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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2013-002524

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SC Court of Appeals

The State,

Respondent,

vs.

Alan Dale Smith,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in allowing the State to reference the additional images found on Appellant's computer or utilize demonstratives including the file names of the other images depicting the sexual exploitation of a minor because they were part of the *res gestae* of the crime for which he was charged and also were properly admitted under Rule 404(b), SCRE. Further, there was no prejudice from the testimony of the demonstration of the computer's file structure in light of the information the jury was already provided regarding the thirty images and videos for which Appellant was indicted. (Appellant's Issues 1 and 2).

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

- I. **The trial court did not err in allowing the State to reference the additional images found on Appellant's computer or utilize demonstratives including the file names of the other images depicting the sexual exploitation of a minor because they were part of the *res gestae* of the crime for which he was charged and also were properly admitted under Rule 404(b), SCRE. Further, there was no prejudice from the testimony of the demonstration of the computer's file structure in light of the information the jury was already provided regarding the thirty images and videos for which Appellant was indicted. (Appellant's Issues 1 and 2).**

Appellant contends the trial court erred in allowing the State to reference the "thousands" of other images depicting the sexual exploitation of a minor found on Appellant's computer at the same time as the thirty images and videos for which he was indicted. He also maintains the trial court erred in allowing the State to demonstrate the computer's file structure for the jury when the presentation included the file names of images depicting the sexual exploitation of a minor for which Appellant was not indicted.

These other images, and the fact they were on the computer at the same time as the images for which Appellant was indicted, form the *res gestae* of the crime and were properly admitted by the trial court. Further, the multitude of additional images demonstrates Appellant had to know of the existence of the child pornography on his computer and, therefore, show an absence of mistake or accident under Rule 404(b), SCRE. In addition, the items form part of the common scheme or plan and were properly admitted under that exception to Rule 404(b). Further, Appellant has suffered no prejudice from the admission of the testimony and demonstrative exhibit.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion.” State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Res Gestae

Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). “The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.” Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004)).

This evidence of other crimes is admissible:

when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’ ” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... ‘[and is thus] part of the res gestae of the crime charged.’ And where evidence is admissible to provide this ‘full presentation’ of the offense,” [t]here is no reason to

fragmentize the event under inquiry” by suppressing parts of the “res gestae.”

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001).

The other files in this case were located on the same computers as the 30 files for which Appellant was indicted.¹ They were spread throughout the computer in numerous folders and locations. The State’s evidence demonstrated the files were purposefully downloaded and were not in temporary locations or locations indicating someone attempted to delete the files. The other unindicted files were clearly linked to the files for which Appellant was indicted.

Further, the charges originated because a friend of Appellant’s viewed the child pornography on his computer while she was attempting to create a music CD. She indicated she opened a window on the computer and it was thumbnail pictures of young girls in “sexual poses.” (T.152-154; R.121-123). She indicated she viewed 15-20 pictures once the computer began a slideshow of the pictures in the folder. (T.153-154; R. 122-123). There is no indication the pictures she viewed were the same ones listed in the indictment so the fact there were many others on the computer was important to explain to the jury. In addition, another friend of Appellant’s viewed the images of sexual exploitation of a minor. She specifically testified the video she saw was titled “Four-year-old Being Raped by her Father.” (T.182; R. 151). This video is not one of the ones for which Appellant was indicted, so again it was important for the State to explain there

¹ It is important to note the only reason the State listed specific images or videos in each indictment was because Appellant requested during a pre-trial hearing. (T.10-12; R. 10-12).

were many more photos and videos on Appellant's two computers so the jury would understand the ones for which he was indicted may not be the same ones seen by the friends.

Appellant's main argument regarding why they were not admissible centered on the fact the State could have charged him with 1000 or more counts of sexual exploitation of a minor and not just 30 counts. (T.128-129; R.101-102). This argument demonstrates the relationship between the files and strengthens the argument the other files form part of the *res gestae* of the crime. The State should not be punished for only indicting 30 images and not 1000 or more.² The images, all of them, form the context of Appellant's crime and the jury deserved to know these were not isolated images. Accordingly, the trial court did not err in admitting the images because they formed part of the *res gestae* of the crime.

Rule 404(b)

Additionally, even if not part of the *res gestae* of the crime, the images were admissible under Rule 404(b), SCRE. The downloaded and saved images, as evidence of other bad acts, demonstrated an absence of mistake or accident. Further, they were properly admitted as part of a common scheme or plan. 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). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if

² Most likely if the State had indicted him on all 1000 or more images on the hard drive, he would be arguing the State piled on or "guilted the lily" and abused its prosecutorial discretion.

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).

Absence of Mistake or Accident

Appellant's main argument at trial centered his claim he did not know the images depicting the sexual exploitation of a minor were on his computer. He made the contentions in his statement to law enforcement. (T.218-219; State's Exhibit 2; R.187-188; 546). He argued someone else must have downloaded the images and that he had no idea how they got to his computer. Finally, he asserted he looked at adult pornography and occasionally a child pornography image would show but he did not download them.

In order to rebut these arguments, the State demonstrated the images being on his computer were not an accident or mistake but were intentionally downloaded and Appellant had to know of their existence given the fact they were located throughout his hard drive and accounted for roughly 80% of what was stored on his hard drives. (T.303; R. 272). The fact Appellant's computers contained thousands of images and videos of child pornography indicated their existence on the computer were not the result of an inadvertent download while attempting to download legal pornography. (T.334-335; R.303-304). The number and vast dispersion of the images belies his argument he did not know they were on the computer.

As a result, the testimony to the number of images and their locations rebutted any argument made by Appellant that they were mistakenly downloaded or were unintentionally downloaded while attempting to download other materials or when his computer obtained a virus. Accordingly, the trial court properly admitted the testimony and evidence to demonstrate an absence of mistake or accident.

Common Scheme or Plan

The un-indicted images also demonstrate a common scheme or plan to download child pornography, disperse it throughout the computer in many innocuous sounding folders, and possess the images and videos similar to the thirty charged images and videos. “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 277-278.

The images all are images of child pornography. They are found in many of the same locations as the indicted images and videos. All were downloaded, and permanently saved, to the hard drives of Appellant’s two computers. The thousands of images were not in temporary storage as they would have been if they were merely viewed on websites or if Appellant attempted to delete them. (T.305; R. 274). All the images were saved in various locations throughout his computer mixed in with other documents. (T.300-302; R.269-271). The screenshot of the file structure used as a demonstrative to explain the file structure of Appellant’s computer and how the images were located included some images for which Appellant was indicted and some other images. (T.291; R. 260).

The similarities in this case demonstrate a common scheme or plan to find, download, and possess explicit images of sexual exploitation of a minor on the part of

Appellant. Accordingly, the trial court did not err in finding the testimony and exhibits admissible under the common scheme or plan exception to Rule 404(b).

Prejudicial Impact

Finally, any possible prejudice from admitting the testimony and demonstrative exhibits was minimal at most. The State indicted Appellant for 30 counts of sexual exploitation of a minor. The indictments presented included the specific names of the images or videos for which Appellant was charged. The specificity was at the request of the defendant. The jury was aware the Appellant downloaded and possessed 30 images and videos which had file names such as “pthc_ptsc 9yo jenny sucking daddys dog, naked. Look at her lil pussy.jpg” and “3yo Sex Made Him Cum 2 Pedo Pedofilia Kids Child Porn.jpg.”³ (Indictments; R. 547-636). The fact the jury was told more images of a similar nature existed on his computer did not prejudice Appellant, especially in light of the probative value of demonstrating his knowledge of the files as well as the lack of accident or mistake in the files being on his computer.

³ There are other files with even more graphic file names included in the Indictments. The State has not had the actual photos and videos transported to the Court. The State believes the graphic descriptions in the file names is sufficient to demonstrate Appellant did not suffer any prejudice from other file names being referenced; however, if this Court wishes to view any of the photos or videos, the State will have them transported.

CONCLUSION

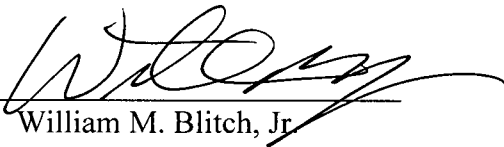
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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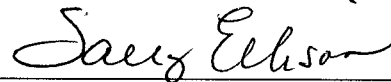
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 20th day of July, 2015.



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