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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SAMMY LEE SCARBOROUGH,

APPELLANT

Appellate Case No. 2013-002458

Appeal from Dillon County

Paul M. Burch, Circuit Court Judge

Opinion No. 2016-UP-074

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Sammy Lee Scarborough petitions the Court for rehearing. Counsel respectfully submits that this Court overlooked four factors in affirming the convictions. First, in addressing the consolidation of the cases, counsel respectfully submits that this Court overlooked the factual differences between the present case and State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct.App. 2013). Second, counsel submits this Court overlooked the fact that the prior bad act evidence admitted pursuant to rule 404(b) was not relevant and did not

constitute a common scheme or plan. Third, counsel submits this Court overlooked the fact that during the motion to consolidate the State failed to inform the trial judge that Minor #2 denied abuse by Petitioner. When Minor #2 denied abuse during the consolidated trial, the judge should have declared a mistrial. Fourth, counsel respectfully submits that this Court overlooked the fact that the testimony of the minors that Petitioner showed them pictures of naked boys and girls humping is not sufficient to establish that the pictures were obscene for purposes of the dissemination of obscene material statute.

In relying on State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct.App. 2013) to find that the trial judge did not abuse his discretion by refusing to sever seven different indictments naming three different minor victims, this Court overlooked the factual differences between this case where the State failed to demonstrate that the allegations involving the three separate minors arose out of a single chain of circumstances, were provable by the same evidence and were of the same general nature, and the McGaha case where this Court found that the molestation of each child during the same time period and in the same location, accomplished through the same access to them, established a sufficiently connected chain of circumstances to satisfy this element, a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other and the charges in the two cases were not merely of the same general nature—they were identical.

In the present case the State sought to consolidate for trial indictments alleging sexual abuse of three separate minors. In support of trying the three separate cases together the State argued, "The witness – the victims here are necessary witnesses to the other victims' cases, so the testimony of each witness will be required in the other case." (R. p. 10, lines 4-6). The State further argued, 'These are closely related in time, place and character. All of the victims were between the

age of five and eight when this abuse occurred. All were subject to acts of abuse by the defendant to include oral and anal sex. All of them were shown pornographic material by the {sic}these so these cases are certainly related closely in kind." (R. p. 10, line 24 – p. 11, lines 1-5). The State made these arguments to the judge despite the fact that, prior to trial, Minor #2 had denied the allegation contained in indictment #2013-GS-17-328 for criminal sexual conduct with a minor first degree to both a forensic interviewer and to an investigator from the Attorney General's office. (R. p. 310, lines 18-20; p. 311, lines 10-15; p. 321, line 14 – p. 322, line 1). The judge allowed joinder stating, "...just from discussion it appears from the Jones case and much so in the interest of judicial economy the State is entitled to have it's [sic]motion granted. We'll get it all together here and we'll try it." (R. p. 17, lines 3-7). The trial judge erred.

The three separate groups of allegations involved three different minors at unknown time frames within an over two year window for Minors #1 and #2 and a six month window for Minor #3. All three minors were neighbors of Petitioner. Minors #1 and #2 are brothers. Minor #1 testified at trial that Appellant put his "ding a ding" in his throat and made him choke. (R. p. 181, lines 10-11). Minor #1 testified that this took place in the barn. (R. p. 186, lines 5-19). Minor #1 also testified that on one occasion Appellant showed him a magazine with naked girls and naked boys. (R. p. 184, lines 1-13). Minor #2, testified at trial that Petitioner never touched him and he never touched Petitioner. (R. p. 214, lines 19-22). Minor #2 testified, however, that he saw Petitioner make Minor #1 suck his "wee wee." (R. p. 209, lines 2-22). Minor #2 also testified that Petitioner showed him and his brother pictures of gay boys humping with their clothes off. (R. p. 209, line 2 – p. 211, lines 1-25).

Minor #3 testified at trial that Petitioner tried to put "his turtle in my butt." (R. p. 235, line 18 – p. 236, lines 1-6). Minor #3 testified that this took place in the back of Petitioner's yard. (R. p.

235, lines 22-25). Minor #3 testified that Petitioner told him to suck his turtle but Minor #3 did not do it. (R. p. 240, lines 9-19). Minor #3 testified that on one occasion Petitioner showed him a magazine with girls and boys with their clothes off humping. (R. p. 237, lines 11-24). Minor #3 testified that he never saw Petitioner do anything to Minor #1 or Minor #2. (R. p. 239, line 19 – p. 240, lines 1-2).

Minor #2 denied abuse by Petitioner. Minor #1 alleged oral sex in the barn. Minor #3 alleged anal sex in the back yard and an attempted oral sex. The offenses did not arise out of a single chain of circumstances and are not of the same general nature. Additionally the offenses were not proved by the same evidence and witnesses. At trial the State called the grandmother and aunt of Minors #1 and #2 and the mother of Minor #3. The State attempted to prove the case involving Minor #1 through Minor #1's testimony, his statements admitted pursuant to Rule 801(d)(1)(D) and the testimony of Minor #2. The State attempted to prove the case involving Minor #3 through Minor #3's testimony and his statements admitted pursuant to Rule 801(d)(1)(D).

In contrast, in McGaha the Court found a single chain of circumstances noting, "The time periods of the abuse overlapped almost precisely—McGaha abused Dana between March 2009 and August 2010 and Elaina between May 2009 and August 2010." 404 S.C. at 295, 744 S.E.2d at 605. The indictment involving Minor #1 alleges a time frame of between January 1, 2010 and May 25, 2012. (R. p. 463). The indictment involving Minor #3 alleges a time frame of between November 1, 2011 and May 25, 2012. (R. p. 459). Unlike the varying allegations in the present case, the Court noted that the allegations in McGaha were not merely of the same general nature—they were identical. Unlike the different evidence used to prove the allegation of Minor#1 and Minor #3 in the present case, the charges in McGaha were proven by the same

evidence through the same witnesses. The trial judge should have required the State to prosecute the charges involving Minor #1 and Minor #3 in separate trials.

Counsel respectfully submits that this Court additionally overlooked the prejudice resulting from the joint trial. In State v. McGaha, 404 S.C. 289, 298, 744 S.E.2d 602, 606 (Ct. App. 2013) this court wrote,"In cases where the defendant argues prejudice from the admission of evidence of the other charges tried in the same case, our courts have analyzed whether evidence of one or more charges would be admissible in a trial involving only the other charge. Unlike in McGaha, the State in the present case would not have been able to show a common scheme or plan pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), in a subsequent trial because the connection between the two allegations must be more than just a general similarity. See Smith, 322. S.C. at 110, 470, S.E.2d at 366; State v. Stokes, 279 S.C. 191, 192, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted."); see also State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). "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. State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009).

If separate trials had properly been granted, the allegation involving Minor #1 would not have been admissible in the trial involving Minor #3 and vice versa. While Minor #2 would have been called as a witness to prove the allegation involving Minor #1, his recanted allegation

against Petitioner would not have met the clear and convincing standard required for admission pursuant to Rule 404(b), SCRE in either the trial involving Minor #1 or Minor #3. The trial judge erred in allowing consolidation.

Counsel respectfully submits that this Court, in finding that the trial judge did not err in allowing Minor #4 to testify that Petitioner previously abused him, overlooked the fact that the State failed to prove that the prior act was relevant and failed to prove that the prior act met the common scheme or plan exception to Rule 404(b). Minor #4 is Petitioner's nephew. Minor #4's mother testified that when her son was four years old he told her that he had been sexually abused in Petitioner's truck. (R. p. 259, lines 13-23). The mother called the police, who took a report and sent Minor #4 for a forensic interview but charges were never filed in regard to Minor #4's allegation. (R. p. 260, line 18 – p. 261, lines 1-13). At trial Minor #4 testified that Petitioner put his private part in the minor's mouth. (R. p. 280, line 8 – p. 281, lines 1-8).

Minor #4's testimony is not relevant to the charged offenses. The only relevance of the prior bad act involving Minor #4 is to show that because Petitioner is alleged to have committed a prior bad act with Minor #4, he must have committed the acts with Minors #1, #2 and #3. There is nothing unique or connecting which makes the prior bad act with Minor 4 relevant. The act constitutes improper character or evidence. This is precisely the type of evidence that is prohibited by Rule 404.

The testimony from Minor #4 is not only irrelevant but also does not fit the common scheme or plan exception to Rule 404(b). In State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009), a majority of the South Carolina Supreme Court, emphasizing similarities and dissimilarities, wrote:

> Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other.

> 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. State v. Parker, 315 S.C. 230, 433 S.E.2d 831(1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).
>
> Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (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. See State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (evidence admissible as common scheme or plan where all victims were foster children of similar age and the types of sexual batteries were similar); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984) (evidence admissible as common scheme or plan where both victims were defendant's daughters, were the same age at time of the initial attack, and defendant gave same explanation for his actions). We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.
>
> A close degree of similarity establishes the required connection between the two acts and no further "connection" must be shown for admissibility.

At the time of trial Minor #1 was seven years old. (R. p. 172, lines 21-22). Minor #2 was five years old at the time of trial. (R. p. 201, lines 12-13). Minor #3 was eight years old at the time of trial. (R. p. 228, lines 19-20). Minor #4 was eight years old at the time of trial but three or four years old when he reported an incident to his mother. (R. p. 272, lines 17-18; p. 259, lines 13-23; R. p. 28, lines 15-19).

The relationships between Petitioner and Minor #4 and Petitioner and the other minors were different. (R. p. 38, line 22 – p. 39, lines 1-13). Minors #1, #2, and #3 were neighbors of Petitioner. Minor #4 is Petitioner's nephew and Petitioner was a babysitter for Minor #4. There is no evidence in the record that Petitioner was the babysitter for Minors #1, #2 or #3. There was no testimony presented that Petitioner was in a position of authority over Minors #1, #2 and #3 .

The location of the alleged incidents was different. (R. p. 39, lines 14-20). Minor #4 alleged an incident in Appellant's truck parked at a store (R. p. 25, line 22 – p. 26, lines 1-11) while Minor #1 alleged an incident in Appellant's barn, (R. p. 186, lines 5-13), and Minor #3 alleged an incident in Petitioner's backyard. (R. p. 232, lines 19-21).

The prior allegation of Minor #4 did not involve the showing of any naked pictures while the allegations of Minors #1, #2 and #3 involved naked pictures. (R. p. 40, lines 7-12). Importantly, the allegations of Minor #4 are very different from the allegations made by Minor #3. Minor #3 testified that Petitioner tried to hump him. (R. p. 232, lines 16-21). He later testified that Petitioner tried to put his turtle in his butt and it hurt. (R. p. 236, lines 4-12). Minor #3 testified about only **attempted** oral sex. (R. p. 240, lines 9-19). The sole allegation made by minor #4 was oral sex. The only similarities between the prior bad allegations involving Minor #4 and the charged offenses involving Minors #1, #2 and #3 are the fact that all four minors are young boys and Minor #4 and Minor #1 both allege oral sex. The prior bad act testimony from Minor #4 does not constitute the common scheme or plan exception of Rule 404(b).

Under the similarities framework established by Wallace, the testimony of Minor #4, where the dissimilarities far outweighed the similarities, should not have been admitted pursuant to Rule 404(b). The ages were different, the relationship was different, the location was different and the acts were different. As discussed above, the testimony was not relevant. Common scheme or plan evidence is only relevant when proof of the common scheme or plan is strong proof of motive, if an issue, identity, absence of mistake or accident, if an issue, or intent, if an issue.

In State v. Lyle, 125 S.C. 406, 118 S.E. 803, 811 (1923) the South Carolina Supreme Court wrote:

> A plan or system common to other crimes was not an essential ingredient of the crime charged. Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged. If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" (State v. Weldon, 39 S. C. 321, 17 S. E. 688, 24 L. R. A. 126), or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system. See Shaffner v. Com., 72 Pa. 63, 13 Am. Rep. 651,State v. Kenny, supra, and full discussion by Justice Werner in People v. Molineux, supra.

Under the framework established in Lyle, the common scheme or plan exception would only apply if the common scheme or plan went to prove identity or intent. Pursuant to current Rule 404(b), common scheme or plan evidence could also be used to prove motive and the absence of mistake or accident. Similarities alone, however, are not adequate to meet the common scheme or plan exception to Rule 404(b) because, as the rule provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The testimony of Minor #4, does not meet the common scheme or plan exception under Wallace or Lyle. Under Rule 403, the prejudicial effect of the irrelevant and inadmissible prior bad act evidence far outweighs any possible probative value. The error is not harmless.

Additionally, in regard to the mistrial motion, counsel respectfully submits that this Court overlooked the fact that the State went forward with and argued for a consolidated trial, including a criminal sexual conduct with a minor first degree charge involving Minor #2, knowing that, prior to trial, Minor #2 denied the criminal sexual conduct with a minor first

degree accusation to both a forensic interviewer and an investigator from the Attorney General's Office. During the motion to consolidate the State failed to inform the trial judge that Minor #2 denied abuse by Petitioner.

In response to the mistrial motion the State responded:

> Judge, a directed verdict motion can be made at the appropriate time by Mr. Hobbs. That's essentially the motion he's making. The State was well aware from the beginning that we're dealing with little children who say different things almost every time you talk to thing [sic].
>
> The consistency with this case is every single time they've pointed our this defendant as the perpetrator. Now, we knew well – we were well aware coming into this case that Minor 2's situation, Minor 2's situation may be an indictment we had to pull based on what he said.
>
> We also knew that the engaging child in sexual performance was an indictment that we might have to pull off based on the testimony. We weren't sure. Okay. As late as last night we had the kid you just heard from, Minor 3, saying that he saw Minor 1 and Minor 2 do things to each other because Sammy Scarborough told them to.
>
> He didn't testify to that right there. Therefore, that's another one we will be pulling. Those two, and we knew that. There is ample evidence in the record to support going forward on all the other indictments, and that is precisely what we anticipated. With the exception of, well, maybe Minor 2 is going to tell us what he told us a few times and saying that he was abused also.
>
> The fact that we consolidated based on what we believed the evidence would show we can't go back now and unconsolidate or mistrial. We, in good faith, put our evidence forward. We argued the Court – We argued to the Court that we thought X,Y, and Z were going to be presented. And X and Y were presented just part of Z wasn't.
>
> So the consolidation should stand, and the idea of a mistrial, I get it. Mr. Hobbs has got to ask for this, but obviously, that would -- that's ludicrous at this point.

(R. p. 247, line 4 – p. 248, lines 1-14).

The prosecution, however, knew, prior to calling all seven indictments to trial, that Minor #2 had denied the allegation contained in indictment #2013-GS-17-328 for criminal sexual conduct with a minor first degree to both a forensic interviewer and to an investigator from the Attorney

General's office. (R. p. 310, lines 18-20; p. 311, lines 10-15; p. 321, line 14 – p. 322, line 1). Minor #2's Grandmother and Aunt testified that Minor #2 did not disclose to them that that he had been sexually abused. (R. p. 144, lines 17-20 ; p. 178, lines 18-23). Minor #2 testified at trial that Petitioner never touched him and he never touched Petitioner. (R. p. 214, lines 19-22).

This is not a case where the prosecution was surprised because a witness changed his story on the stand. The prosecution knew that Minor #2 had denied the allegations. The prosecutors, as ministers of justice, had a duty to refrain from prosecuting a charge that the prosecutors knew would not be supported by Minor #2's testimony. Rule 3.8(a) Rules of Professional Conduct. Additionally, when arguing the consolidation motion, the prosecutors had a duty to inform the trial judge that Minor #2 had denied the allegation contained in indictment #2013-GS-17-328 for criminal sexual conduct with a minor first degree to both a forensic interviewer and to an investigator from the Attorney General's office. Rule 3.3 Rule of Professional Conduct. Under the very specific facts of the present case, where the State, over objection, joined seven indictments with three separate alleged minor victims, knowing that one of the minors had denied the allegations of the indictment, a mistrial was necessary.

In State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (S.C. Ct. App. 2000) (footnotes omitted), the South Carolina Court of Appeals wrote:

> Although the decision is vested in the sound discretion of the trial court, a mistrial is proper only where it is dictated by "manifest necessity" or "the ends of public justice." Whether a mistrial is manifestly necessary is a fact specific inquiry. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." A trial judge's decision to grant or deny a mistrial will not be reversed on appeal absent an abuse of discretion amounting to an error of law.

A mistrial was manifestly necessary in the present case in order to ensure a fair trial based on competent evidence rather than unsupported allegations contained in an indictment. The fact that the indictment was "withdrawn" does not cure the prejudice. The State's opening

statement references the allegations involving all four minors. (R. pp. 89-94). The failure to grant the mistrial under the highly unusual facts of this case constitutes an abuse of discretion amounting to an error of law.

Finally, in refusing to find that the trial judge erred in refusing to direct a verdict of acquittal on the three dissemination of obscene materials charges, counsel respectfully submits that this Court overlooked the fact that the testimony of the minors that Petitioner showed them pictures of naked boys and girls humping is not sufficient to establish that the pictures were obscene for purposes of the dissemination of obscene material statute. S.C. Code §16-15-305 provides:

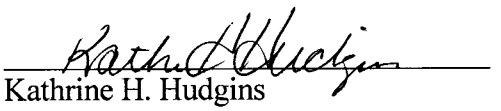
> For purposes of this article any material is obscene if:
>
> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;
>
> (2) the average person applying 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.

While the statute does not require the State to introduce into evidence at trial the actual alleged obscene material, the State still bears the burden of proving that the material is obscene pursuant to the statute. The testimony of the minors in the present case did not establish that the material was obscene. The testimony failed to establish that the material depicted sexual conduct in a patently offensive way, failed to establish that the material appealed to a prurient interest in sex and failed to prove that the material lacked literary, artistic, political or artistic value. The

State failed to meet its burden of proving that the material was obscene. The judge erred in refusing to direct a verdict of acquittal for the dissemination of obscene material charges.

Based on the above four arguments, counsel respectfully petitions this Court for rehearing.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 4th day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 4th day of March, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 4th day
of March, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.