STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY

Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2013-002458

THE STATE,

Respondent,

v.

SAMMY LEE SCARBOROUGH,

Appellant.

INITIAL BRIEF OF RESPONDENT

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IV.

The trial judge correctly denied Appellant's directed verdict motion on the three dissemination of obscene material charges because S.C. Code § 16-15-305 does not require the actual material to be introduced.

STATEMENT OF THE CASE

A Dillon County Grand Jury indicted Appellant for three counts of first-degree criminal sexual conduct (CSC) with a minor, three counts of dissemination of obscene material, and one count of engaging a child in sexual performance, indictments 2013-GS-17-290, -291, -292, -293, -294, -328, and -710. (R.* Indictments.) On November 4, 2013, Appellant proceeded to a trial before the Honorable Paul M. Burch and a jury. Kyle M. Hobbs, Esquire, represented Appellant, and Assistant Solicitor Shipp Daniel and Assistant Attorney General Kelly W. Hall represented the State. After the State rested, it withdrew two indictments: 2013-GS-17-710, engaging a child under 18 for sexual performance, and 2013-GS-17-328, first-degree CSC with a minor as to Victim 2. The jury found Appellant guilty of all remaining charges, and Judge Burch sentenced him to two concurrent life sentences for the two counts of first-degree CSC with a minor and three concurrent five-year sentences for the three counts of dissemination of obscene material. (Tr. 507-08, 523.)

On November 15, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On May 25, 2012, Q. Murphy (Mother) reported to the City of Dillon Police Department that her sons, Victim 1 and Victim 2, had been sexually molested. (Tr. 121, line 19-Tr. 122, line 6.) After interviewing the victims, Detective Jason Turner signed warrants on Appellant and unsuccessfully attempted to arrest him at his home. (Tr. 129, line 13-Tr. 130, line 3.) The Department was finally able to locate and arrest Appellant in Virginia around February 2013. (Tr. 135, line 19-Tr. 136, line 1.) He was charged with three counts of first-degree CSC with a minor, three counts of dissemination of obscene material, and one count of engaging a child in sexual performance and proceeded to trial in November 2013.

Pretrial, the State moved to consolidate the cases involving all three victims, arguing they were of the same general nature, that each victim was a necessary witness for the others, and that they were closely related in kind, place, and character in accordance with State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). (Tr. 9, line 20-Tr. 11, line 22.) Defense counsel argued allowing the cases to be tried together would create a substantial prejudice against Appellant. (Tr. 11, line 24-Tr. 13, line 18.) After listening to the arguments of both counsel, the trial judge granted the motion to consolidate, based on the factors from the Jones case and in the interest of judicial economy. (Tr. 17, lines 3-7.)

Next, the State moved to allow a fourth victim to testify under Lyle[1] regarding sexual abuse by Appellant that was handled in the family court. (Tr. 17, line 20-Tr. 18, line 4.) The State called Victim 4 outside the presence of the jury. (Tr. 18, lines 4-8.)

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[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Victim 4 testified that when he was three years old, Appellant made him put Appellant's "private" in his mouth while they were in his truck at a store. (Tr. 25, line 19-Tr. 26, line 21; Tr. 28, lines 15-20.) The State then argued Victim 4's testimony should be admitted under Lyle because, in accordance with the Wallace[2] case, the similarities outweighed the dissimilarities. (Tr. 30, line 5-Tr. 31, line 14.) Specifically, the State pointed out the following similarities between the evidence it would present at trial regarding the three victims and the testimony from Victim 4: (1) manner of sex (oral), (2) age of victims, (3) gender of victims, (4) position of authority of Appellant over victims. (Tr. 31, line 11-Tr. 32, line 2.) The State admitted the only dissimilarity was the location because the three victims all said it happened at the same place while Victim 4 testified it happened in a different place. (Tr. 32, lines 4-7.) Defense counsel argued a three-year-old would not be able to remember what happened to him and disagreed that the matters were highly similar. (Tr. 34, lines 20-25; Tr. 36, lines 21-23.) He also argued psychological and physical differences exist between three-year-olds and six-year-olds. (Tr. 38, lines 12-21.) However, he conceded the gender and ages of the boys were similarities. (Tr. 40, line 23-Tr. 41, line 1.)

The trial court granted the State's motion, finding the testimony Victim 4 provided was straightforward and concise and determined it met the clear and convincing standard to allow the testimony to be admitted under Lyle. (Tr. 46, line 16-Tr. 47, line 15.) At that point, defense counsel asked the trial court to elaborate on its ruling based on Wallace. (Tr. 47, lines 17-21.) The trial court named degree of control and authority of an adult over children who were put in his care and said the rest of the similarities had

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[2] State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009).

been argued adequately for appellate review. (Tr. 47, line 22-Tr. 48, line 3.) Right before the trial began, Appellant renewed his Lyle motion, and the trial judge stood by his previous ruling. (Tr. 100, line 15-Tr. 101, line 7.)

Larry Jason Turner of the City of Dillon Police Department testified regarding Mother's reporting of her sons' molestation. (Tr. 121, line19-Tr. 122, line 6.) He testified that he interviewed each victim separately, obtaining enough information to start an investigation. (Tr. 123, line 6-Tr. 126, line 20.) Each victim disclosed that he was abused and where the abuse happened, and Turner was able to isolate the abuse to a range of dates based on when the family moved in beside Appellant. (Tr. 123, line 19-Tr. 124, line 10; Tr. 124, line 24-Tr. 125, line 11.) Turner opined that is was not uncommon for children to be unable to identify an exact date for abuse. (Tr. 125, lines 12-22.) He arranged forensic interviews for both victims for May 29, 2012, and drove the family to the Care House in Florence for the interviews. (Tr. 127, lines 6-15.) As a result of the interviews, Turner learned of a third victim, whom he interviewed as soon as he returned to the police station. (Tr. 128, lines 13-22.) Victim 3 disclosed where the abuse happened and the date he reported it to his mother. (Tr. 129, lines 2-12.) Turner testified he signed warrants for Appellant on June 13, 2012, based on information received from the three victims. (Tr. 129, lines 13-20.) On cross-examination, Turner admitted he did not search Appellant's house for obscene materials. (Tr. 145, line 24-Tr. 147, line 1.)

Victim 1 and 2's grandmother (Grandmother) testified next. (Tr. 158, lines 16-23.) She testified her daughter came to her and asked her to talk to the victims to find out whether they were telling the truth. (Tr. 162, line 18-163, line 6.) When she talked to Victim 1, he did not disclose sexual abuse at first. (Tr. 163, lines 15-22.) After she asked him again, he disclosed he had been touched inappropriately at Appellant's house. (Tr.

164, lines 9-21.) She testified Victim 1 acted nervous and scared and looked down a lot while they talked. (Tr. 163, line 23-Tr. 164, line 3; Tr. 165, lines 3-12.) Victim 2 did not make a disclosure about sexual abuse to her. (Tr. 165, lines 13-20.) She reported the victims were not exposed to sexual things at her house. (Tr. 165, line 21-Tr. 166, line 13.) She testified Victim 1 screams at night, saying, "Stop. Get away." (Tr. 166, line 23-Tr. 167, line 3.)

Victim 1 testified that Appellant "put his ding a ding in my throat and made me choke" in Appellant's barn. (Tr. 202, lines 10-16; Tr. 207, lines 5-12.) He also testified Appellant showed him pictures of naked girls and boys in a magazine. (Tr. 204, line 22-Tr. 205, line 5.) He denied that his cousin Stefan ever touch him or tried to make Victim 1 touch him. (Tr. 208, lines 1-11.) He testified Appellant gave him balloons. (Tr. 208, lines 18-22.) On cross-examination, Victim 1 described the barn as red with a white edge across it and again testified Appellant "made me suck his ding a ding." (Tr. 213, lines 10-22.)

Victim 2 testified Appellant showed him picture of gay boys with their clothes off humping. (Tr. 231, line 9-Tr. 233, line 15.) He testified he saw his cousin Stefan touch Victim 1's penis and saw Appellant touch Victim 1's penis. (Tr. 233, line 16-Tr. 234, line 12.) He testified Appellant gave him candy and balloons and that he played kick ball and basketball at Appellant's house. (Tr. 226, lines 8-14; Tr. 234, lines 20-25.)

Victim 3's mother testified the neighborhood children all spent time at Appellant's house, including the three victims. (Tr. 240, lines 10-24.) She testified Appellant gave the children candy, balloons, and a football. (Tr. 240, line 25-Tr. 241, line 9.) She reported that her son, Victim 3, disclosed in November 2011 that he had

been sexually abused in the backyard at Appellant's house. (Tr. 241, lines 10-17.) She admitted she did not go to the police. (Tr. 241, lines 18-23.)

Victim 3 testified Appellant tried to hump him in Appellant's backyard. (Tr. 253, lines 17-21.) He reported Appellant gave him a football and a balloon. (Tr. 254, lines 3-4.) He testified he saw Appellant's "turtle" when he was at the back of Appellant's yard. (Tr. 256, lines 18-24.) He further elaborated that Appellant tried to put his "turtle" in Victim 3's butt and that it hurt. (Tr. 257, lines 4-12.) He also testified Appellant showed him a nasty magazine with boys and girls humping with their clothes off. (Tr. 258, lines 11-24.) He stated that when Appellant was humping him, Appellant touched Victim 3's "turtle" and squeezed it, which he testified hurt. (Tr. 259, lines 5-11.) He further testified Appellant tried to make him suck Appellant's "turtle" but he did not. (Tr. 261, lines 9-19.) On cross-examination, Victim 3 admitted he told the lady he talked to (the forensic interviewer) that Appellant had not touched his butt and that he had never taken his clothes off around Appellant. (Tr. 264, lines 1-6.) However, he agreed that he was now saying Appellant did touch his butt. (Tr. 264, lines 7-9.) He also testified Appellant put his head to Appellant's "thing." (Tr. 264, lines 10-16.)

At that point, Appellant renewed his objection to the Lyle evidence, arguing that the State had not presented evidence that all three victims were sexually abused because Victim 2 denied any abuse. (Tr. 266, line 21-Tr. 267, line 23.) He also moved for a mistrial. (Tr. 267, lines 24-25.) The State argued Appellant was essentially making a directed verdict motion and should wait until the appropriate time. (Tr. 268, lines 4-6.) The State admitted children say different things at different times and argued the fact the cases were consolidated based on what the State believed the evidence would show

demonstrated good faith and that the mistrial motion should be denied. (Tr. 268, line 6-Tr. 269, line 14.) The trial court denied the motion. (Tr. 270, line 12.)

Victim 4's mother testified Appellant is her uncle by marriage and that Victim 4 spent a lot of time around Appellant, seeing him almost every day. (Tr. 279, line 7-Tr. 280, line 6.) Appellant babysat Victim 4 for about a year between the ages of two and four. (Tr. 280, lines 7-12.) When Victim 4 was four years old, he reported sexual abuse to his mother.[3] (Tr. 280, lines 13-17.) She testified he told her it happened in Appellant's truck. (Tr. 280, lines 18-21.) She confronted Appellant about the abuse and he started laughing. (Tr. 281, lines 6-10.) She then reported it to the police and took Victim 4 to the Care House for a forensic interview. (Tr. 281, lines 18-25.) Criminal charges were never brought, and the matter was resolved in the family court. (Tr. 282, lines 2-11.)

Victim 4 testified that he saw Appellant's "private part" while they were in his truck. (Tr. 300, lines 11-18.) He stated that Appellant had his pants unbuttoned with his "private part" sticking out of the pants and that he made Victim 4 touch it with his lips. (Tr. 301, lines 3-14.) Victim 4 testified Appellant's "private part" was in his mouth for a second and that it made him feel bad. (Tr. 301, lines 17-24.)

Sally Williamson, the forensic interviewer from Care House, testified regarding her interviews with Victims 1, 2, and 3. Victim 1 and Victim 2 did not disclose sexual abuse to her. (Tr. 317, lines 10-11; Tr. 332, lines 10-15.) Victim 3 did disclose sexual abuse to her. (Tr. 323, lines 3-5.)

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[3] Although Victim 4's mother testified Victim 4 was four years old when he reported the sexual abuse, Victim 4 testified he was three years old when it occurred.

Valerie Williams, the investigator from the SC Attorney General's Office, testified she met all the victims as part of preparation for trial. (Tr. 338, line 19-Tr. 340, line 17.) Victim 1 disclosed sexual abuse to her, but Victim 2 did not. (Tr. 341, lines 19-21; Tr. 342, lines 14-16.) Victim 3 also disclosed sexual abuse to her. (Tr. 342, line 17-Tr. 343, line 1.)

Gaye Allen Cook testified next as an expert in child abuse assessment. (Tr. 365, line 7-Tr. 366, line 13.) She testified children do not always report sexual abuse and explained how disclosure is a process. (Tr. 367, line 9-Tr. 368, line 19.) She also explained delayed disclosure and opined that 95-96% of the children she has treated delayed disclosure of their abuse. (Tr. 368, line 20-Tr. 370, line 3.)

After the State rested, it withdrew two of the charges: engaging a child under 18 for sexual performance and first-degree CSC with a minor as to Victim 2. (Tr. 388, lines 8-16.) Appellant then moved for a directed verdict on the first-degree CSC with a minor charge as to Victim 3 because Victim 3 admitted he told the forensic interviewer Appellant did not touch him. (Tr. 388, lines 18-25.) The State argued direct evidence was presented by Victim 3 that Appellant put his "turtle" in his butt and it hurt. (Tr. 389, lines 8-13.) The trial court denied the motion. (Tr. 389, lines 14-15.) Appellant then moved for directed verdict on the obscene dissemination charge as to Victim 3, arguing no material was presented into evidence. (Tr. 389, line 16-Tr. 390, line 24.) The State argued the statute does not require the obscene material to be presented and that Victim 3's testimony was sufficient. (Tr. 390, line 25-Tr. 391, line 5.) The trial court denied the motion. (Tr. 393, lines 18-19.) Subsequently, Appellant moved for directed verdict on the other two obscene dissemination charges as to Victims 1 and 2. (Tr. 393, line 20-Tr. 394, line 15.) The State argued there was more detail provided in Victim 1 and 2's

testimony than Victim 3's. Specifically, the State pointed out the victims talked about pictures of gay sex, boys and girls without clothes on, and boys and girls humping. (Tr. 394, line 16-Tr. 395, line 14.) The trial court denied that motion too. (Tr. 395, line 15.) Finally, Appellant moved for directed verdict on the first-degree CSC with a minor charge as to Victim 1, arguing Victim 1 testified initially on the stand that nothing occurred, and then later testified something did occur, in direct contradiction to the forensic interviewer's statement that he had never disclosed any sexual abuse. (Tr. 396, line 24-Tr. 397, line 12.) The trial court denied the motion, noting it was for the jury to decide. (Tr. 397, lines 13-15.) Appellant then renewed his motion for a mistrial in regard to the Lyle evidence, which the trial court again denied. (Tr. 397, line 16-Tr. 399, line 13.)

In his charge to the jury, the trial judge went over the limitations of evidence of other crimes or prior bad acts and read the statutes to the jury, including the one for dissemination of obscenity. (Tr. 449-55.) Ultimately, the jury found Appellant guilty of all five charges, and Judge Burch sentenced him to life imprisonment for the two first-degree CSC with a minor charges and five years' imprisonment for the three dissemination of obscene material charges. (Tr. 476.)

ARGUMENT

I.

The trial judge properly granted the State's motion to consolidate the three victims' cases because they were of the same general nature involving connected transactions closely related in kind, place, and character and Appellant's substantive rights were not prejudiced.

Appellant argues the trial judge abused his discretion in refusing to sever seven different indictments naming three different child victims, claiming the State failed to demonstrate that the three groups of alleged offenses were of the same general nature, arose out of a single chain of circumstances, and were provable by the same evidence. Additionally, he argues Appellant was prejudiced by the joint trial. On the contrary, the trial judge correctly consolidated the cases based on the factors from the Jones[3] case and in the interest of judicial economy.

A defendant has "no inalienable right" to be tried separately for each indicted offense when charged with multiple crimes. McCrary v. State, 249 S.C. 14, 38, 152 S.E.2d 235, 247 (1967). "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. Rice, 368 S.C. 610, 614, 629 S.E.2d 393, 394 (Ct. App. 2006); State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996); State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). "A motion for severance is addressed to the sound discretion of the trial judge, whose ruling will not be disturbed on appeal absent an abuse of that discretion."

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[3] State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996).

State v. Beekman, 405 S.C. 225, 229, 746 S.E.2d 483, 485 (Ct. App. 2013), *cert. granted* (citing State v. Caldwell, 378 S.C. 268, 277, 662 S.E.2d 474, 479 (Ct. App. 2008)); State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)); State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996); State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). "The court's ruling will not be disturbed on appeal absent an abuse of that discretion." Simmons, 352 S.C. at 350, 573 S.E.2d at 860 (citing Tucker, 324 S.C. at 164, 478 S.E.2d at 265); State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); State v. Deal, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002).

The fact that the indictments involved three different victims did not require severance of the charges. In Jones, "the offenses charged were of the same general nature involving allegations of a pattern of sexual abuse involving the two minor victims . . . [who] had been taken to the same location . . . ." Id. at 315, 479 S.E.2d at 520. In State v. Cutro, 365 S.C. 366, 369-75, 618 S.E.2d 890, 891-95 (2005), the Supreme Court affirmed the circuit court's denial of appellant's motion to sever charges involving three victims, where she was charged with two counts of homicide by child abuse and one count of assault and battery involving incidents all occurring at different times with different children. Here, the cases were closely related in kind, place, and character. Furthermore, each victim was a necessary and material witness to the other victims'

cases. All victims were between the ages of four and six when the abuse occurred.[4] All were subjected to oral or anal sex and were shown pornographic material. The abuse occurred in Appellant's backyard or barn area, and all the victims had similar relationships with Appellant as a close neighbor with whom they spent time. The offenses charged were of the same general nature and were interconnected. Moreover, the trial judge's consolidation of the charges was consistent with principles of judicial economy while also ensuring that the minor victims would not be unnecessarily subjected to repeated appearances in court for multiple trials to testify multiple times about the abuse they suffered at Appellant's hands.

Pretrial, Appellant argued consolidating the cases would create a substantial prejudice against Appellant. Specifically, he argued all the victims denied they were sexually battered and, thus, the cumulative effect of their testimony—"It wasn't me. It was him. It wasn't me."—would invoke emotion in the jury to believe something occurred and wrongfully convict Appellant. (Tr. 12, lines 16-22.) On the contrary, the State presented in its motion to consolidate that all the victims were subjected to acts of abuse to include oral and anal sex. And during the trial, Victim 1 and Victim 3 testified to being sexually abused by Appellant, while Officer Turner testified Victim 2 disclosed sexual abuse by Appellant to him. The testimony demonstrated each of the three victims made a disclosure of sexual abuse at the hands of Appellant. Therefore, Appellant's argument that Appellant was prejudiced because of the victims' denial of sexual battery

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[4] The State argued to the trial judge during its motion to consolidate that the age range of the victims at the time of the abuse was between five and eight years of age, but the record indicates the ages were between four and six.

is without merit. Thus, he has not shown prejudice as a result of the consolidation of cases.

In State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002), this Court addressed the issue of consolidation. This Court determined the circuit court properly exercised its discretion in joining Grace's charges of criminal sexual conduct and lewd act. This Court based its decision on the fact that the charges were of the same general nature, finding they were all sexual misconduct crimes, they occurred in the same location, the evidence showed a pattern of abuse, and most of the witnesses were the same. Id. at 24, 564 S.E.2d at 333. Here, the charges were also of the same general nature: all sexual misconduct crimes, occurred in Appellant's backyard or barn, showed a pattern of abuse involving oral and anal sexual abuse, and shared the same witnesses. Additionally, similarities exist among the victims: all boys between the ages of four and six when the abuse occurred. Just as the trial court was correct in its decision to consolidate the charges in Grace, so it was here. Because motions concerning consolidation and severance will not be reversed absent an abuse of discretion, this Court should affirm the trial court's decision.

II.

The trial court properly allowed testimony of prior and other bad acts by Appellant because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Appellant maintains the trial court erred in allowing the State to admit the testimony of Victim 4 regarding other bad acts by Appellant. He argues Victim 4's testimony was irrelevant and did not fit the common scheme or plan exception to Rule 404(b). On the contrary, the trial court properly considered the evidence and allowed the evidence of Victim 4's sexual abuse by Appellant as part of a common scheme or plan based on the similarities to the acts charged.

Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Proof of prior bad acts must be clear and convincing if they are not the subject of a conviction. State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

Prior to trial, the State moved *in limine* to admit the testimony of Victim 4 regarding sexual abuse by Appellant. Victim 4 testified Appellant was known to him as an uncle, though he was not certain they were actually related. When Victim 4 was three

years old, the Appellant made Victim 4 put his penis in his mouth in Appellant's truck outside a store.

Victim 4's allegations were clear and convincing. "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). In Fletcher, the Court found clear and convincing evidence did not exist when no testimony named Fletcher as the person who handcuffed the victim or placed him in the attic. Id. Here, the State provided direct evidence through Victim 4's testimony that Appellant made him put Appellant's penis in his mouth while in Appellant's truck outside a store. (Tr. 25, line 19-Tr. 26, line 21.) Additionally, the State asked the trial court to take judicial notice that the Family Court found by a preponderance of the evidence that Appellant committed sexual abuse and consequently placed him on the central registry. (Tr. 30, lines 13-21.)

"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. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-78. The South Carolina Supreme Court provided some factors to consider including: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner

of the occurrence, for example, the type of sexual battery. Id. at 433-34, 683 S.E.2d at 278.

Victim 4's testimony is sufficiently similar to the testimony by the three victims to be admissible. All four testified to being similar ages during the sexual abuse, from age three to age six. The type of abuse was similar because it involved oral and anal sex. Each victim was male. Appellant was in a position of authority over each of the victims, as Appellant was an uncle by marriage of Victim 4 and babysat him on a regular basis and was a neighbor to the other victims, regularly keeping them and having them over to his house to play. (Tr. 31, lines 17-24; Tr. 240, lines 19-24; Tr. 279, line 21-Tr. 280, line 12.) The only dissimilarity was where the abuse occurred. The three victims were abused in Appellant's backyard or barn, while Victim 4 was abused in Appellant's truck outside a store. The similarities in this case certainly outweigh the slight difference of where the abuse occurred. Notably, Appellant conceded the ages and genders of the victims were similarities. (Tr. 40, lines 24-Tr. 41, line 1.)

Appellant argues the testimony by Victim 4 was not relevant and only shows Appellant must have committed the crimes charged because he is connected to a prior bad act. Appellant argues "[t]here is nothing unique or connecting which makes the prior bad act with [Victim] 4 relevant." (App. Br. 15.) However, due to the similarities between Victim 4's sexual abuse and the abuse that happened to the other three victims—young boys between the ages of four and six, Appellant having a position of authority over them, the types of abuse: anal and oral—there were unique characteristics that connected the three victims to Victim 4.

The trial judge found Victim 4's testimony clear and convincing, noted the similarity in the victims' ages, and agreed with the State that Appellant had a degree of

authority over the child victims. He correctly admitted the Lyle evidence based on the similarities outweighing the dissimilarities.

III.

The trial judge properly denied Appellant's motion for mistrial because even though Victim 2 denied the allegations in one indictment and did not disclose abuse to the forensic interviewer or investigator and the State subsequently withdrew that indictment, the consolidation of the three cases was proper based on what the State, in good faith, believed the evidence would show.

Appellant argues the trial judge abused his discretion in refusing to declare a mistrial after Victim 2 denied the allegations in one of the indictments and later in the trial the forensic interviewer and the investigator from the Attorney General's Office confirmed that Victim 2 had earlier denied the allegations contained in the indictment. Specifically, he maintains the State had a duty to refrain from prosecuting a charge it knew was not supported by probable cause. However, Officer Larry Jason Turner testified Victim 2 disclosed to him that he was sexually abused. Thus, the State brought the charge based on the evidence it possessed at the beginning of the trial and did not know that Victim 2 would fail to disclose the abuse during his testimony. The State acted in good faith based on the evidence it possessed and subsequently made a prudent decision not to go forward on the charge based on what was presented by Victim 2 at trial. The trial court properly denied the motion for mistrial.

The "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007). "The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal

quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show **both error and prejudice** in order to be entitled to a mistrial." Id. at 585-86, 698 S.E.2d at 865 (emphasis added). "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." Id. at 586, 698 S.E.2d at 865 (citation and internal quotation marks omitted). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." Id. at 586, 698 S.E.2d at 865-66 (citation and internal quotation marks omitted). The trial court is in the best position to ascertain the potential prejudicial effect of any offending testimony and the Supreme Court favors the exercise of wide discretion of the circuit court in ruling on a motion for mistrial in each individual case. State v. Jones, 325 S.C. 310, 324, 479 S.E.2d 517, 524 (Ct. App. 1996).

Here, the State based its charges against Appellant on the initial report prepared by the police, which included a disclosure by Victim 2 of sexual abuse by Appellant. Appellant based his argument for mistrial on the fact that Victim 2 did not testify at trial to being sexually abused. (Tr. 267, lines 18-25.) Appellant states in his brief, "This is not a case where the prosecution was surprised because a witness changed his story on the stand." (App. Br. 21.) It is true that the State admitted it was well aware from the beginning that the case involved "little children who say different things almost every time you talk to [them]." (Tr. 268, lines 6-9.) The State further admitted it was well aware it may have to pull the indictment against Victim 2 based on what he said. (Tr. 268, lines 12-15.) However, simply because the State knew there was a possibility Victim 2 might not disclose on the stand does not mean it should not have attempted to prosecute a crime it knew occurred based on Victim 2's statement to police.

During the motion to consolidate, Appellant had the opportunity to argue Victim 2 had not disclosed abuse. However, rather than specifically arguing about Victim 2's failure to disclose to his grandmother, his aunt, the forensic interviewer, and the investigator from the Attorney General's Office—as he does in his brief—Appellant only made a broad, general argument that "none of those children allege that they were actually sexually battered." (Tr. 12, lines 6-7.) This is a very different argument from the one he makes now, namely that Victim 2 denied the allegations of sexual abuse and the State knew this and had a duty to refrain from prosecuting. Appellant focused on the fact that based on the information he had prior to trial, no victim referred to penetration. He never argued Victim 2 did not disclose at all. This indicates Appellant knew Victim 2 disclosed to the police and was only concerned about whether the disclosure contained information supporting penetration. Thus, it is likely both parties were surprised by Victim's denial of the allegations when he took the stand. Appellant's statement in his brief that the State joined the seven indictments "knowing that one of the minors had consistently denied the allegations of the indictment" simply is not true. (App. Br. 21.) Victim 2 disclosed the abuse to his mother, who reported it to Officer Turner, who testified Victim 2 also disclosed to him. Disclosing sexual abuse to one's mother and a police officer is certainly not consistent denial.

During the consolidation motion, the State acknowledged discrepancies existed between what the victims told the forensic interviewer and what they were now testifying occurred and explained it would present expert testimony to talk about why children may say certain things during a forensic interview and something different at trial. The State presented expert testimony by Gaye Allen Cook, who testified that forensic interviews can be very difficult for children. (Tr. 376, line 10-Tr. 378, line 4.) She explained

children can be reluctant to disclose sexual abuse in such an environment and often do not disclose in that setting.

The trial court did not err in denying Appellant's motion for mistrial based on Victim 2's failure to disclose sexual abuse when he took the stand at trial. Because Officer Turner had already testified Victim 2 had disclosed the sexual abuse to him, the trial court properly denied the motion. However, even if the trial court erred in denying the motion for mistrial, Appellant has shown no prejudice resulting from the denial. See Wilson, 389 S.C. at 585-86, 698 S.E.2d at 865 ("A mistrial should only be granted when absolutely necessary, and a defendant must show **both error and prejudice** in order to be entitled to a mistrial." (emphasis added)). At trial, he argued he was prejudiced because "we have lumped all of these accusations together, and now we're going to admit Lyle evidence based on this case but not that case." Even though Victim 2's indictment was withdrawn, the evidence from Victims 1 and 3 were sufficiently similar to Victim 4's testimony to allow it to come in under Lyle. Therefore, removing Victim 2's indictment did not affect the use of Victim 4's testimony and did not prejudice Appellant. Indeed, rather than prejudice Appellant, withdrawing the indictment based on Victim 2's inability to testify to the sexual abuse actually may have benefited Appellant by indicating to the jury the State did not believe it had enough to convict him of a crime against Victim 2.

IV.

The trial judge correctly denied Appellant's directed verdict motion on the three dissemination of obscene material charges because S.C. Code § 16-15-305 does not require the actual material to be introduced.

Appellant argues the trial judge erred in denying Appellant's directed verdict motion on the three dissemination of obscene material charges because the State did not introduce in evidence any purported obscene material and relied only on the testimony of the child victims.

Section 16-15-305 of the South Carolina Code provides:

> (A) It is unlawful for any person knowingly to disseminate obscenity. A person disseminates obscenity within the meaning of this article if he:
>
> (1) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, digital electronic file, or other representation or description of the obscene;
>
> (2) presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene;
>
> (3) publishes, exhibits, or otherwise makes available anything obscene to any group or individual; or
>
> (4) exhibits, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, present, rent, or to provide: any motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, video tapes and recordings, or any matter or material of whatever form which is a representation, description, performance, or publication of the obscene.
>
> (B) For purposes of this article any material is obscene if:
>
> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;

> (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;
>
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
>
> (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.
>
> . . .
>
> (D) **Obscenity must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or groups.**

S.C. Code Ann. § 16-15-305 (2003) (emphasis added).

Nothing in the statute requires evidence of the obscene material itself to be introduced. Evidence in the form of testimony from the victims is sufficient to establish the nature of the material such that the jury could determine whether Appellant had violated the statute. In his charges to the jury, the trial judge read the statute to the jury so it was fully aware of its responsibility in making its own determination of whether the statute had been met.

According to the language of subsection (D), the jury is allowed to judge the obscenity with reference to children if it appears from "the circumstances of its dissemination to be especially for or directed to children . . . ." S.C. Code Ann. § 16-15-305 (2003). Based on the testimony of the victims, the jury could certainly have found the material was obscene by listening to the victims' description of the content and by the circumstances in which it was shown to the child victims. Victim 1 testified Appellant

showed him pictures of naked girls and boys in a magazine. (Tr. 204, line 22-Tr. 205, line 5.) Victim 2 testified Appellant showed him picture of gay boys with their clothes off humping. (Tr. 231, line 9-Tr. 233, line 15.) He also testified Appellant showed him a "nasty" magazine with boys and girls humping with their clothes off. (Tr. 258, lines 11-24.)

While South Carolina has not addressed this particular issue, North Carolina addressed the issue of sufficiency of evidence in the form of the minors' testimony in reviewing the denial of a directed verdict in State v. Hill, 632 S.E.2d 777, 786 (N.C. Ct. App. 2006). Though the issue in Hill revolved around Hill's defense that he was unable to provide pornographic materials to the minors because he was out of town, the court found evidence from the minors themselves that Hill provided pornography to them was sufficient to send the case to the jury to resolve.

Because no requirement to produce the actual obscene materials exists in the statute, the trial court properly denied Appellant's motion for directed verdict based on the State's failure to introduce into evidence any purported obscene materials. The testimony of the victims was sufficient direct evidence to withstand the directed verdict motion and allow the case to go to the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

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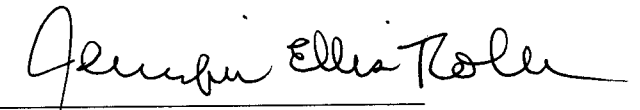
Solicitor, Fourth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

December 23, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY

Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2013-002458

THE STATE,

Respondent,

v.

SAMMY LEE SCARBOROUGH

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 23rd day of December, 2014.

ANGELA BENNETT
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ALAN WILSON
ATTORNEY GENERAL

December 23, 2014

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
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Post Office Box 11589
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RE: State v. Sammy Lee Scarborough
Appellate Case No. 2013-002458

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services