

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT RECEIVED

v.

JUL 11 2013

RICHARD BURTON BEEKMAN,

SC Court of Appeals

APPELLANT.

APPELLATE CASE NO. 2011-196688

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5145

PETITION FOR REHEARING

The Appellant, Richard Burton Beekman, respectfully petitions the Court for a rehearing of its Opinion No. 5145 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

This Court erred in affirming the Trial Court's refusal to sever the two charges against Beekman. Beekman was charged with (1) a lewd act upon a child in violation of S.C. CODE ANN. § 16-15-140 against his twelve year-old stepdaughter; and (2) a separate charge of first degree criminal sexual conduct with a minor in violation of § 16-3-655(A)(1) with respect to his eight year-old stepson. R. 373, 376. Over Beekman's objection, the Trial Court tried these two cases together. R. 37.

This Court erred in affirming the Trial Court's severance ruling where the charges did not arise out of a single chain of circumstances, were not sufficiently similar, and were not provable by the same evidence.

"Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." *State v. Smith*, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). However, where the offenses are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. *See State v. Middleton*, 288 S.C. 21, 23-24, 339 S.E.2d 692, 693 (1986).

The two separate charges against Beekman involved two different victims, different time periods of alleged misconduct, and different types of alleged conduct – touching of a female's genitals and male anal penetration. One victim alleged only one incident, while the other victim alleged several instances of sexual contact. R. 66-79; 124-130. The two charges were not provable by the same evidence as each charge had a different victim and thus a different witness testifying as to whether Beekman had committed the acts for which he was indicted. There would not have been a great overlap of evidence between the two charges had each been properly tried in a separate trial.

In addition, Beekman was fundamentally prejudiced where the stepson's allegations would not have been admissible as a prior bad act in a separate trial involving the stepsister's allegations and vice versa. The State would not have been able to show a common scheme or plan in a subsequent trial because the connection between the prior bad

act and the alleged crime must be more than just a general similarity. There were sufficient differences between the two alleged incidents to negate a common scheme or plan: (1) different sexes of the victims; (2) different ages of the victim when the abuse occurred; and (3) different alleged types of sexual battery. The dissimilarities outweigh the similarities.

Finally, the probative value of the prior bad act evidence did not outweigh the danger of unfair prejudice to Beekman under Rule 403, SCRE. Here, Beekman was prejudiced where the jury could infer his alleged propensity for child sexual abuse where the State bolstered its case by stacking the charges together. The prejudicial effect of consolidating Appellant's sexual abuse charges was extremely high where: (1) there was no physical evidence to support each child's allegations; (2) the stepson's rectal examination "was normal" and showed no signs of penetration; and (3) the stepson did not claim that he was sexually abused until after he had learned of his sister's sexual abuse allegation. Tr. 271, l. 8 – 273, l. 2.

Furthermore, the State admitted that it had a weak case against Beekman when it also improperly argued that the charges should be consolidated as *res gestae* of the case:

[I]f the jury can't hear about how [the stepson] disclosed, they're missing a big chunk. *That's all the evidence the State has in this case is each of the children's disclosures*. *We don't have any physical evidence*. All we have is their evidence. That's the only direct evidence the State has. If you were to take out how the disclosure came about, the jury would miss half the case.

Tr. 56, l. 22 – 57, l. 3; (emphasis added). Therefore, even if the evidence was admissible under Rule 404(b), SCRE, its prejudicial effect would substantially outweigh any probative value under Rule 403, SCRE. Accordingly, because the evidence pertaining to each alleged victim would not have been admissible in separate trials, the Trial Court

erred in refusing to grant Beekman's motion to sever.

CONCLUSION

For the reasons set forth herein, Appellant Richard Burton Beekman respectfully requests that the Opinion of the Court of Appeals be withdrawn, his convictions reversed, and the case be remanded for separate new trials on each charge.

Respectfully submitted,.



Carmen V. Ganjehsani
Appellate Defender

This 11th day of July, 2013.

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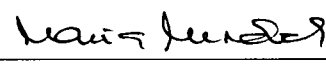
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, and Richard Burton Beekman # 347134, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 11th day of July, 2013.


Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 11th day
of July, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.