

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Clifton Newman, Circuit Court Judge

RECEIVED
DEC 28 2014
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ALAN DALE SMITH,

APPELLANT

APPELLATE CASE NO. 2013-002524

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in allowing the State to reference thousands of additional images of child pornography in addition to the thirty images or videos for which appellant was indicted?
2. Did the trial judge err in allowing the State to display a screen shot with additional file names containing images that were not the subject of the thirty indictments and the prejudicial impact for those file names outweighed any probative value?

STATEMENT OF THE CASE

In June of 2011, the Richland County Grand Jury indicted Smith for two counts of sexual exploitation of a minor third degree, indictments #2011-GS-40-2789, 2790. In June of 2013, the Richland County Grand Jury indicted Smith for an additional 28 counts of sexual exploitation of a minor third degree, indictments #2013-GS-40-4171 – 4201. In July of 2013, all thirty indictments were amended to include a specific image or video with a specific file name as found on the computers. (Tr. p. 10, line 12 – p. 11, lines 1-17). On July 22, 2013, Smith proceeded to jury trial before the Honorable Clifton B. Newman. Gregory B. Collins and Jennifer C. Davis represented Smith at trial. Margaret F. Bodman, Britton L. All and Carter R. Potts. prosecuted the case. The jury returned verdicts of guilty as charged. Judge Newman sentenced Smith to ten years on each count, ordering that the sentences on indictment #2013-GS-40-4171, #2013-GS-40-4172 be served consecutively to the sentences on indictments #2011-GS-40-2789, #2011-GS-40-2790, resulting in an aggregate twenty (20) year sentence. On July 31, 2013, Appellant Smith filed a motion to reconsider and clarify the sentence.¹ On October 21, 2013, a hearing was held on the motion to reconsider and clarify the sentence. On November 25, 2013, Judge Newman denied the motion. A timely notice of intent to appeal was filed on November 27, 2013. This appeal follows.

¹ According to testimony at the hearing on the motion to clarify the sentence, the South Carolina Department of Corrections interpreted the sentence to be an aggregate 40 year sentence rather than an aggregate 20 year sentence as intended by the sentencing judge. (Oct.21, 2013, Tr. p. 12, R. p. **). The projected release date on the South Carolina Department of Corrections website is listed as February 24, 2024.

ARGUMENTS

1. The trial judge erred in allowing the State to reference thousands of additional images of child pornography in addition to the thirty images or videos for which appellant was indicted.

The State indicted Appellant for thirty counts of sexual exploitation of a minor third degree. Each indictment referenced a specific image or video with a specific file name as found on the computers. Prior to trial the State moved, pursuant to Lyle, to admit, in addition to the thirty images which form the basis for the indictments, thousands of pornographic images discovered on the two computers by the forensic analyst, Agent Bart Cave from the South Carolina Law Enforcement Division {SLED}. (Tr. pp. 101 – 103). The State argued that the additional images proved absence of mistake or accident. (Tr. p. 103, lines 23-25). Appellant objected. (Tr. p. 104, line 22 – p. 105, 106, lines 1-2). After hearing testimony from Agent Cave the judge ruled stating, “I agree that the State should be able to reference the facts as the officer testified to in his examination a moment ago. I also agree with the defense that the previous jury decided the admissibility of all these things. The state can make references and hopefully what is admitted subsequently will be what is presented during the course of the trial.” (Tr. p. 129, lines 2-13).

The prosecutor then asked if, in her opening statement, she should only reference the thirty images which were the subject of the indictments. (Tr. p. 129, lines 14-16). The judge replied, “You can reference whatever you want to.” (Tr. p. 129, lines 17-18). In her opening statement the prosecutor told the jury, “These are a few of the thousands of movies and videos police found on the defendant’s computer showing children - - “ (Tr. p. 139, lines 3-5). Appellant objected. (Tr. p. 139, line 6). The judge overruled the objection. (Tr. p. 139, line 7). The judge erred.

During Agent Cave’s testimony the prosecutor again referenced thousands of child porn images and videos found on Appellant’s computer. (Tr. p. 303, lines 1-12). Appellant again

objected. (Tr. p. 303, lines 13-15). The objection was again overruled. (Tr. p. 303, lines 16-17). At the close of the State's case, Appellant again objected to references the State was allowed to make to thousands of images of child pornography that were not the subject of an indictment. (Tr. p. 357, lines 22-24). In closing argument the State again referenced thousands of images of child pornography. (Tr. p. 490, lines 13-23). The trial judge erred in allowing the prosecution to reference thousands of pornographic images that were not the subject of an indictment. Any possible probative value of such reference is far outweighed by the prejudice to Appellant.

The State argued that reference to thousands of images of child pornography showed lack of mistake of accident. (Tr. p. 103, lines 23-25). South Carolina law precludes evidence of prior crimes or other bad acts to prove the defendant's guilt for the crime charged. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006); State v. Mathis, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct.App. 2004). Evidence of prior crimes is inadmissible to prove bad character of the defendant or that he acted in conformity therewith. State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682 (2000). Such evidence may be admissible, however, to show the absence of mistake or accident. State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923); Rule 404(b), SCRE.

The State's reference to thousands of un-indicted images did not show the absence of mistake or accident, especially in light of the thirty images that were the subject of indictment. Additionally, Agent Cave testified that none of the indicted images were temporary folders or "pop-ups" but were instead intentionally downloaded. (Tr. p. 335, lines 1-12). The State's reference to thousands of un-indicted images of child pornography constituted improper character evidence requiring reversal.

2. The trial judge erred in allowing the State to display a screen to the jury with additional file names containing images that were not the subject of the thirty indictments and the prejudicial impact of those file names outweighed any probative value

Prior to Agent Cave's testimony before the jury, Appellant objected to the admissibility of slides containing file names for un-indicted images. (Tr. p. 253, line 25 – p. 254, lines 1-7). The judge withheld ruling until he heard the testimony. (Tr. p. 254, lines 16-18; p. 256, lines 14-16). During the testimony of Agent Cave Appellant objected to displaying file names of images that were not the subject of the thirty indictments. (Tr. p. 291, lines 8-10). Appellant argued that the file names were highly prejudicial and not probative as they are not the subject of any indictment. (Tr. p. 291, line 17 – p. 292, lines 1-13).

The judge overruled the objection finding reference to the un-indicted file names helped the jury understand the State's case and was sufficiently more probative than prejudicial. (Tr. p. 297, line 22 – p. 298, line 1). At the close of the State's case Appellant renewed his objection to displaying to the jury file names of images that were not the subject of an indictment. The trial judge erred in allowing the State to display file names of images that were not the subject of an indictment.

The State did not argue the file names met an exception pursuant to Rule 404(b). Instead, the State argued that the screen shot was simply demonstrative evidence showing the location in the computer where Agent Cave found some of the images that were the subject of an indictment. Appellant stated he would not object if the State limited the file names to those included in the indictments. (Tr. p. 292, lines 8-13). The trial judge should have limited the references to file names to images that were the subject of an indictment.

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” State v. Black, 400

S.C. 10, 16, 732 S.E.2d 880, 884 (2012). “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.” State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011). The trial judge in the present case abused his discretion in not limited the file names to indicted images. As discussed in issue one with regard to the State’s reference to thousands of images of child pornography that were not the subject of an indictment, the State’s reference to highly inflammatory file names for images that are not the subject of an indictment constitutes improper character evidence requiring reversal.

Additionally, Agent Cave could have explained the location of the images that were the subject of indictment without reference to the file names for the un-indicted images. Evidence may 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 403, SCRE. “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998).

CONCLUSION

Based on the above arguments, Appellant's sentences and convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of December, 2014.

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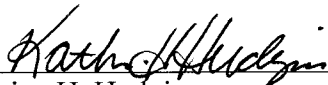
ALAN DALE SMITH,

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CERTIFICATE OF SERVICE

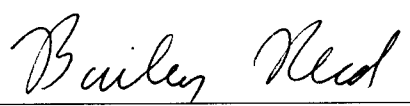
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of December, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of December, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021 .