ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH ANTHONY DRACHSLIN, SR.,

APPELLANT

APPELLATE CASE NO. 2014-000945

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to try separately sexual abuse charges stemming from allegations made by two sisters?

STATEMENT OF THE CASE

On May 21, 2013, a Pickens County grand jury indicted appellant for first-degree criminal sexual conduct with a minor and for third-degree criminal sexual conduct with a minor related to Older Sister. R. ___ (indictments). Appellant was also indicted for third-degree criminal sexual conduct with a minor related to Younger Sister. R. 65, ll. 4 – 10. On April 23, 2014, appellant was tried before the Honorable G. Edward Welmaker and a jury. R. 1. Sam Tooker represented the State. R. 1. John DeJong represented appellant. R. 1. The jury convicted appellant of the charges related to Older Sister, but acquitted him of the charge related to Younger Sister. R. 336, ll. 3 – 9. Judge Welmaker sentenced appellant to concurrent terms of twenty-five and fifteen years' imprisonment. R. 345, ll. 14 – 20. This appeal follows.

ARGUMENT

The trial court erred in refusing to try separately sexual abuse charges stemming from allegations made by two sisters.

Relevant Facts

In this sexual abuse case, the complainants were two sisters. R. 119, ll. 13 – 21. Older Sister was ten years old at the time of trial; Younger Sister was seven years old. R. 119, ll. 13 – 21. Appellant is their grandfather. R. 118, ll. 7 – 9. Appellant came from Pennsylvania to live with his son because, according to his son, appellant "couldn't take care of himself too well." R. 118, l. 22 – 119, l. 6. Appellant's son ("Son") had a small house and allowed appellant to share a room with his grandson. R. 119, ll. 7 – 12. R. 131, ll. 19 – 23.

Son worked nights. R. 120, ll. 6 – 13. He woke up earlier than normal to check the Internet because he was expecting a package. R. 120, ll. 6 – 13. Son claimed that as he walked down the hall, he saw appellant "putting his hands down my daughter's pants and underwear." R. 118, ll. 15 – 17. Son "hollered at him." R. 121, ll. 1 – 4. Appellant told Son he was playing doctor. R. 121, ll. 5 – 8. Son continued to berate appellant, called his wife, and then called 911. R. 121, ll. 9 – 18. Son told the 911 dispatcher that he wanted "to shoot the son of a bitch." R. 137, ll. 10 – 13. Son admitted he was angry. R. 137, ll. 16 – 17. Son's wife called their pastor—who called Son soon after Son called 911. R. 154, l. 14 – 156, l. 7. The pastor was so concerned about Son's anger that he told him that he would come to their house immediately and told Son "please, don't do anything that he would regret." R. 156, ll. 3 – 7.

Officer Brian Bolding ("Bolding") of the Pickens County Sheriff's Office was the first policeman on the scene. R. 189, ll. 3 – 19. He saw appellant on the front steps. R. 189, ll. 20 – 24. Son came outside and spoke with Officer Bolding. R. 189, ll. 20 – 24. Officer Bolding then approached appellant and asked him if he was okay. R. 190, l. 16 – 17. Officer Bolding claimed that appellant replied that he was not okay "because he had been caught with his hand down his granddaughter's pants." R. 190, ll. 18 – 20. A detective soon arrived on the scene. R. 190, l. 24 – 191, l. 6. The detective interviewed the girls. R. 258, ll. 2 – 16. While Older Sister alleged several instances of abuse, Younger Sister denied she had been abused. R. 258, ll. 2 – 16. R. 268, ll. 7 – 12.

The officers then interrogated appellant. R. 268, l. 13 – 270, l. 9. Appellant denied molesting the children. R. 271, ll. 5 – 9. The detective continued to interrogate appellant. R. 274, l. 1 – 276, l. 5. The detectives claimed that appellant voluntarily then admitted digitally penetrating Older Sister and gave them a written statement to that effect. R. 275, l. 21 – 276, l. 5. R.___(State's Ex. 6).

Older Sister testified and claimed appellant touched her buttocks and digitally penetrated her vagina. R. 217, ll. 2 – 21. Older Sister, on cross-examination, admitted that during her forensic interview, she told the interviewer that appellant never touched her on the skin or put anything inside of her. R. 221, ll. 5 – 21. The State did not play Older Sister's forensic interview because Judge Welmaker found that a portion of the tape was unreliable. R. 58, l. 4 – 60, l. 19. The forensic interviewer took a break and when she returned, asked leading questions "about did you tell the sheriff this and did you tell the investigator this." R. 59, ll. 15 – 23. Judge Welmaker found that the

remainder of the tape was not reliable and the State elected not to show the portions of the tape the Judge Welmaker found were admissible. R. 60, ll. 6 – 19.

Younger Sister claimed on direct-examination that appellant touched her vagina and buttocks. R. 236, l. 18 – 237, l. 14. She could not remember whether the touching was on top of or under the clothes. R. 237, ll. 9 – 11. Younger Sister denied that appellant had ever hurt her. R. 240, ll. 14 – 16. The State's child abuse pediatrician who performed a physical examination of Younger Sister admitted on cross-examination that Younger Sister denied that appellant had ever touched her genitals. R. 176, ll. 1 – 24. Younger Sister's forensic interview was admitted into evidence and published to the jury. R. 185, ll. 2 – 19. The jury ultimately acquitted appellant of charges related to Younger Sister. R. 336, ll. 8 – 9.

Appellant objected to trying the cases together. R. 8, l. 20 – 9, l. 11. Appellant argued he would be prejudiced because the allegations would not be admissible in separate trials. R. 51, l. 14 – 56, l. 22. Appellant argued that the common scheme or plan exception contained in Rule 404(b) would not apply because it lacked "logical relevance." R. 54, l. 25 – 55, l. 11. Appellant also argued the allegations were not sufficiently similar to qualify as a common scheme or plan. R. 55, l. 12 – 56, l. 22. Judge Welmaker took the matter under advisement. R. 57, l. 24 – 58, l. 3.

When the court returned from a break, it began with jury selection and read the charges for both Older Sister and Younger Sister to the venire. R. 64, l. 10 – 65, l. 11. One of the potential jurors was disqualified after telling Judge Welmaker, "When you said he had three charges against him, I know in my mind he's guilty. I have two teenager daughters. . . . With three charges against him, I just as soon take him out

back." R. 81, ll. 9 – 15. During a break after jury selection, Judge Welmaker placed his reasoning on the record for trying the cases together. R. 103, l. 15 – 105, l. 3. The trial judge found that the allegations would be admissible in separate trials under the common scheme or plan exception and did not find "any substantial prejudice to the defendant." R. 104, l. 14 – 105, l. 3.

Discussion

The trial judge erred in trying these cases together. Separate charges cannot be tried together "if the defendant's substantive rights" would be prejudiced. State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). Separate charges can be tried together where "the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character." Id. "Offenses are considered to be of the same general nature where they are interconnected." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002).

Appellant's substantive right that was prejudiced was that in separate prosecutions, the allegations concerning Younger Sister would not have been admissible under Rule 404(b), SCRE. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998) . An analysis of Rule 404(b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) is required in the context of joinder. Cutro at 103, 504 S.E.2d at 325. "Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes." Id. "The trial judge must clearly perceive the connection between the other crimes in the crimes charged." Id. "Further, other crimes which are not the subject of conviction must be proven by clear and convincing evidence." Id.

As argued by appellant, the common scheme or plan exception to Rule 404(b) requires some logical relevancy between the allegations. Lyle at 811. Without a logical connection, then the allegations are admitted only to show the defendant's propensity to commit such crimes, which is not allowed. Id. See also People v. Molineux, 6 Bedell 264, 61 N.E. 286 (N.Y. 1901). The modern evidence rule retains the razor sharp logic of these earlier cases by stating that prior bad acts may not be offered to prove "action in conformity therewith." Rule 404(b), SCRE.

Admission of these allegations together was not sought to prove identity, absence of mistake, or motive, but as inadmissible propensity evidence. State v. Burns, 978 S.W.2d 759, 760-61 (1998). Our Supreme Court recognized the need to return to the basic reasoning of Lyle in State v. Fonseca, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011). Fonseca recognized the "thin disguise" of character evidence costumed in the threadbare garb of motive, intent, or common scheme or plan evidence in a child sex case. State v. Fonseca, 383 S.C. 640, 649, 681 S.E.2d 1, 5 (Ct. App. 2009). Fonseca is structurally identical to Lyle. It asks why the bad act evidence was being offered. It first asks whether the bad act evidence is relevant to motive or intent and concludes it is not. Id. at 647-48, 681 S.E.2d at 4-5. It then asks whether there is any argument for the admission of the bad acts and concludes there is not. Id. at 649-50, 681 S.E.2d at 5-6. As in Fonseca, these allegations could not be admitted in separate trials and therefore joinder deprived appellant of a substantial trial right.

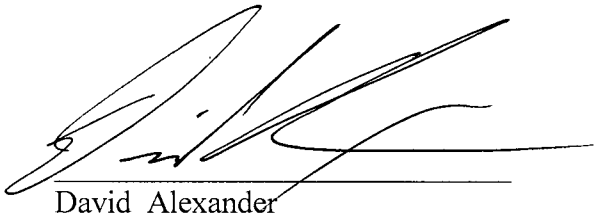
Appellant was unquestionably prejudiced. With Younger Sister's charges joined, the jury heard evidence that otherwise would have been inadmissible. The jury saw a forensic interview for Younger Sister, which they did not see for Older Sister. The jury

heard Younger Sister allege that appellant had molested her. Nor was the joinder harmless. Appellant showed that his supposed confession was likely the result of duress caused by Son's anger and law enforcement questioning his manhood. Older Sister contradicted her trial testimony about penetration in her forensic interview and was successfully impeached. Under these facts, the Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of February, 2015.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph Anthony Drachslin, Sr. states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge G. Edward Welmaker, which was held on April 24, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Joseph Anthony Drachslin, Sr..

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of February, 2015.

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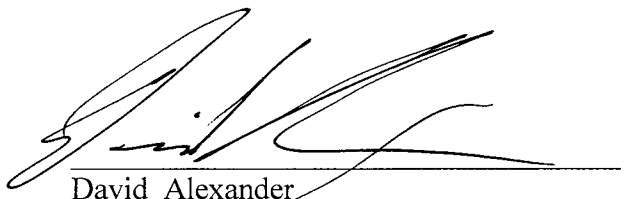
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial Transcript
(3) Court's Exhibits # 1, # 2
(4) State's Exhibit # 2, #5, #6

I certify that this designation contains no matter which is irrelevant to this appeal.

February 27th, 2015



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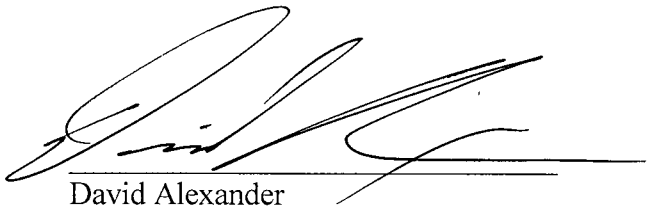
Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 27, 2015



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Joseph Anthony Drachslin, Sr., #359751 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of February, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of February, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.