Appellant to life imprisonment without the possibility of parole for criminal sexual conduct with a minor in the first degree, to twenty years imprisonment for criminal sexual conduct with a minor in the second degree, and to ten years imprisonment for incest. Tr. 464, l. 19 – Tr. 465, l. 6; R. *(sentence sheets).

On September 7, 2021, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred by allowing the state to introduce inadmissible character evidence where (1) no exception found within Rule 404(b), SCRE, applied, (2) where the evidence was not necessary for presentation of the context of the charged offenses, and (3) where the danger of unfair prejudice substantially outweighed the probative value of the evidence.

Standard of review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. 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 appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Mattison, 352 S.C. at 583, 575 S.E.2d at 855.

If there is any evidence to support the admission of bad act evidence, the trial court's ruling will not be disturbed on appeal. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App.

2004); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). In order for an error to warrant reversal, the error must result in prejudice to the defendant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (explaining that error without prejudice does not warrant reversal).

Relevant facts

On August 11, 2021, the state filed a "motion in limine for admission of *res gestae* evidence and common scheme or plan." R. *(motion). The state moved to elicit testimony through the alleged victims in the case "of ongoing multiple acts of abuse perpetrated upon them *and their siblings*" by Appellant. R. *(motion) (emphasis added). The state also wanted to elicit testimony about "abuse inflicted upon them by the co-defendant, Sarah Lacy." R. *(motion). According to the state, "[t]he purpose of this testimony [was] to assist the jury in understanding the context of the crimes" charged. R. *(motion). Thus, the state argued the evidence was part of the res gestae of the criminal charges for which Appellant stood trial. R. *(motion).

Further, the state argued the evidence was admissible pursuant to the common plan or scheme exception found within Rule 404(b), SCRE. R. *(motion). Although citing the relevant case law, the state incorrectly argued that similarities among the acts *alone* were sufficient to support admissibility. R. *(motion). The state also argued the testimony established "a logical relevance to the underlying crime(s)" to support admission. R. *(motion).

On August 11, 2021, Judge Gibbons heard argument on the state's motion. 8/11/21 Tr. 1. The state explained there were nine children living in the home along with Appellant and Lacy. 8/11/21 Tr. 10, ll. 19-23. The state claimed that it was "a sort of lifestyle to normalize sexual behaviors between both of the defendants and their sexual activities, as well as having the children join in on the sexual activities as well." 8/11/21 Tr. 11, ll. 1-4. According to the state, if the judge

ruled the evidence of other crimes committed by other people and against other people inadmissible, then the state would likely be unable to try the case. 8/11/21 Tr. 11, ll. 5-9 ("it would tie our hands and be almost impossible to divvy out the type of abuse that was going on with each individual child because they were often"). After recognizing the state could not show a similar pattern of abuse, the state claimed it "clearly" showed "the logical connection between the events of sexual abuse that was going on between the children at the hands of these defendants." 8/11/21 Tr. 12, ll. 2-14. According to the state, this was "one of these particularized situations that is very unique, very specific ... in regards to how these children were systematically abused on a daily basis." 8/11/21 Tr. 12, ll. 15-19.

Defense counsel argued that "similarity is not enough" in order for evidence of prior bad acts to constitute common plan or scheme. 8/11/21 Tr. 13, ll. 6-15. Here, all the state produced was "similarity" and failed to show any type of logical connection. 8/11/21 Tr. 13, l. 16. Further, defense counsel argued the danger of unfair prejudice outweighed the evidence's probative value. 8/11/21 Tr. 13, ll. 17-21; 8/11/21 Tr. 15, ll. 2-4. Judge Gibbons took the matter under advisement. 8/11/21 Tr. 16, ll. 24-25.

The parties reconvened on August 18, 2021. 8/18/21 Tr. 1. The state reiterated its position that if the judge excluded the evidence of prior bad acts the state would be unable "to actually present a full picture to the jury." 8/18/21 Tr. 3, ll. 9-15. Further, the state reiterated its argument, without explanation or the proffering of evidence, that "there [was] that logical connection" and "it would meet the requirement of clear and convincing evidence." 8/18/21 Tr. 3, ll. 18-22.

Judge Gibbons granted the state's request to present the evidence of prior bad acts, and importantly, noted that the defense was "protected in the record." 8/18/21 Tr. 4, ll. 4-6. Noting that trial counsel could make a contemporaneous objection "without having to stand up every

single time something is said." 8/18/21 Tr. 4, ll. 6-9. He explained that defense counsel could simply note his objection for the record during the trial. 8/18/21 Tr. 4, ll. 9-15.[1]

Minor 1, Appellant's biological daughter, explained that Appellant and Sarah Lacy were in a romantic relationship. Tr. 167, ll. 2-3; Tr. 167, ll. 12-17. Appellant and his five children lived in a house in Chester with Sarah and her four children. Tr. 171, ll. 11-24. Appellant worked as a truck driver while Sarah stayed home. Tr. 172, ll. 1-2; Tr. 183, ll. 19-20. Appellant would be "gone for like two days at a time" for his job as a truck driver. Tr. 203, ll. 18-22.

After explaining sexual abuse allegedly perpetrated on her by Appellant and Sarah, Minor 1 testified that the only other child in the room when these things would happen was Minor 2. Tr. 178, ll. 19-22. Minor 1 also claimed she often saw Appellant hitting Sarah. Tr. 183, ll. 1-12. She further claimed that Sarah urinated on Minor 1's brother a few times. Tr. 184, ll. 21-24.

During her first forensic interview on September 12, 2019, Minor 1 called Sarah a "sexual and physical abuser." State's Exhibit #1. Minor 1 then described the sexual abuse she, Minor 2, and Minor 1's brother suffered at the hands of Sarah. State's Exhibit #1. According to Minor 1, Sarah had "sex stuff," including "ding-a-lings." State's Exhibit #1. Sarah would stick these inside Minor 1 and make Minor 1 use them on herself. State's Exhibit #1. Minor 1 indicated Sarah would make Minor 1 touch Sarah sexually as well – either with her hand or the ding-a-ling. State's Exhibit #1. Minor 1 believed that Sarah sexually abused her brother because Sarah took him into a room and closed the door. State's Exhibit #1. Minor 1 was emphatic throughout the first

[1] During the trial, when the state sought to introduce State's Exhibit #1, which was digital media containing the first and second forensic interviews of Minor 1, defense counsel renewed his objection by stating, "Previous object as ruled upon." Tr. 136, ll. 6-9. Similarly, defense counsel renewed his objection when the state sought to introduce State's Exhibit #2, which was the forensic interview of Minor 2. Tr. 136, ll. 20-24. State's Exhibits #1 and #2 are on file with this Court.

interview that Appellant did not know of this sexual abuse and he was not abusive to her or any of the children. State's Exhibit #1.

On September 25, 2019, a forensic interviewer talked to Minor 1 again. State's Exhibit #1. Minor 1 claimed she lied previously. State's Exhibit #1. According to Minor 1, she lied about Appellant; he did abuse her. State's Exhibit #1. Minor 1 explained that Sarah started sexually abusing her while Appellant was at work. State's Exhibit #1. However, Appellant subsequently joined Sarah in sexually abusing her. State's Exhibit #1.

During this second forensic interview, Minor 1 also claimed that she saw Sarah try to have sex with her brother. State's Exhibit #1. Minor 1 also believed Sarah and Appellant made her brother watch them have sex. State's Exhibit #1. When the forensic interviewer asked if she ever saw Appellant and Sarah make Minor 2 and Minor 1's brother have sex, Minor 1 claimed that once while watching a movie, she saw hands moving under covers. State's Exhibit #1.

Minor 2, Sarah Lacy's biological daughter, described being sexually abused by Appellant, but she claimed Minor 1 would leave the room prior to any abuse occurring. Tr. 218, l. 23 – Tr. 219, l. 4. The state played Minor 2's forensic interview, which covered much more ground, for the jury. State's Exhibit #2.

During her forensic interview, Minor 2 graphically described physical abuse allegedly suffered by Sarah at Appellant's hands. State's Exhibit #2. Minor 2 then described being sexually abused by Appellant. State's Exhibit #2. She claimed her mother, Sarah, tried to stop the abuse, but Appellant would hit Sarah in order to continue abusing Minor 2. State's Exhibit #2.

Minor 2 claimed Appellant forced Minor 1's brother to "do it" to Sarah. State's Exhibit #2. She further claimed that Appellant would make all the kids watch him and Sarah have sex. State's Exhibit #2. Minor 2 alleged that Appellant made her – Minor 2 – have sex with Minor 1's

brother. State's Exhibit #2. According to Minor 2, Appellant held her while she had sex with the brother. State's Exhibit #2.

Minor 2 claimed Appellant beat her brother when he urinated on himself. State's Exhibit #2. Appellant would use drop cords to beat them. State's Exhibit #2. Minor 2 even claimed two other children were forced to have sex. State's Exhibit #2.

Discussion

Common scheme or plan

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. "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." State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). "In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity." Id. "Proof that a defendant has been guilty of another crime equally as heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty." Id. (internal quotation omitted). "Thus, evidence of a defendant's other crimes serves the prohibited purpose of showing he has a propensity to engage in criminal behavior." Id. In essence, evidence of other bad acts is not admissible to prove a person's guilt; however, such evidence may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult

matter to determine." Lyle, 125 S.C. at 406, 118 S.E. at 807. "The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be included." Id. "[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny." Id. Judges must resolve the question of admissibility "in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." Id. Therefore, "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." Id.

In addition, if the defendant were not convicted of the prior bad act, evidence of the conduct must be clear and convincing. Gaines, 380 S.C. at 29, 667 S.E.2d at 731; State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. "Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

Recently, in a trilogy of cases decided on the same day, the South Carolina Supreme Court overruled State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) concerning evidence constituting the common plan or scheme exception found within Rule 404(b), SCRE, in criminal sexual conduct cases. State v. Durant, 430 S.C. 98, 106-107, 844 S.E.2d 49, 53 (2020); State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020); State v. Cotton, 430 S.C. 112, 844 S.E.2d 56 (2020). In order to understand Rule 404(b), SCRE, all three decisions must be read in tandem.

The Court explained that Wallace was an outlier in the case law as it held only a close degree of similarity was necessary to establish the required connection between the prior bad act and the charged offense. Perry, 430 S.C. at 35-37, 842 S.E.2d at 660-61. According to the Court, "[t]he 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." Id. After overruling Wallace, the Court explained that in order for the common plan or scheme exception to apply, "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." Id. at 44, 842 S.E.2d at 664-665.

After ensuring the Bench and Bar were well aware that the logical connection test applies when determining admissibility of other crimes evidence to show common scheme or plan, the Court held evidence of prior bad acts allegedly committed by Perry were not admissible. Id. at 38, 842 S.E.2d at 661. Perry was charged with criminal sexual conduct with two of his daughters. Id. at 27, 842 S.E.2d at 655. First daughter testified that Perry first assaulted her when she was between five and seven years old. Id. She claimed that after the first incident, he would digitally penetrate her early in the morning during her weekend visitations with him. Id. She asserted the assaults often involved physical force, and that Perry threatened she would get into trouble if she told. Id. The assaults stopped when she was sixteen years old. Id. at 27, 842 S.E.2d at 656.

The second daughter claimed the sexual assaults against her started when she was about ten years old. Id. Perry would digitally penetrate her early in the morning. Id. The assaults did not involve any physical force, and they stopped when she turned twelve. Id. Perry had told her not to tell because she would get into trouble. Id. at 28, 842 S.E.2d at 656.

The state introduced the testimony of Perry's stepdaughter ostensibly under the common plan or scheme exception within Rule 404(b), SCRE. Id. Stepdaughter testified that when she was nine-years old Perry digitally penetrated her. Id. This occurred periodically over the next four years. Id. The assaults included an incident in the bathtub. Id. She further claimed that Perry told her not tell because no one would believe her. Id. The alleged assaults against Stepdaughter occurred twenty-two to twenty-seven years prior to the offenses for which Perry stood trial. Id.

The Court held the sexual assault of Stepdaughter was "not substantially similar" to the assaults of the biological daughters. Id. at 37, 842 S.E.2d at 661. The assaults started at different ages, occurred within a different frequency, varied regarding use of physical force, and involved different forms of ensuring silence. Id. at 38, 842 S.E.2d at 661-662. The Court was unpersuaded that the dissimilarities in the girls' ages could be made similar by describing the ages as pre-pubescent. Id. at 39, 842 S.E.2d at 662. The Court was also unpersuaded that the dissimilarity of the locations of the alleged assaults could be made similar by claiming all occurred within the home. Id. Put bluntly and succinctly, the Court held it could not be said that Perry had a "monopoly" on his criminal method simply because of the similarities present: father figure, in the home, in a bedroom, and beginning in the pre-pubescent years. Id. at 40, 842 S.E.2d at 662.

Looking for that logical connection, the Court held there was not any fact in the crimes charged that was made more or less likely to be true by the testimony of the stepdaughter. Id. at 40, 842 S.E.2d at 663. "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." Id. at 41, 842 S.E.2d at 663. "'Repetition of the same act or same crime does not equal a "plan."'" Id. (quoting State v. Perez, 432 S.C. 491, 502, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring). "The common scheme or plan exception demands more. There must be

something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." Id. See State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (holding there was no connection between the other crime and the charged crime in order to support the common plan or scheme exception where there was only a general similarity between the two); State v. Rivers, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979) (holding evidence of prior bad acts should have been excluded where the Court was "[u]nable to clearly perceive the connection between the acts").

The Court held that the prior acts in dispute were admissible where the defendant "had a particularly unique method of committing his attacks common to all the girls." State v. Durant, 430 S.C. 98, 106-107, 844 S.E.2d 49, 53 (2020). The Court explained that

> 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.

Id. The Court held that the facts demonstrated the requisite logical connection between the prior acts of sexual abuse and the one forming the basis of the crime charged. Id.

The Court affirmed the admission of prior bad acts where the similarities between the prior acts and current criminal charge were extensive and a logical connection existed. Cotton, 430 S.C. at 114, 844 S.E.2d at 57. Cotton met a young woman 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. Id. at 113-114, 844 S.E.2d at 57. Then, he drove to a secluded location, threatened to shooting the woman, raped her outside the car, and drove her home. Id. at 114, 844 S.E.2d at 57. The prior bad act evidence consisted of testimony from another woman that she met Cotton online, he picked her up in his car to take her on a date, and he became aggressive quickly. Id. He forced her to

perform oral sex on him in the car. Id. He then drove to a secluded location where he raped her. Id. Afterward, he drove her home. Id.

The Court, in Perry, explained its ruling in Cotton: "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." Perry, 430 S.C. at 43-44, 842 S.E.2d at 664. The trial court supplied a logical connection between the prior bad act evidence and a specific, disputed fact in the case before the jury. Id. The trial court also "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." Id.

Here, the state simply failed to show any logical connection between the prior bad act evidence and the charged offenses. The state alleged Appellant committed sexual batteries against Minor 1 and Minor 2. Whether Appellant physically assaulted Sarah, his co-defendant, was not connected to the alleged sexual assaults at all. There was simply no relationship between the two. Likewise, the testimony regarding Sarah's sexual contact with Appellant's son was not connected to the charged offenses. Without question, Minor 2's claims that she was forced to have sex with Appellant's son was not related to the offenses for which Appellant stood trial. Frankly, any acts involving the other seven children were unconnected to the charges against Appellant.

The state wanted to present these prior bad acts to convince the jury that Appellant was a sexual deviant, and as such, he had likely committed the charged offenses of sexual battery. According to the state, the children lived in a "house of horrors" created by Appellant and Sarah, which involved sexual assaults between the adults and among even the children, physical beatings between the adults and the adults and the children, lack of sanitation, deficiencies in hygiene, and

a general mood of hyper-sexualization. This so-called "house of horrors" was not connected at all to the charged offenses as it had no tendency to prove a fact in dispute or that Appellant committed the charged offenses. The state used the prior bad acts for the very purpose for which they are prohibited – propensity.

Res gestae

Evidence is admissible as part of the *res gestae* of the charged offenses when it provides part of the context of the crime or is necessary to the full presentation of the case or is "intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context." State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (internal citations omitted)). A prior bad act is admissible under the theory of *res gestae* when it is "so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other." Id. See also State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (stating "the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"); State v. Gilmore, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct. App. 2011) (explaining "the State may prove the actions of the defendant when those actions are part of the crime, not separate"); State v. Adams, 354 S.C. 361, 379-380, 580 S.E.2d 785, 794-795 (Ct. App. 2003) (permitting evidence of other crimes when the evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order

"to complete the story of the crime on trial by proving its immediate context or the '*res gestae*' "or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the *res gestae* of the crime charged").

None of the prior bad act evidence presented by the state was necessary to complete the story of the alleged crimes. Nor was it necessary to prove the immediate context of the crimes. Sarah's sexual assaults of Appellant's son had nothing to do with Appellant's alleged assaults of Minor 1 and Minor 2. There was no context this evidence provided that was related to the charged offenses. The same must be said of the other prior bad act evidence, including the physical assaults and the sex acts performed in front of the other seven children. Most disturbingly, the jury heard Minor 2's claim that she was forced to have sexual intercourse with Appellant's son. This evidence was not linked in point of time or circumstances of the crimes charged such that a jury could not understand fully one without the other.

Danger of unfair prejudice substantially outweighs probative value

Finally, even if the evidence fit within one of the enumerated exceptions and was proven by clear and convincing evidence, the trial court erred in admitting it as "its probative value was substantially outweighed by the danger of unfair prejudice." See Rule 403, SCRE. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence.[2] The second step

[2] "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must

requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence.[3] The third step requires balancing of the probative value and unfair prejudice. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Finally, the prior bad act evidence was of low probative value as none of it went to the charged offenses. Rather, the evidence posed a high danger of unfair prejudice as it was used to argue Appellant was of a bad character because he created a "house of horrors" for the children in his care. The evidence posed the high danger of unfair prejudice that the jury would view Appellant's conduct as propensity evidence. Knowledge of this so-called "house of horrors" allowed the jury to render a verdict on an improper one – an emotional reaction to a chaotic home.

Balancing the low probative value of the prior bad acts against the extremely high danger of unfair prejudice required exclusion of the evidence. The danger of unfair prejudice substantially outweighed the probative value. The trial judge erred in allowing the jury to consider the evidence,

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consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

[3] "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)).

which was presented by two live witnesses and in the forensic interviews over several days of the trial. Most importantly, the prior bad acts involving sexual deviancy presented too great a danger of unfair prejudice that the jury would use those acts for the improper purpose – of deciding the case on an emotional basis or as propensity evidence. See State v. Cross, 427 S.C. 465, 474, 832 S.E.2d 281, 286 (2019) (describing evidence of a prior sex crime as "exceedingly high" in a criminal sexual conduct trial).

II. The trial judge erred by admitting into evidence a purported medical questionnaire in which the alleged victim of sexual abuse identified Appellant as her abuser where the danger of unfair prejudice substantially outweighed any probative value and where the evidence was needlessly cumulative due to its corroborative nature of the alleged victim's trial testimony.

Standard of review

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" State v. Simmons, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018) (quoting State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-495 (2013)). "'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. (quoting Kromah, 401 S.C. at 349, 737 S.E.2d at 494-495). "A trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances").

Relevant facts

Dr. Susan Lamb, a child abuse pediatrician at Prisma Health Midlands, reviewed the work of Nurse Practitioner Shelby Brady, who examined Minor 1 in October of 2019. Tr. 285, ll. 20-25; Tr. 295, ll. 4-25; Tr. 297, ll. 3-5. Minor 1 was eleven-years old at the time. Tr. 297, ll. 3-5. According to Dr. Lamb, Minor 1 was referred to her office due to concerns of physical abuse, neglect, emotional abuse, and sexual abuse. Tr. 297, ll. 8-11. Minor 1 "was diagnosed with having

experienced sexual abuse there and also being exposed to an environment where there was physical abuse and other inappropriate behaviors going on." Tr. 297, ll. 17-20.

Dr. Lamb explained she and her staff have individuals complete "an adolescent questionnaire kind of based on if the children look like they're kind of acting more like teenagers at that time, and it does have questions about engaging in any consensual sexual activity." Tr. 298, ll. 1-5. The nurse practitioner asked Minor 1 to complete this questionnaire. Tr. 298, l. 5. See also R. *(State's Exhibit #20).

When the state sought to introduce the questionnaire as an exhibit, defense counsel objected on the bases of "cumulative and under 403." Tr. 299, l. 2. The trial judge overruled the objection, "finding that it is more probative than prejudicial under Rule 403." Tr. 299, ll. 3-5. See also R. *(State's Exhibit #20). Thereafter, Dr. Lamb informed the jury that Minor 1 stated on the questionnaire that she had been sexually abused. Tr. 299, ll. 12-19. To question #12 on the questionnaire, which was admitted into evidence and in the jury room during deliberations, Minor 1 reported that she had been "sexually abused and had sex with [Appellant]." R. * (State's Exhibit #20).

The physical exam of Minor revealed a "normal genital exam, normal physical exam," and she was negative for all sexually transmitted diseases. Tr. 299, l. 20 – Tr. 300, l. 3. Nevertheless, Dr. Lamb claimed that a normal genital exam was "absolutely consistent" with the history of sexual abuse reported by Minor 1. Tr. 300, ll. 4-8. Dr. Lamb then referred to "a study of 500 girls reporting greater than ten penetrative acts," in which "86 percent of those children had normal exams." Tr. 300, ll. 8-13. She claimed that based on this study, "by and large the majority of children will have normal exams even if they have experienced repeated penetration." Tr. 300, ll. 13-15.

Discussion

All criminal defendants are entitled to a fair trial. U.S. Const. Amend. VI; S.C. Const. Art. 1, § 14. The South Carolina Rules of Evidence are designed to ensure a fair trial occurs. Pursuant to those rules, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence – or – the needless presentation of cumulative evidence, and the balancing of those considerations.

Probative value

When looking at Rule 403, SCRE, the starting point for analyzing evidence under the rule is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1,

7, 545 S.E.2d 827, 830 (2001); see also Matter of Campbell, 427 S.C. 183, 193, 830 S.E.2d 14, 19 (2019). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)).

According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Needless presentation of cumulative evidence

Even prior to the adoption of the Rules of Evidence, trial courts inherently had the general discretionary power to exclude evidence that was merely cumulative and to limit the number of witnesses to be heard on behalf of a party to establish a single point or proposition of fact. State v. Lyle, 125 S.C. 406, ___, 118 S.E. 803, 814 (1923). Nevertheless, few reported cases address the

propriety of a trial court's admission or exclusion of evidence on the basis that the evidence was needlessly cumulative.

This Court affirmed a trial judge's refusal to admit an actual truck into evidence in a trial involving breach of contract and various other civil claims where the trial judge ruled the truck was needlessly cumulative to other evidence already admitted. Wright v. Craft, 372 S.C. 1, 33-34, 640 S.E.2d 486, 503-504 (Ct. App. 2006). This Court explained that the trial court "admitted a number of photographs of the truck into evidence, and the jurors were allowed to review the photographs as they deliberated." Id. at 34, 640 S.E.2d at 504. Additionally, "the jurors heard testimony regarding the condition of the truck, both after the accident and at the time of trial." Id. "Admitting the actual truck itself into evidence would have been cumulative, causing needless waste of time." Id. Thus, this Court held, the trial court did not abuse its discretion. Id.

In another case reaching the opposite conclusion, this Court held a trial judge's admission of a photographic lineup, which was cumulative to the witness's in-court identification of the defendant, was not needlessly cumulative where the "central theme" of the "defense was discrediting [the witness]'s identification" of the defendant. State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 72 (Ct. App. 2012). By consistently attacking the reliability of the identification, the defendant made the photographic lineup far more important than it might otherwise have been, thereby increasing its probative value. Id. at 321, 728 S.E.2d at 72. "The increased probative value resulting from [the defendant]'s attacks on the reliability of [the witness]'s identification also means the photos were not 'needlessly' cumulative." Id.

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice of evidence – or the cumulative nature of the evidence – the court must balance these considerations.

State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the danger of unfair prejudice – or the cumulative nature of the evidence – may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE, or if the presentation of cumulative evidence is needless.

Analysis

Applying this analytical framework to the present case reveals that balancing of the low probative value of the improperly corroborative evidence offered by the state and the extreme danger of unfair prejudice posed by the evidence necessitated the exclusion of the questionnaire. The framework also reveals the evidence was unquestionably cumulative – and needlessly so.

The starting point for determining the probative value, danger of unfair prejudice, and cumulative nature of the evidence is with the ultimate issue before the jury. The question before the jury was – did Appellant commit a sexual battery against his daughter, Minor 1? Although Minor 1's statement on the questionnaire was relevant and probative of this question, the questionnaire was unnecessary as the same evidence was presented through the testimony of Minor 1, her forensic interviews, and the testimony of Sarah Lacy. Thus, the questionnaire was undisputedly cumulative to other evidence presented. Furthermore, the questionnaire was needlessly cumulative as there was no need to use the evidence to buttress Minor 1's identification of her father, Appellant, as there was in Stephens, supra. The questionnaire served no purpose other than to show Minor 1 previously and consistently accused Appellant of sexual misconduct.

The danger of unfair prejudice from questionnaire is very high in the present case. While not directly on point, the case law in South Carolina regarding hearsay related to criminal sexual conduct cases as well as the medical diagnosis exception to hearsay provide guidance when determining exactly the danger of unfair prejudice posed by the questionnaire.

A statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case ... where the declarant is the alleged victim and the statement is limited to the time and place of the incident." Rule 801(d)(1)(D), SCRE. The Supreme Court made clear the necessity of the statement remaining limited to time and place of the alleged incident. Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). If the statement goes beyond time and place, then it is hearsay and in order to be admissible, it must fall within one of the exceptions to the general rule against hearsay. State v. Burroughs, 328 S.C. 489, 497, 492 S.E.2d 408, 412 (Ct. App. 1997) (citing Rule 802, SCRE). This limitation on the hearsay exception illustrates the substantial danger of unfair prejudice when an out-of-court statement made by one alleging sexual abuse goes beyond time and place of the alleged abuse. Here, Minor 1's statement on the questionnaire specifically named Appellant (her dad) as the abuser. The out-of-court statement provided through the questionnaire violated Rule 801(d)(1)(D), SCRE, as it exceeded the time and place limitation.

South Carolina case law points to prosecutors attempting to circumvent the hearsay rules regarding identity of alleged perpetrators through the medical diagnosis exception to hearsay. When a statement is "'made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment,'" it is allowed into evidence as an exception to the rule against hearsay. Rule 803(4), SCRE. "A physician's testimony

as to a patient's history should only include those statements related to him by the patient upon which the physician relied in reaching medical conclusions." State v. Camele, 293 S.C. 302, 304-305, 360 S.E.2d 307, 308 (1987).[4]

The Supreme Court explained that a patient's history as told to the doctor is admissible only as to the information upon which the doctor relied in reaching his professional opinion. State v. Brown, 286 S.C. 445, 446, 334 S.E.2d 816, 816-817 (1985) (citing Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967)). In Brown, the doctor told the jury that the child-patient stated "Mr. Carl" performed certain sex acts on her. The Court held defense counsel's objection to the perpetrator's identity as unnecessary for diagnosis or treatment should have been sustained. Id. at 446, 334 S.E.2d at 817. Further, the Court stated "[t]he perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." Id. at 447, 334 S.E.2d at 817. Therefore, "[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The

[4] See also State v. Watkins, 92 A.3d 172, 187-188 (R.I. 2014) (providing that whether a statement is admissible under the medical diagnosis exception depends on whether what was related by the patient "will assist or is helpful in the diagnosis or treatment" of the patient's illness and holding "the simple fact that a statement could be helpful in diagnosis is not in itself sufficient for admission under Rule 803(4); there must be a proper foundation establishing that the challenged statements were in fact made for purpose of treatment or diagnosis"). "The rationale for the exception is that a patient has a strong motivation to be truthful about information that will form the basis of his diagnosis and treatment, making statements in this regard inherently trustworthy." Tracy A. Bateman, Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception under Rule 803(4) of the Uniform Rules of Evidence, 38 A.L.R.5th 433; see also United States v. Iron Shell, 633 F.2d 77, 83-84 (8th Cir. 1980)(explaining the "rationale behind the rule" is its focus on the patient and its reliance "upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says. It is thought the declarant's motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule").

doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." Id.[5]

Particularly helpful for determining the danger of unfair prejudice in this case is the harmless error analysis conducted by the state appellate courts related to the inadmissible hearsay in the cases discussed supra. The Supreme Court held the erroneous admission of identification hearsay testimony was not harmless where there was no physical evidence in the case and the state's only evidence was the children's account of what occurred. State v. Simmons, 423 S.C. 552, 564, 816 S.E.2d 566, 573 (2018). This Court found the admission of inadmissible hearsay was not harmless where the alleged victim's testimony was "'extremely crucial' to the outcome of th[e] case regarding the alleged sexual relationship between her and Vail, and there was otherwise an absence of overwhelming evidence of Vail's guilt." Vail v. State, 402 S.C. 77, 91, 738 S.E.2d 503, 511 (Ct. App. 2013).

In a similar case, the Supreme Court held a defendant suffered prejudice where his lawyer failed to object to improper corroborative evidence related to a forensic interview. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010). The Court explained Smith was prejudiced by the failure because the outcome of the case hinged on the alleged victim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of guilt. Id. at 568-569, 689 S.E.2d at 633. According to the Court, "[t]he forensic interviewer's hearsay testimony impermissibly corroborated the victim's identification of Smith as the assailant, and the

[5] See also State v. Camele, 293 S.C. 302, 304-305, 360 S.E.2d 307, 308 (1987) (holding a doctor's testimony that the alleged victim of sexual assault told the doctor that the defendant committed the assault was error "because the statement implicating the [defendant] did not assist in her finding that the child had been sexually abused"); State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) (holding the testimony of a nurse that the alleged victim of a sexual assault told the nurse that her assailant asked for a hug before the assault "in no way can be viewed as 'reasonably pertinent' to the victim's diagnosis or treatment"); State v. Simmons, 423 S.C. 552, 564, 816 S.E.2d 566, 573 (2018) (holding a doctor's testimony regarding whom a child named as an alleged abuser was not made for purposes of medical diagnosis or treatment).

forensic interviewer's subsequent opinion testimony improperly bolstered the victim's credibility." Id. The Court was convinced of the prejudicial nature of the testimony due to the prosecutor's heavy reliance on it during closing argument "to overcome inconsistencies" in the alleged victim's testimony. Id. There was "no valid claim of overwhelming evidence of Smith's guilt" in the case. Id. The Court determined that confidence in the outcome was undermined due to the weak case against Smith and the corroborative nature of the improperly admitted testimony. Id.

Here, the questionnaire served to show Minor 1 had consistently identified Appellant as someone who sexually abused her. This presented the danger of unfair prejudice that is inherent in evidence cumulative to the alleged victim's testimony. It is precisely the cumulative effect that enhances the devasting impact of improper corroboration evidence. See Thompson v. State, 423 S.C. 235, 248-249, 814 S.E.2d 487, 494 (2018) (citing State v. Barrett, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989). The low probative value of the questionnaire was substantially outweighed by this danger of unfair prejudice. The trial judge erred by allowing the jury to consider it.

III. The trial judge erred by allowing an expert witness describe the contents of photographs allegedly found on Appellant's phone, specifically of an erect penis, pornographic images involving bondage downloaded from the internet, and pornographic "photographs of very young women" downloaded from the internet, where the judge concluded the danger of unfair prejudice from the photographs themselves outweighed any probative value offered by the photographs.

Standard of review

As previously mentioned, 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). Furthermore, "[a] trial court has particularly wide discretion in ruling on Rule 403 objections." State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances").

Relevant facts

Paula Stevens, an officer with the Fort Mill Police Department, who was qualified as an expert in digital forensics by the trial judge, extracted and processed digital information obtained from Appellant's cell phone. Tr. 265, ll. 17-22; Tr. 268, ll. 1-3; Tr. 270, ll. 2-16. Based on her knowledge of the investigation, Stevens "tagged" information from the extraction that she found "interesting." Tr. 271, ll. 21-25. When the state offered the phone extraction into evidence, defense counsel objected because the defense was "not sure exactly what's being moved into

evidence as far as what kind of images or pictures or anything." Tr. 274, ll. 1-7. With no elaboration, the judge overruled the objection. Tr. 274, l. 8.

Stevens then described items that she found of interest on the phone's extraction. First, she found a "live photograph," which was "actually a short video clip" of "an erect penis and a flash, and there is a couch in the background with what potentially could be a child's face behind the couch." Tr. 274, l. 11 – Tr. 275, l. 3. She also tagged "four photos that had an erect penis with a blanket over it." Tr. 275, ll. 4-6. She noticed that the next photograph was within the same time period based on the time stamp. Tr. 275, ll. 6-7. The next photograph showed "two children underneath a similar blanket at the same time that photograph - - roughly the same time that photograph was being taken." Tr. 275, ll. 7-10. Stevens had no idea to whom the erect penis belonged. Tr. 275, ll. 11-13. However, she claimed the "live photographs" were user generated and not downloaded from the internet. Tr. 277, ll. 4-10.

Stevens also claimed there was pornography, including pornography involving bondage, on the phone. Tr. 276, ll. 2-6. The bondage photographs showed females who were "either tied up or bound in some type of way during a sexual act." Tr. 276, ll. 7-10. Furthermore, there were "visual images and pornography of very young looking women ... where it would say teen porn as kind of the dot com at the bottom." Tr. 276, ll. 11-14. These images were "downloaded from a public facing pornography website." Tr. 277, ll. 11-16.

When the solicitor attempted to publish the actual images that were "tagged for interest" by Stevens, she was unable to get the technology to work. Tr. 281, ll. 8-10. The solicitor had Stevens describe the photo of the "erect penis with a couch in the background with what appeared to potentially be a child's face behind the arm of the couch" yet again. Tr. 280, l. 23 – Tr. 281, l.

1. Realizing the technological problem, the solicitor commented, "She's described it in her testimony and that might be what I have to do." Tr. 281, ll. 12-13.

Later, defense counsel received the trial judge's permission to address the photographs seized from the phone through the extraction that the solicitor intended to publish, after having worked out the technical glitch. Tr. 369, ll. 19-22. Defense counsel clarified the previous objection – "one, we weren't entirely sure what was going to be presented," and two, counsel objected to the photographs the solicitor intended to publish to the jury "under 402 as irrelevant, and 403, more prejudicial than probative in this matter." Tr. 369, l. 23 – Tr. 370, l. 4. Counsel elaborated, "It's a picture of a penis. There's allegations that he looked at pornography, ... and a child that is in one of these pictures where he is displaying his penis." Tr. 370, ll. 4-7. The alleged child in the photograph was "not one of the children that is a victim of the cases that [were being tried]." Tr. 370, ll. 7-10.

The trial judge then had the solicitor mark the photographs for identification purposes only so that he could examine them and make a ruling on the objection. Tr. 370, ll. 17-25; State's Exhibits #27, #28, #29, #30, & #31. After another witness testified on behalf of the state, the judge made his ruling on the admissibility of the actual photographs. The judge concluded that based upon his review of the photographs, he would not allow any of them to be admitted into evidence "under a Rule 403 analysis." Tr. 391, ll. 13-15. After hearing the judge's ruling, the solicitor remarked, "I think that the testimony of the digital forensic expert was enough." Tr. 391, ll. 16-17.

During her closing argument, the solicitor relied heavily upon the "[e]xpert digital forensics" presented in the case. Tr. 425, ll. 11-12. The solicitor recalled for the jury Stevens' testimony of "an erect penis being stimulated and what appeared to be a child's face in the

background behind the couch." Tr. 425, ll. 13-16. According to the solicitor, there was "another one with a timestamp with an erect penis and a bedspread showing children in the bed where someone was stimulating their penis sleeping at the same time." Tr. 425, ll. 16-19. Stevens, the solicitor reminded the jury, said the image "was a picture that whoever had the phone took." Tr. 425, ll. 20-22. Sarcastically, the solicitor argued, "Well, maybe he let someone else borrow his phone so they could record their penis with his children, you can definitely believe that happened." Tr. 425, ll. 22-25.

Discussion

The South Carolina Supreme Court set out the framework for a proper Rule 403, SCRE, analysis several years ago. State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). As described supra, the trial court must examine the specific probative value and determine whether the unfair prejudice substantially outweighs such value. Id. at 534-537, 763 S.E.2d at 28-29. The Collins Court emphasized that simple prejudice is not sufficient, but the objecting party must show *unfair* prejudice. Id.

Although the actual photographs were not admitted into evidence, the jury heard and considered Stevens' graphic description of the photographs. The jury was led to believe that Appellant had a photograph of his erect penis on his phone and that at least one of his children were very near the vicinity of his erect penis due to the child's image in the background of a photograph and the time stamp on other photographs. Further, the jury was led to be believe that Appellant was a sexual deviant based upon pornography, bondage pornography, and potential child pornography on his cell phone. The solicitor capitalized on this erroneously admitted evidence in her closing to paint Appellant as subhuman. Such highly inflammatory propensity evidence is inadmissible under Rule 403. See State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998).

While Nelson concerns the inadmissibility of character evidence, it explains the inflammatory nature of the unfair prejudice in this case. In Nelson, the state prosecuted the Nelson for molesting a three year old child. Id. The state introduced evidence that portrayed the Nelson as a pedophile. Examples of the evidence were videotapes of the Mr. Knozit show, Save the Children advertisements, a photo album of young girls, and Nelson's membership in the Punky Brewster fan club. Id. "Punky Brewster" was a sitcom from the time featuring a child actress in the titular role as Punky Brewster. Id.

None of the evidence improperly admitted in Nelson was pornographic, but the Court reversed because it was only reflected "on an aspect of [Nelson]'s character, i.e. that he is a pedophile." Id. The evidence here is far more unfairly prejudicial than photo albums and a fan club membership. Furthermore, the description of the photographs was presented through an expert in digital forensics. Her testimony carried with it the "imprimatur of an expert witness" heightening the danger of unfair prejudice. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). The trial judge erred by allowing Stevens, the state's expert in digital forensics, to describe inadmissible photographs, involving pornography and sexual deviancy, found on Appellant's cell phone to the jury.

IV. In violation of Appellant's federal and state constitutional right to confrontation, the trial judge erred when he placed Appellant in a position in the courtroom so that two witnesses could not see Appellant when the witnesses testified, without any evidence to support the necessity of moving Appellant.

Standard of review

Appellant has been unable to find a case discussing the standard of review to be used by appellate courts when reviewing a trial court's violation of a defendant's right to be present at all critical stages of the trial by physically placing the defendant within the courtroom so that multiple witnesses cannot see the defendant. However, Appellant has found cases discussing the standard of review used when reviewing other aspects of violations of the Confrontation Clause. Those cases employ an abuse of discretion standard. See State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010) (stating that in criminal cases, the appellate court sits to review errors of law only regarding trial in absentia); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) (applying an abuse of discretion standard to a challenge to a defendant's ability to present a defense).

Although not directly on point as this case involves a violation of the right to confrontation based upon the placement of Appellant in the courtroom in a position in which the witnesses could not see him at all, the standard of review in a case concerning a trial judge allowing videotaped or closed-circuit testimony is instructive. The Supreme Court held that "[a] trial court's decision to allow videotaped or closed-circuit testimony is reversible only if it is shown that the trial judge abused his discretion in making such a decision." State v. Bray, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (internal quotation omitted). See also State v. Johnson, 422 S.C. 439, 449, 812 S.E.2d

739, 744 (Ct. App. 2018) (explaining that where there is evidence to support a trial court's ruling to allow testimony via two-way video, it will not be overturned for an abuse of discretion)

Relevant facts

The state's key witnesses were Minor 1 and Minor 2. After the opening statements, the trial judge indicated that he was going to move Appellant's physical position within the courtroom "when the children testify." Tr. 45, ll. 2-11. The trial judge recognized that Appellant had "a right of confrontation," and claimed he was "not going to disturb that right." Tr. 45, ll. 2-11. The judge claimed he was "going to modify [Appellant's right to confrontation" just a bit." Tr. 45, ll. 2-11. Specifically, the judge was going to ask that Appellant sit where an investigator was seated when Minor 1 and Minor 2 testified. Tr. 45, ll. 2-11. The judge surmised this would be "in the best interest of the children." Tr. 45, ll. 2-11. Further, the judge declared that in this way "he is able to see and able to confront, in air quotes," as far as the judge was concerned. Tr. 45, ll. 2-11.

Trial counsel noted that based on the position of the defense table, he did not think Appellant could be seen from the witness stand as it was. Tr. 45, ll. 13-18. Trial counsel objected to moving Appellant by offering to keep Appellant at the end of the table, which was practically in the grand jury box. Tr. 45, ll. 13-18. Based on this objection, trial counsel agreed to decide later. Tr. 45, ll. 19-20. However, the judge noted that he had moved a defendant before "on cases that have gone up the appellate route," and even had "people turn around and look the other way." Tr. 46, ll. 2-9. Based upon these experiences, the judge believed "this [was] in [his] discretion" and he did not want the children "to make eye contact" with Appellant. Tr. 46, ll. 2-9.

The state argued that moving Appellant to a position in which the key witnesses could not see him was not a violation of "any form of confrontation" because, in the state's view,

"[c]onfrontation [concerned] his ability to, you know, talk to the lawyer, assist with cross examination, he does not have to be glaring into the eyes of the children." Tr. 46, ll. 10-14.

Immediately prior to Minor 1's testimony, the trial judge, as promised, moved Appellant's physical position within the courtroom. Tr. 160, l. 22 – Tr. 161, l. 22. The jury then heard from Minor 1 and Minor 2 while Appellant sat in a position in which the witnesses could not see him.

Discussion

One of the most basic rights contained in the Confrontation Clause of the Sixth Amendment of the United States Constitution is the right to be present at all stages of criminal proceedings. Illinois v. Allen, 397 U.S. 337, 338 (1970). Additionally, the right is guaranteed by the South Carolina Constitution:

> The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Const. art. I, § 14. Further, section S.C. Code Ann. § 17-23-60 states: "Every person accused . . . shall have a right to . . . meet the witnesses produced against him face to face."

"[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). The "literal right to 'confront' the witness at the time of trial" forms "the core of the values furthered by the Confrontation Clause." California v. Green, 399 U.S. 149, 157 (1970). The Confrontation Clause protects a criminal defendant's "right physically to face those who testify against him." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Coy, 487 U.S. 1012. "It is always more difficult to tell a lie about a person

'to his face' than 'behind his back.'" Id. at 1019. "The phrase still persists, 'Look me in the eye and say that.'" Id. at 1018. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." Id. at 1019.

The Confrontation Clause:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green, 399 U.S. at 158 (footnote omitted). Together, these "elements of confrontation" serve to safeguard "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Maryland v. Craig, 497 U.S. 836, 846 (1990). "[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." Id. Without question, United States Supreme Court precedent establishes that the Confrontation Clause reflects a preference for physical face-to-face confrontation. Id. at 849. "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." Id. at 850.

In a case similar to the instant one, the United States Supreme Court held the state trial court erred it forced the defendant to be behind a screen when his accusers testified. Coy, 487 U.S. at 1020. Coy was charged with sexually assaulting two thirteen-year-old girls. Id. at 1014. Relying upon a state statute, the trial court approved the use of a large screen to be placed between Coy and the witness stand during the girls' testimony. Id. The screen enabled Coy to see the witnesses, but the witnesses could not see him at all. Id. at 1015. In answering whether Coy's

right to confrontation was in fact violated by the screen, which was specifically designed to enable the complaining witnesses to avoid viewing Coy as they testified, the Court held it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." Id. at 1020.

The Court rejected the state's argument that the confrontation interest was outweighed by the necessity of protecting victims of sexual abuse. Id. at 1020-1021. Leaving for another day the question of whether exceptions to the holding that the Confrontation Clause requires face-to-face confrontation, the Court explained that any exceptions "would surely be allowed only when necessary to further an important public policy." Id. at 1021. The Court rejected an argument that such an important public policy was satisfied by the Iowa statute permitting such testimony as it "could hard hardly be viewed as firmly rooted" having been passed in 1985. Id. The Court also noted that because "no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." Id.

In Maryland v. Craig, 497 U.S. 836, 844 (1990), the United States Supreme Court reached the question left open in Coy – whether any exceptions exist to the face-to-face requirement of confrontation. More precisely, in Craig, the Court addressed the constitutionality of Maryland's statutory procedure that allowed a child victim to testify without seeing the defendant via a one-way closed-circuit television. Craig, 497 U.S. at 841. The Court held that "a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." Id. at 853.

After reviewing the history and purpose of the Confrontation Clause, the Craig Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-

to-face confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 850 (emphasis added). The Court explained that "if the state makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." Id. at 855. In applying this two-pronged standard, the trial court is required to make a fact-specific finding of necessity in order to allow substitution of video for live testimony. Id. at 855-56 ("The requisite finding of necessity must of course be a case-specific one."). "The trial court must hear evidence and determine whether use of [the special procedure] is necessary to protect the welfare of the particular child witness who seeks to testify." Id. at 855. "The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." Id. at 856. "Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma." Id. "Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" Id.

The South Carolina Supreme Court addressed whether the trial court's factual findings regarding the necessity of a child witness to testify via closed-circuit television were supported by sufficient evidence. State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000). The South Carolina Legislature adopted a statute mandating that courts "treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when

appropriate." S.C. Code Ann. § 16-3-1550(E). In Bray, the trial judge allowed an alleged victim of child sexual abuse testify using closed-circuit television. Id. at 26-27, 535 S.E.2d at 638. The Supreme Court reversed because the trial judge failed to set for case-specific reasons for using the procedure. Id. at 31, 535 S.E.2d at 641.

First, the Court explained the procedure a trial court must use when attempt to protect a child witness. Id. at 29, 535 S.E.2d at 640. The "'trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child.'" Id. (quoting State v. Murrell, 302 S.C. 77, 81, 393 S.E.2d 919, 921 (1990)). Bray's trial judge granted the state's request for a special procedure based upon a finding of a young child who was molested and the testimony of the child's mother and an expert that showed the child's family, except for the mother, did not believe the child. Id. at 30, 535 S.E.2d at 640. The Court rejected the notion that one reasonable inference to be drawn from the judge's statements was a finding that the alleged victim would be harmed by testifying in the presence of Bray. Id. The Court was "unable to ascertain precisely the basis of the trial court's ruling." Id.

Although there was evidence indicating the alleged victim was afraid of testifying in the presence of Bray, there was more generalized testimony concerning her fear of the courtroom and other relatives. Id. at 30-31, 535 S.E.2d at 640. Due to the failure of the trial court to set forth case-specific findings of fact supported by evidence presented, the Supreme Court reversed and remanded for a new trial. Id. at 31, 535 S.E.2d at 640. While not mandating it, the Court reiterated "that the better practice in these cases, when possible, is for the trial judge to personally interview the child witness prior to determining whether use of CCTV is necessary." Id. at 31, 535 S.E.2d

at 641. See also State v. Lewis, 324 S.C. 539, 548, 478 S.E.2d 861, 866 (Ct. App. 1996) (reversing a trial court's ruling allowing a child witness to testify via closed-circuit testimony where the witness testified she would be scared to talk about private things if Lewis were present and she would be nervous or uncomfortable to have Lewis present as this failed to show more than *de minimis* risk of trauma); State v. Rogers, 293 S.C. 505, 507-508, 362 S.E.2d 7, 8 (1987), overruled on other grounds by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (reversing where the trial judge allowed a witness to testify via videotape without an evidentiary showing of necessity; the judge's general remarks about children feeling uncomfortable testifying in open court in these types of cases was not sufficient).

In addition to the requirement of a case-specific determination for the need of alternative testimony, the trial court must "place the child in as close to a courtroom setting as possible." State v. Murrell, 302 S.C. 77, 80-81, 393 S.E.2d 919, 921 (1990). Finally, "the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and [the defendant]." Id.

The South Carolina Supreme Court found no violation of a defendant's right to confrontation where the trial judge required the defendant sit at the far end of the defense table where the children who were testifying could not see her as they testified. State v. Lopez, 306 S.C. 362, 365-366, 412 S.E.2d 390, 392-393 (1991). The Court held the state made an adequate showing of necessity for the alternative procedure to be employed. Id. The state introduced a letter from a psychologist suggesting the children not testify, but requesting safeguards if the children did so. Id. at 364, 412 S.E.2d at 391. The state also "testified without objection that another expert had also concluded the children would be traumatized by testifying in front of Lopez." Id. at 366, 412 S.E.2d at 392. Finally, the judge personally interviewed the children. Id.

Thus, the Court concluded there was adequate evidentiary support for the trial court's finding of the necessity of instituting a procedure to prevent the children witnesses from testifying while face-to-face with Lopez. Id. at 366, 412 S.E.2d at 393. See also In the Interest of Cisco K., 332 S.C. 649, 654-655, 506 S.E.2d 536, 539 (Ct. App. 1998) (affirming the family court's reliance on the testimony of an expert witness regarding the necessity of using closed-circuit television for testimony); cf. State v. Johnson, 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018) (addressing the Confrontation Clause where a witness testifies via two-way video testimony).

While a violation of the Confrontation Clause in this matter is subject to harmless error pursuant to Chapman v. California, 386 U.S. 18 (1967), the "assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." Coy, 487 U.S. at 1021-1022. See also State v. Lewis, 324 S.C. 539, 551-552, 478 S.E.2d 861, 867-868 (Ct. App. 1996) (holding the state failed to show a violation of Lewis's right to confrontation was harmless beyond a reasonable doubt where the child's testimony was "the heart of the state's case").

On remand, the Iowa Supreme Court held the error in allowing the minor witnesses in a criminal sexual conduct case to testify behind a screen, which prevented the witnesses from seeing the defendant was not harmless beyond a reasonable doubt. State v. Coy, 433 N.W. 2d 714, 714 (Iowa 1988). The court noted the witnesses' testimony was the only direct evidence of Coy's guilt. Id. With that evidence stricken, the remaining evidence was all circumstantial and merely connected Coy to the offenses. Id. Although the court concluded the circumstantial evidence was "persuasive," the evidence was not "overwhelming." Id. According to the court, "[t]he remaining

evidence was clearly not so overwhelming that it can be said beyond a reasonable doubt that the defined error did not contribute to the jury's finding of guilt." Id.

Here, the state made no showing that alternative procedures were necessary in order for Minor 1 and Minor 2 to testify as required by controlling law from the United States Supreme Court and the South Carolina Supreme Court. The trial judge failed to make any fact-specific findings to justify the special procedure he employed that prevented the witnesses from seeing Appellant as they testified. There was absolutely no evidence presented that the children would suffer trauma from testifying while face-to-face with Appellant, and likewise, there was no finding of this kind by the trial judge. There was absolutely no evidence presented that the special procedure was necessary to protect the welfare of the particular witnesses, and likewise, there was no finding of this kind by the trial judge. Although the judge indicated he was acting "in the best interest of the children" by requiring Appellant not be seen by the witnesses, there was no evidence in the record to support his comment. The judge simply did not want the children to make eye contact with Appellant, and he believed it was completely within his discretion to move Appellant so that eye contact would not be made because he had acted in this fashion in other cases that had gone up on appeal. The judge's decision here runs contrary to controlling precedent, and it must be reversed.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of July, 2022.

RECEIVED
Jul 20 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRADLEY MARK CORLEW,

APPELLANT

APPELLATE CASE NO. 2021-000989

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) which is wblitch@scag.gov, and on Bradley Mark Corlew, #385931, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of July, 2022.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

Hackett, Susan

From: Hackett, Susan
Sent: Wednesday, July 20, 2022 6:31 PM
To: wblitch@scag.gov; Caroline Collins (CCollins@scag.gov)
Cc: Stock, Chris
Subject: State v. Bradley Mark Corlew - 2021-000989
Attachments: Corlew, Bradley Mark - Initial Brief of Appellant and Designation of Matter 2021-000989.pdf; Letter to AG 072022 IBOA.pdf

Mr. Blitch,

Attached to this email is the initial brief of appellant and designation of matter in State v. Bradley Mark Corlew, Appellate Case No. 2021-000989. Please accept this email as service pursuant to the appellate court rules. I will be filing these documents with the Court of Appeals momentarily.

If you have any questions or require additional information, please contact me.

-Susan

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