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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2015-000424

David Carmichael, ... Respondent,

v.

State of South Carolina, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective where trial counsel articulated that he did not move to sever the trials because a conviction on one charge would have been admissible at a second trial and where his assessment of the case was reasonable and correct?

STATEMENT OF THE CASE

The Richland County Grand Jury indicted Respondent in September 2007 and July 2012 for three counts of lewd act on a minor child. (App. pp. 895-98). James Shadd III, Esquire ("trial counsel"), represented Respondent. (App. p. 1). On October 8, 2012, Respondent proceeded to a jury trial before the Honorable Roger L. Couch and a jury. (App. p. 1). On October 11, 2012, the jury found Respondent guilty as indicted. (App. p. 880, lines 15-24). Judge Couch sentenced Respondent to concurrent terms of fifteen years imprisonment for each charge, suspended upon the service of ten years of imprisonment and five years of probation. (App. p. 899-901). Respondent did not appeal his convictions or sentences.

Respondent filed an application for post-conviction relief on April 16, 2013, and and amended application on or about August 15, 2014. (App. p. 910; p. 921). Petitioner filed a return on or about September 12, 2103. (App. p. 915) The Honorable Robert E. Hood ("the post-conviction relief judge") convened an evidentiary hearing on September 5, 2014. (App. p. 923). Respondent was present and represented by Kristy G. Goldberg, Esquire. (App. p. 923). The post-conviction relief judge granted relief in an order filed December 22, 2014. (App. p. 987). The post-conviction relief judge denied Petitioner's motion for reconsideration on January 20, 2015. (App. p. 1016). This Petition for a Writ of Certiorari follows.

ARGUMENT

I. The post-conviction relief judge erred in finding trial counsel ineffective for failing to move to sever the trial of Respondent's charges.

The post-conviction relief judge found trial counsel ineffective "for deciding not to request a severance of the indictments." (App. p. 994). Respondent submits this finding is controlled by an error of law and not supported by probative evidence in the record because the post-conviction relief judge improperly ruled "it is probable that a court would have found that [Respondent's] indictments should not have been tried together." (App. p. 997).

A. Standard of review

In this post-conviction relief action, Respondent bore the burden of proof. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). This Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, Respondent must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Respondent such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)). This Court must also reverse the post-conviction relief judge's decision when it is controlled by an error of law. Talley v. State, 371 S.C. 535, 540, 640 S.E.2d 878, 880 (2007) (citing Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000)). This Court reviews questions of law *de novo*. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (citing Goins v. State, 397 S.C. 568, 726 S.E.2d 1 (2012)).

B. Trial counsel articulated a valid strategic reason for not moving to sever the charges

In the order granting relief, the post-conviction relief judge held trial counsel ineffective for failing to move to sever Respondent's trials. However, trial counsel testified he strategically chose, in consultation with Respondent, to proceed on all charges simultaneously. Because he articulated a valid strategy for not pursing a severance, trial counsel was not deficient, and the post-conviction relief judge erred in finding otherwise. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Trial counsel testified he believed there was a danger of trying the cases separately. (App. p. 955, line 14). Specifically, trial counsel testified there was a risk of evidence of one charge being introduced in a trial for another charge. (App. p. 955, lines

17-23; p. 968, lines 12-17). Trial counsel testified he made a strategic decision to not move to sever the charges. (App. p. 955, line 33).

Trial counsel did not act unreasonably by determining the prior incidents could be admissible in separate trials as prior bad acts or prior convictions. See Strickland, 466 U.S. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). Under Rule 404(b), SCRE, prior incidents are admissible as evidence of a common scheme or plan if there is a "close degree of similarity" between them. State v. Beekman 405 S.C. 225, 231, 746 S.E.2d 483, 487 (Ct. App. 2013). (citing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009)). Factors to be considered in determining the degree of similarity include the age of the victims, the relationship between Respondent and the victims, the location of the incident, the use of coercion or threats, and the manner of the incident. Id. at 232, 746 S.E.2d at 487.

Here, the other incidents would have been admissible in separate trials because they are similar in most significant respects. The victims were all significantly younger than Respondent.[1] Victim 1 was eight to ten years old when the inappropriate touching occurred. (App. p. 91, line 25-p. 92, line 1). Victim 2 was seven or eight years old. (App. p. 175, lines 8-11). Victim 3 was thirteen years old when Respondent inappropriately touched her. (App. p. 459, lines 21-22; p. 461, line 24).

The relationship between Respondent and the victims was almost identical in all three cases: all three victims testified they knew Respondent through church. (App. p.

[1] Although the post-conviction relief judge indicated he agreed with Respondent's argument that the third victim was post-pubescent, Respondent presented no evidence to that effect at the evidentiary hearing. He also presented no explanation for why the pre/post pubescent distinction is relevant in this or any other scenario. Thus, the post-conviction relief judge's reliance on this factor is not supported by any evidence in the record and must be reversed. Jackson, 329 S.C. at 348, 495 S.E.2d at 769.

90, lines 10-13; p. 174, lines 5-24; p. 460, line 11-p. 461, line 3). Respondent gained access to the victims through personal relationships with their parents cultivated through church membership, which trial counsel testified was a very close relationship. (App. p. 967, lines 3-7). See Childs v. State, 339 S.E.2d 311, 313 (Ga. Ct. App. 1985) ("In the instant case, it appears that the appellant had a scheme to prey upon every available female child within his family circle, and the prior incidents related by the two witnesses were extremely similar to the offenses for which he was tried and convicted.").

Although the location of the incident with each victim varied, there were similarities. The first inappropriate touching of the Victim 1 occurred when her family allowed Respondent to look after her while they were grocery shopping. (App. p. 92, lines 13-18). The second inappropriate touching occurred when Victim 1 was left alone with Respondent while her family was outside. (App. p. 96, line 7-p. 97, line 24). The third inappropriate touching of Victim 1 occurred when Victim 1 spent the day with Respondent and his sister, while the sister was asleep in the adjoining room. (App. p. 98, line 8-p. 100, line 9). Respondent's touching of Victim 2 occurred when Respondent babysat Victim 2 and her brother. (App. p. 175, lines 8-18). Respondent touched Victim 3 while riding in a car with Victim 3 and her father. (App. p. 456, lines 20-23). Incidents with Victim 1 and Victim 2 occurred when they were left in Respondent's care. The second incident with Victim 1 occurred when her family was nearby, and the third incident happened while Respondent's sister slept nearby. This behavior is similar to Respondent's behavior with Victim 3, where the conduct occurred while her father was in the same car. Lewd acts committed in a house and lewd acts committed in a car are indistinguishable when the alleged inappropriate behavior was otherwise similar.

Only Victim 1 testified Respondent threatened her after her third encounter with him. (App. p. 101, lines 24-25). However, the fact only one victim alleged Respondent made use of threats or coercion is not dispositive. Beekman, 405 S.C. at 232, 746 S.E.2d at 487 ("We recognize that Stepson reported Beekman's use of threats and coercion while Stepdaughter did not[.]").

In addition to the similarities in location, the manner of the incidents was strikingly similar as well. Victim 1 reported Respondent inappropriately touched her vagina, inappropriately touched her chest area, and made vulgar comments. (App. p. 94, lines 12-13; p. 96, line 11; p. 97, lines 12-13; p. 100, lines 8-9). Victim 2 testified Respondent pulled her pants down and put her hand on his penis while she was asleep. (App. p. 178, line 13-p. 179, line 5). Victim 3 testified Respondent, during a car ride, reached into the back seat of the car while she was sleeping and attempted to reach into her underwear. (App. p. 466, line 2-p. 469, line 1).

Respondent's victims were all young girls. He had a close familial relationship with them based on church membership. He touched them inappropriately when left alone with them and when their families were nearby. In each case, the assaults never progressed beyond inappropriate touching. In light of the vast similarities in Respondent's conduct with each victim, his prior bad acts regarding each victim would be admissible in separate trials under Rule 404(b), SCRCP, as evidence of a common scheme or plan.

Furthermore, testimony about these other incidents could also not have been excluded under Rule 403, SCRE, because the prejudicial effect does not substantially outweighed the probative value. Id. at 230, 746 S.E.2d at 486 (citing State v. Gilliam, 373 S.C. 601, 646 S.E.2d 872 (2007); Rule 403, SCRE). The testimony regarding other

incidents was extremely probative to corroborate Respondent's *modus operandi* when engaging in these inappropriate behaviors. See State v. Clasby, 385 S.C. 148, 158-59, 682 S.E.2d 892, 898 (2009) (allowing admission of testimony about uncharged crimes as "extremely probative" where there was otherwise no physical evidence to corroborate the victim's testimony). As such, testimony about the other incidents would have been admissible in separate trials.

Trial counsel also reasonably believed use of the prior allegations at a separate trial would be more damaging if introduced as a prior conviction. Prior convictions are admissible when the probative value is not substantially outweighed by the danger of unfair prejudice. Rule 609(a)(1), SCRE; State v. Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000). As noted above, testimony regarding Respondent's prior conduct would be extremely probative in a subsequent trial. Clasby, 385 S.C. at 158-59, 682 S.E.2d at 898. This probative value is not substantially outweighed simply because introduction of a prior conviction may prejudice Respondent in the jury's eyes. See United States v. Kelly, 510 F.3d 433, 437-38 (4th Cir. 2007) (in a prosecution for traveling in interstate commerce to engage in illicit sexual conduct, upholding introduction of prior conviction for attempted rape as not unfairly prejudicial because "'it tends to prove [the defendant's] propensity to molest young children.'" (citing United States v. Gabe, 237 F.3d 954 (8th Cir. 2001))).

Trial counsel's decision to forego a motion to sever was valid and reasonable because these other incidents would have been admissible at separate trials anyway. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (attorney not deficient for failing to make futile arguments). Because trial counsel had a valid strategic reason for not moving to sever, the post-conviction relief judge's finding of deficiency is not

supported by probative evidence in the record and is controlled by an error of law. This Court should grant certiorari to correct this mistake.

C. Respondent failed to demonstrate he was prejudiced by having his charges tried together

The post-conviction relief judge also erred in determining Respondent was prejudiced by trial counsel's decision to not move for a severance. Even if trial counsel made a motion to sever, the trial court could have properly declined to grant the motion. "Charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced." Beekman 405 S.C. at 229, 746 S.E.2d at 486. The post-conviction relief judge ruled the charges relating to each of the three victims do not arise out of a single chain of circumstances. (App. p. 998). However, the post-conviction relief judge narrowly construed the requirement of a single chain of circumstances to require temporal and geographical proximity. See id. at 231, 746 S.E.2d at 486 (declining to interpret a "restrictive reading of the phrase 'a single chain of circumstances'").

In State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013), the court of appeals determined sexual abuse of two separate victims arose out of a single chain of circumstances where the victims had the same relationship with the defendant, were of similar ages, the duration of the abuse was similar, and the defendant gained access to the victims through similar means. McGaha, 404 S.C. at 295, 744 S.E.2d at 605. Here, Respondent was a close family friend of each of the three victims. He had access to each victim by virtue of a close relationship developed through church membership. The first victim was between the ages of four and nine, the second victim was between the ages of

seven and eleven, and the third victim was age thirteen. Although there is some disparity in the ages of the victims, all were clearly much younger than Respondent. All were clearly children, regardless of their physical development.[2] The duration of each incident was also similarly brief, with Respondent never committing more than an inappropriate touching on any of the victims. See State v. Grace, 350 S.C. 19, 24 n.1, 564 S.E.2d 331, 334 n.1 (Ct. App. 2002) (upholding joint trial where defendant's *modus operandi* was similar for each occurrence). In light of the similarity of the incidents in this case, Respondent submits these incidents arose out of a "single chain of conduct" as our courts have interpreted that phrase. See Wallace, 384 S.C. at 434 n.1, 683 S.E.2d at 278 n.1 ("Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be **factually similar** and does not add an additional layer of analysis." (emphasis added)).

Similarly, the incidents were all of the "same general nature." Respondent gained access to each victim through his relationship with the victims' families. Each victim reported similar types of behavior from Respondent. Victim 1 reported three instances of inappropriate contact from Respondent. The first incident involved Respondent inappropriately touching Victim 1's vagina. The second incident involved Respondent touching Victim 1's chest area and making inappropriate comments. The third incident involved Respondent unzipping Victim 1's pants and reaching into her underwear while Respondent's sister slept in the next room. Victim 2 testified Respondent pulled her pants down and put her hand on his penis while she was asleep. Finally, Victim 3 reported Respondent, during a car ride, reached into the back seat of the car while she

[2] Again, Petitioner notes Respondent presented no evidence of the physical development of any of the victims and no evidence of the relevance of physical development to these issues.

was sleeping and attempted to reach into her underwear. These incidents are sufficiently similar to satisfy the requirement that the charged crimes be of the same general nature.

Furthermore, similar evidence was provided regarding each incident. Although the corroborating witnesses were different for each victim, there was overlap in the investigation of the cases. The same officer investigated the complaints of Victim 1 and Victim 2. (App. p. 422, lines 15-21). The same medical doctor examined Victim 1 and Victim 3. (App. p. 521, line 20). Thus, each case was capable of being proven by overlapping evidence. See Beekman, 405 S.C. at 231, 746 S.E.2d at 487 (noting the "great overlap of evidence"). Similarly, Respondent's defense was similar in that he attempted to portray himself as the subject of a conspiracy in which each victim made accusation against him in retaliation for his involvement in church-related activities. See State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (other incidents admissible where defendant "gave to each the same explanation for his actions").

Respondent has also not demonstrated he was prejudiced by the joint trial because it did not result in "the admission of prior bad act evidence that would have otherwise been inadmissible." Beekman, 405 S.C. at 230, 746 S.E.2d at 486. As noted above, the other incidents would have been admissible as prior bad acts in joint trials. If convicted in a first trial, Respondent's behavior could be admitted as a prior conviction. Furthermore, Respondent was not prejudiced simply because the solicitor attempted to discredit his defense in her closing argument. This case hinges on the credibility of the victims, and the solicitor would have made similar arguments even if the charges were tried separately.

Because our jurisprudence allows a wide degree[3] of latitude in joining sexual abuse crimes for prosecution, this is simply not a case where the trial court would have abused its discretion in denying a motion for severance. Thus, Respondent has not shown he was prejudiced by trial counsel's tactical decision to proceed with a joint trial. Strickland, 466 U.S. 695 ("The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). Accordingly, Respondent submits the post-conviction relief judge erred as a matter of law and as a matter of fact in ruling the State would not have been allowed to proceed with a joint trial. Certiorari is necessary to correct this mistake.

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[3] See State v. Jalette, 382 A.2d 526, 532 (R.I. 1978) (acknowledging the general recognition "that courts have extended a greater latitude of proof as to like occurrences when considering sexual offenses than has been permitted in the trial of other criminal charges." (citations omitted)). The overwhelming majority of decisions from our appellate courts have found joinder of trials was appropriate in sexual abuse cases. See, e.g., Beekman 405 S.C. 225, 746 S.E.2d 483; Clasby, 385 S.C. 148, 682 S.E.2d 892; Wallace, 384 S.C. 428, 683 S.E.2d 275; McGaha, 404 S.C. 289, 744 S.E.2d 602; Grace, 350 S.C. 19, 564 S.E.2d 331.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari, vacate the order granting post-conviction relief, and affirm Respondent's convictions.

Respectfully submitted,

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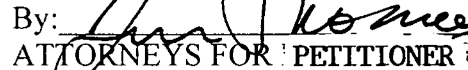
By: 
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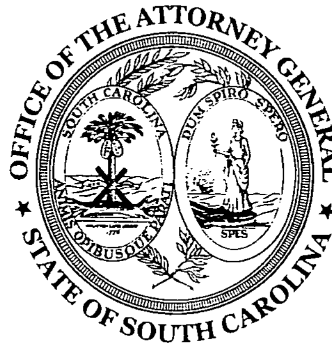

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September 21, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
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Re: <u>David Carmichael, #352788 v. The State of South Carolina</u>
Appellate Case No. 2015-000424

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Petition for Writ of Certiorari and Appendix** in the above-referenced case. By copy of this letter we are serving petitioner today.

Sincerely,

J. Watt W

Joshua L. Thomas (for)
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JLT/jcb
Enclosures

cc: Robert M. Dudek, Esquire