

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

G. Edward Welmaker, Circuit Court Judge

Opinion No. 5145 (S.C. Ct. App. filed 6/26/2013)

09-GS-39-1404-1405

THE STATE,

RESPONDENT,

V.

RICHARD BURTON BEEKMAN,

PETITIONER.

APPELLATE CASE NO. 2013-002002

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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SC Court of Appeals

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CERTIFICATION BY COUNSEL

The Court of Appeals issued its decision on June 26, 2013. App. 1-11.
Counsel for Petitioner certifies that the petition for rehearing was made on July 11,
2013 and finally ruled on by the Court of Appeals on August 22, 2013. App. 12-17.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the Trial Court's refusal to sever Petitioner's charges of criminal sexual conduct with a minor and lewd act upon a child where: the alleged sexual abuse involved two victims; the offenses do not arise out of a single chain of circumstances and are not provable by the same evidence; and Petitioner was prejudiced by its improper influential effect on the jury?

STATEMENT OF THE CASE

On September 15, 2009, Petitioner Richard Burton Beekman was indicted by the Pickens County Grand Jury for (1) first degree criminal sexual conduct (CSC) with a minor and (2) lewd act upon a child. R. 372.

On July 25, 2011, Petitioner proceeded to trial before the Honorable G. Edward Welmaker and a jury. R. 1. Petitioner was represented by John Dejong, and the State was represented by Assistant Solicitor Jenny Barwick. R. 1. The jury found Appellant guilty as charged. R. 362, ll. 11-22.

On July 28, 2011, Judge Welmaker sentenced Petitioner to (1) thirty years imprisonment for the CSC with a minor conviction and (2) fifteen years imprisonment for the lewd act upon a child conviction. R. 369, ll. 17-23. The sentences were to run consecutively for a total of forty-five years imprisonment. R. 369, ll. 22-23.

On June 26, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentence. *State v. Beekman*, Opinion No. 5145 (S.C. Ct. App. filed June 26, 2013). App. 1-11. Petitioner subsequently filed a petition for rehearing on July 11, 2013. App. 12-16. The South Carolina Court of Appeals issued an Order denying the petition for rehearing on August 22, 2013. App. 17.

This petition for a writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Petitioner was charged with having committed a lewd act upon his twelve year-old stepdaughter, Minor Child 1, based on her allegation that she was sleeping and when she woke up, Petitioner was touching her "private area." R. 57, ll. 2-6; R. 62, l. 14 – 69, l. 25; 85, ll. 17-20. Petitioner was also charged with having committed a sexual battery upon his eight year-old stepson, Minor Child 2, based on his allegation that Petitioner engaged in sexual penetration with him. R. 85, ll. 21-22; 121, ll. 5-10; R. 127, l. 21 – 129, l. 15. Minor Child 2 also testified to several instances of inappropriate touching involving Petitioner. R. 124, l. 6 – 127, l. 9.

Minor Child 1 maintained that the sexual abuse occurred on July 7, 2008. R. 62, ll. 14-20. As for Minor Child 2, there was no evidence presented as to when the alleged sexual abuse occurred, except for that Minor Child 2 was eight years old, "[s]o there was eight months where those incidents could have occurred." R. 285, ll. 21-22; R. 312, l. 10 – 313, l. 18 (emphasis added).

Notably: (1) there is no physical evidence to support Minor Child 1 and Minor Child 2's allegations; (2) Minor Child 2's rectal examination "was normal" and showed no signs of penetration; and (3) Minor Child 2 did not claim that he was sexually abused until after he had learned of his sister's sexual abuse allegation. R. 132, ll. 9-11; 226, l. 8 – 228, l. 2.

Motion to Sever Charges

Pretrial, defense counsel moved to sever Petitioner's CSC with a minor and lewd act upon a child charges and argued that "it's prejudicial to try these two cases together." R. 14, l. 23 – 51, l. 9. Specifically, defense counsel argued that Petitioner's charges do not "arise out of a single chain of circumstances" because the charges involve "*different victims,*

different times, and . . . different witnesses.” R. 15, ll. 7 – 17, l. 14 (emphasis added). Defense counsel further emphasized, “[Petitioner] is prejudiced where you’re trying two sexual charges against separate victims.” R. 17, ll. 17-18.

Conversely, the State maintained that Petitioner’s charges did arise out of a single chain of circumstances because the allegations are “integrally connected.” R. 18, ll. 1-25. The State also claimed that Petitioner would not be prejudiced by joinder of the charges because “even if Your Honor were to divide these trials, what happened to [Minor Child 1] would still come in to the trial through common [scheme] or plan or through *res gestae*.” R. 19, ll. 6-9.

Furthermore, the State admitted that “as far as *res gestae*[:]

[I]f the jury can’t hear about how [Minor Child 2] disclosed, they’re missing a big chunk. *That’s all the evidence the State has in this case is each of the children’s disclos[ures]. 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.*

R. 20, l. 22 – 21, l. 3 (emphasis added).

After reviewing the evidence, the Trial Court found “that the indictments do arise out of the same chain of circumstances” and “that [the charges] are certainly of the same general nature, as far as the sexual abuse of children[.]” R. 36, l. 20 – 37, l. 4. The Trial Court also found that joinder of Petitioner’s charges would not be unduly prejudicial and based on its findings, the Trial Court denied defense counsel’s motion to sever Petitioner’s charges. R. 37, ll. 5-10.

ARGUMENT

The Court of Appeals erred in affirming the Trial Court's refusal to sever Petitioner's charges of criminal sexual conduct with a minor and lewd act upon a child where: the alleged sexual abuse involved two victims; the offenses do not arise out of a single chain of circumstances and are not provable by the same evidence; and Petitioner was prejudiced by its improper influential effect on the jury.

The Court of Appeals erred in affirming the Trial Court's refusal to sever the two charges against Petitioner. Petitioner 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 Petitioner's objection, the Trial Court tried these two cases together. R. 37. The Court of Appeals 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. In addition, Petitioner was significantly prejudiced by the trying of the two separate charges together.

"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) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge

erred in consolidating the charges for one trial where the crimes “did not arise out of a single chain of circumstances, and required different evidence for proof”); *see also State v. Tate*, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial).

In this case, the Trial Court erred in failing to sever Petitioner's CSC with a minor and lewd act upon a child charges because the charges *do not* arise out a single chain of circumstances and Petitioner was prejudiced by the improper consolidation of the charges. R. 36, l. 20 – 37, l. 10; *Smith*, 322 S.C. at 109, 470 S.E.2d at 365. Specifically, defense counsel argued that Petitioner's charges do not arise out of a single chain of circumstances because the charges involve “*different victims, different times, and . . . different witnesses.*” R. 15, ll. 7 – 53, l. 14 (emphasis added). Notably, although Minor Child 1 maintained that the sexual abuse occurred on July 7, 2008, “*there was eight months where those incidents could have occurred*” to Minor Child 2 based on his testimony that he was eight years old when the alleged abuse occurred. R. 62, ll. 14-20; R. 285, ll. 21-22; R. 312, l. 10 – 313, l. 18 (emphasis added). *See Middleton*, 288 S.C. at 23, 339 S.E.2d at 693 (finding the charges “did not arise out of a single chain of circumstances, and required different evidence for proof”).

There are too many dissimilarities between the two charges to warrant trying them together in a single trial. The two separate charges against Petitioner 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. The stepdaughter alleged only one incident, while the stepson 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 Petitioner 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, Petitioner 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 pursuant to *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) in a subsequent trial because the connection between the prior bad act and the alleged crime must be more than just a general similarity. See *Smith*, 322 S.C. at 110, 470 S.E.2d at 366; *State v. Stokes*, 279 S.C. 191, 192, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted."); see also *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979).

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009).

Here, 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.

The Court is also to balance the probative value of the evidence against its prejudicial effect. *See Parker*, 315 S.C. at 233, 433 S.E.2d at 832; *see also* Rule 403, SCRE. Defense counsel argued to the trial court, “[Petitioner] is prejudiced where you’re trying two sexual charges against separate victims.” R. 17, ll. 17-18. As such, Petitioner was prejudiced because 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 Petitioner’s sexual abuse charges was extremely high where: (1) there was no physical evidence to support Minor Child 1 and Minor Child 2’s allegations; (2) Minor Child 2’s rectal examination “was normal” and showed no signs of penetration; and (3) Minor Child 2 did not claim that he was sexually abused until after he had learned of his sister’s sexual abuse allegation. R.132, ll. 9-11; 226, l. 8 – 228, l. 2; R. 271, l. 8 – 273, l. 2.

Furthermore, the State admitted that it had a weak case against Petitioner 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 [Minor Child 2] disclosed, they’re missing a big chunk. *That’s all the evidence the State has in this case is each of the children’s disclos[ures]. 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.*

R. 20, l. 22 – 21, 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. The evidence pertaining to each alleged victim would not have been admissible in separate trials. *See State v. Fletcher*, 379 S.C. 17,

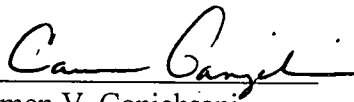
26, 664 S.E.2d 480, 484 (2008) (“[C]ertain prior bad act testimony is inadmissible [because] it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial.”).

Accordingly, Petitioner’s sexual abuse charges should not have been tried together as they fail to meet the requirements for consolidation of charges, and Petitioner was prejudiced by the Trial Court’s denial of his motion to sever the charges. *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693 (finding “[i]t is evident the charges against appellant did not arise out of the same transaction”) (citing *State v. Whitener*, 238 S.C. 244, 89 S.E.2d 701 (1955)); *see also Smith*, 322 S.C. at 110, 470 S.E.2d at 366 (“Further, under these facts, we hold the prejudicial effect of the ABHAN conviction outweighs its probative value. We find the ABHAN conviction would not be admissible under *Lyle* in a subsequent trial on the homicide.”).

CONCLUSION

For the reasons set forth herein, Petitioner Richard Burton Beekman respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeals to review the decision, reverse the Opinion of the Court of Appeals and his convictions, and remand the case for separate new trials on each charge.

Respectfully submitted,


Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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THE STATE,

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APPELLATE CASE NO. 2013-002002

CERTIFICATE OF SERVICE


I certify that a true copy of the petition for writ of certiorari to the Court of Appeals and a copy of the appendix, in this case has been served on Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Richard Beekman # 347134, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, and the S.C. Court of Appeals, this 22nd day of November, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of November, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.