STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMMY LEE SCARBOROUGH,

APPELLANT

APPELLATE CASE NO. 2013-002458

FINAL BRIEF OF APPELLANT

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2. Did the trial judge err in admitting Rule 404(b) evidence when the State failed to prove that the prior act was relevant and the prior act did not meet the common scheme or plan exception to Rule 404(b)?

3. Did the trial abuse his discretion in refusing to declare a mistrial after Minor 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 Minor 2 had denied the allegation contained in the indictment?

4. Did the trial judge err in refusing to direct a verdict of acquittal on the three dissemination of obscene material charges when the State did not introduce in evidence any purported obscene material and relied only on the testimony of the child witnesses?

STATEMENT OF THE CASE

In June of 2013, the Dillon County Grand Jury indicted Scarborough for three counts of criminal sexual conduct with a minor first degree, three counts of dissemination of obscene material and one count of engaging a child in sexual performance, indictments #20130GS-17-290, 291, 292, 293, 294, 328 and 710. On November 4, 2013, Scarborough proceeded to jury trial before the Honorable Paul M. Burch. Attorney Kyle M. Hobbs represented Scarborough at trial. Assistant Solicitor Shipp Daniel and Assistant Attorney General Kelly W. Hall prosecuted the case. At the end of the State's case, the State "withdrew" indictment #2013-GS-17-710, engaging a child in sexual performance and indictment #2013-GS-17-328, criminal sexual conduct with a minor first degree, involving Minor 2. (R. p. 367, lines 8-16). The jury returned verdicts of guilty on the remaining indictments. Judge Burch sentenced Scarborough to two concurrent life sentences for the two criminal sexual conduct with a minor charges and three concurrent five year sentences of the dissemination of obscene material charges. A timely notice of intent to appeal was served on November 15, 2013. This appeal follows.

STATEMENT OF FACTS

The State, represented by both the Fourth Circuit Solicitor's Office and the South Carolina Attorney General's Office, tried Appellant Scarborough on seven different indictments involving three different minor victims despite the fact that Minor 2 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 1 and Minor 2 are brothers. Minors 1, 2, and 3 were neighbors of Appellant. Minor 4 is Appellant's nephew and was not the subject of any of the current seven indictments and the allegations made by Minor 4 were not criminally prosecuted. Instead, Minor 4 was allowed to testify, over objection, pursuant to Rule 404(b). 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. 200, 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).

On May 25, 2012, the mother of Minors 1 and 2, filed a report with Jason Turner of the City of Dillon Police Department indicating that her two boys may have been sexually assaulted. (R. p. 100, line 19 – p. 101, lines 1-6). Officer Turner testified that he questioned Minor 1 who told him he had been sexually abused at Appellant's house. (R. p. 102, lines 6-25). Minor 1 was unable to provide any dates. The more than two year time frame alleged in indictment #2013-GS-17-0292, January 1, 2010 through May 25, 2012, is

based on the time when the Minors became neighbors with Appellant up to the time the mother made the police report. (R. p. 103, lines 1-8).

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).

Officer Turner testified that Minor 2 also told him that he had been sexually abused at Appellant's house and, like his brother, could not provide any dates. (R. p. 103, line 18 – p. 104, lines 1-11). Minor 2's Grandmother and Aunt, however, testified that Minor 2 did not disclose that he had been sexually abused. (R. p. 144, lines 17-20 ; p. 157, lines 18-23). Minor 2, testified at trial that Appellant never touched him and he never touched Appellant. (R. p. 214, lines 19-22). Minor 2 testified, however, that he saw Appellant make Minor 1 suck his "wee wee." (R. p. 209, lines 2-22). Minor 2 also testified that Appellant 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's mother testified that in November of 2011, her son told her that he had been sexually abused in Appellant's backyard. (R. p. 220, lines 10-17). She did not report the allegation to the police at the time. (R. p. 220, lines 18-25). After Minors 1 and 2 went to a "forensic interview" on May 29, 2012, the police contacted Minor 3's mother. (R. p. 107, lines 13-20). Minor 3 and his parents met with Officer Turner at the police station where Minor 3 told the officer that he had been sexually abused at Appellant's house in November of 2011. (R. p. 107, line 21 – p. 108, lines 1-12). Indictment #2013-GS-17-

0290, and 0291 involving Minor 3 alleges a time frame of six months between November 1, 2011, and May 25, 2012.

Minor 3 testified at trial that Appellant tried to put "his turtle in my butt." (R. p. 235, line 18 – p. 236, lines 1-6). Minor 3 testified that on one occasion Appellant showed him a nasty magazine with girls and boys with their clothes off humping. (R. p. 237, lines 11-24). Minor 3 testified that he never saw Appellant do anything to Minor 1 or Minor 2. (R. p. 239, line 19 – p. 240, lines 1-2).

Minor 4's mother testified that when her son was four years old he told her that he had been sexually abused in Appellant'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 Appellant put his private part in the minor's mouth. (R. p. 280, line 8 – p. 281, lines 1-8).

The three indictments for dissemination of obscene material were based solely on the testimony of the Minors. The police never searched for or recovered any obscene material from Appellant's house. The State presented no medical evidence.

The forensic interviewer testified about the RATAC protocol. (R. pp. 285-287). She also testified that that neither Minor 1 nor Minor 2 disclosed any sexual assault during the forensic interview. (R. p. 309, lines 7-9; p. 310, lines 10-15). An investigator from the South Carolina Attorney General's Office who was also trained to do forensic interviews and trained as a victim's advocate testified that Minor 2 never disclosed any sexual abuse to her. (R. p. 321, lines 14-16; p. 317, lines 12-13). Another witness who did not interview the

minors was qualified, over objection, as an expert in child abuse assessment. (R. p. 344, line 7 – p. 345, lines 1-13).

ARGUMENTS

1. The trial judge abused his discretion in refusing to sever seven different indictments naming three different child victims when the State failed to demonstrate that the three groups of alleged offenses were of the same general nature, failed to prove that the offenses arose out of a single chain of circumstances and were provable by the same evidence and the Appellant was prejudiced by the improper joint trial.

Two of the indictments, one for criminal sexual conduct with a minor first degree and one for dissemination of obscene material, indictments #2013-GS-17-0292, 0293, involved Minor. 1. Two of the indictments, one for criminal sexual conduct with a minor first degree and one for dissemination of obscene material, indictments #2013-GS-17-0328, 0294, involved Minor 2. Two of the indictments, one for criminal sexual conduct with a minor first degree and one for dissemination of obscene material, indictments #2013-GS-17-0290, 0291, involved Minor 3. The last indictment for engaging a child in a sexual performance involved all three Minors.

At the beginning of the trial the State moved to "consolidate" the seven indictments for one trial. (R. pp. 9 – 17). 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 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).

Appellant objected to the consolidation or joinder explaining that some of the children were denying that they were actually sexually battered, and arguing that the offenses do not arise out of a single chain of circumstances and the joinder results in substantial prejudice. (R. p. 11, line 24 – p. 12, 13, lines 1-18). 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.

"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. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). However, where the offenses are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. See State v. Middleton, 288 S.C. 21, 23-24, 339 S.E.2d 692, 693 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge erred in consolidating the charges for one trial where the crimes "did not arise out of a single chain of circumstances, and required different evidence for proof"); see also State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial).

First, the criminal sexual conduct with a minor first degree offense involving Minor 2 is not of the same nature as the criminal sexual conduct with a minor first degree offense involving Minors 1 and 3 because the State knew, prior to trial, that Minor 2 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). Importantly, at trial Minor 2 denied the allegation contained in the indictment. While Minor 1 also denied the allegations to one forensic interviewer, he testified as to the allegations before the jury. Minor 3 also testified to the allegation contained in the indictment before the jury. The unsupported criminal sexual conduct with a minor offense involving Minor 2 is simply not of the same general nature as the criminal sexual conduct with a minor offenses involving Minors 1 and 3. While the State certainly would have called Minor 2 as a witness to the offense involving Minor 1, he was not a witness to the offense involving Minor 3 and the joinder of the offenses involving all three minors was improper.

As to Minor 1 and Minor 3, the State failed to prove that these alleged offenses were of the same general nature. "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). The offenses involving Minor 1 and Minor 3 were not interconnected and were not of the same general nature. As discussed below, Minor 1 alleged oral sex. Minor 3 alleged anal sex with attempted oral sex. The three groups of offenses involving Minors 1, 2 and 3 were not of the same general nature.

Second, the State failed to prove that the offenses arose out of a single chain of circumstances provable by the same evidence. The three separate groups of offenses 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. Minor 3 testified that he never saw Appellant do anything to Minor 1 or Minor 2. (R. p. 239, line 19 – p. 240, lines 1-2). There was no testimony from Minor 1 about allegations involving Minor 2 and 3 and no testimony from Minor 2 about allegations involving Minor 3.

There would not have been an overlap of evidence between the offenses involving Minor 1 and the offenses involving Minor 3 had each been properly tried in a separate trial. 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). 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 failed to prove the criminal sexual conduct offense involving Minor 2. The State should have proceeded solely on the offenses involving either Minor 1 or the offenses involving Minor 3. The cases should not have been tried together. The case involving Minor 2 should never have been brought to trial at all based on the evidence as the State knew it to be.

As to the dissemination of obscene material offenses, the State failed to prove that the offense involving Minor 1 and the offense involving Minor 3 arose out of a single chain of circumstances. Neither Minor 1 nor Minor 3 testified that they viewed the material together. The offenses involving Minor 1 should have been severed from the offenses involving Minor 3.

Appellant was prejudiced by the improper joinder. Evidence of allegation made by one of the minors would not have been admissible in the trial of the other minors. The State 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 prior bad act and the alleged crime 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).

The State failed to prove a connection between the three groups of offenses. There were also substantial dissimilarities between the offenses. Minor 1 alleged oral sex. Minor 3 alleged humping or attempted anal sex and attempted oral sex. Minor 2 denied any sex. If separate trials had properly been granted, the evidence involving Minor 1 would not have been admissible in the trial involving Minor 3 and vice versa. The evidence in regard to Minor 2 would not have met the clear and convincing standard required for admission pursuant to Rule 404(b), SCRE.

2. The trial judge erred in admitting Rule 404(b) prior bad act evidence when the State failed to prove the prior act was relevant and the prior act did not meet the common scheme or plan exception to Rule 404(b).

At trial, in addition to the three separate and improperly joined cases discussed above, the State moved to offer the testimony of Minor 4 pursuant to Rule 404(b). (R. pp. 17-48). The State argued that the testimony of Minor 4 should come in as evidence of a common scheme or plan. (R. p. 30, lines 5-12). Appellant objected to the admission of the testimony arguing that the testimony did not meet the requirements of Rule 404(b). (R. pp. 34-41; 44-46). The judge granted the State's motion to admit the testimony stating:

> The State's motion to allow the Lyle evidence I think they made a good case there, and that motion is granted. And I'll also add this that over the past 22 years I've tried several cases similar to this and sometimes there are problems and sometimes there are not. And I don't see any real problem with this. And, you know, as far as the Court's point of view as far as the clear and convincing aspect of it the child was straight forward and concise. As I said as far as the Court's point of view I think that clear and convincing argue [sic] has been met. Of course what a trial jury does is up for grabs."

(R. p. 47, lines 3-15).

Appellant asked for clarification in regard to the ruling and pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). The judge responded, "Well, you got your similarities there. You've got young children. I agree with the State that you've got the degree of control, degree of authority by an adult male over children that apparently had children put in his care. And I don't think I need to go any further than to say that. What's been said and what's been argued is good enough for appellate review." (R. p. 47, line 22 – p. 48, lines 1-3). Appellant renewed the objection to the prior bad act testimony of Minor 4 prior to Minor 4 testifying. (R. p. 245, line 21 – p. 246, lines 1-23). Appellant moved to exclude the prior bad act evidence. (R. p. 248, line 15 – p. 249, lines 1-11). The judge again overruled the objection and denied the motion to

exclude. (R. p. 249, line 12). The trial judge erred.

In State v. Wallace, 384 S.C. 428, 433, 83 S.E.2d 275, 277 (2009), the South Carolina Supreme Court wrote, "The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant. Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence." The testimony of Minor 4 was not relevant and did not meet an exception to Rule 404(b).

In regard to relevance the State argued, "Judge, as it relates to Lyle, 401 is the first consideration. Relevance, I don't think that there is any question that the testimony here is relevant." (R. p. 30, lines 5-7). The State offered no other explanation as to why the testimony of Minor 4 is relevant to the offense involving Minors 1, 2 and 3. Rule 401, SCRE defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without it." The only relevance of the prior bad act involving Minor 4 is to show that because Appellant 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). During the pre-trial hearing to determine the admissibility of the testimony of Minor 4 the State argued that the similarities between the cases outweighed the dissimilarities. (R. p. 31, lines 6-14). The prosecutor told the trial judge:

> It's oral sex. The age of the victims are similar. They're very young individuals. The sex of the victims is the same. They are little boys. And, finally, there is a position of authority to some degree over these victims. In this case Sammy Scarborough was the uncle or great uncle by marriage of Minor 4. In the other cases there are no relationship by blood. But Mr. Sammy is what they called him in the neighborhood, he kept them throughout the neighborhood. It was very common to go over to his house to play. It was a very common thing.

Appellant argued that while all four of the child witnesses were under eleven years of age and boys, their ages differed. (R. p. 38, lines 12-21). 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). S.C. Code §16-3-655 requires the minor to be less than eleven years of age.

Appellant argued that the relationships between Appellant and Minor 4 and Appellant and the other minors were different. (R. p. 38, line 22 – p. 39, lines 1-13). Minors 1, 2, and 3 were neighbors of Appellant. Minor 4 is Appellant's nephew and Appellant was a babysitter for Minor 4. There is no evidence in the record that Appellant was the babysitter for Minors 1, 2 or 3. The grandmother of Minors 1 and 2 testified that she saw Appellant playing kick ball with her grandson's one time. (R. p. 146, line 23 – p. 147, lines 1-10). There was no testimony presented, however, that Appellant was in a position of authority over Minors 1, 2 and 3 .

Appellant argued that 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), Minor 2 alleged an incident outside at Appellant's house, (R. p. 214, line 23 – p. 215, lines 1-4) and Minor 3 alleged an incident in Appellant's backyard. (R. p. 232, lines 19-21).

Appellant also argued that 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 Appellant tried to hump him. (R. p. 232, lines 16-21). He later testified that Appellant 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 simply does not constitute the common scheme or plan exception of 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.

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.

3. The trial judge abused his discretion in refusing to declare a mistrial after Minor 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 Minor 2 had earlier denied the allegations contained in the indictment.

After the testimony of the three minors and after Minor 2 denied the allegation contained in indictment #2013-GS-17-328 for criminal sexual conduct with a minor first degree and after the State failed to prove the allegations contained in indictment #2013-GS-17-710, engaging a child in sexual performance,[1] Appellant renewed his objection to the prior bad act evidence and moved for a mistrial. (R. p. 245, line 21 – p. 246, p. 247, lines 1-3). Appellant argued that the State's failure to prove allegations, after Appellant unsuccessfully moved for severance, warranted the granting of a mistrial. Alternatively, Appellant argued that the State's failure to prove the allegation in regard to Minor 2 further supported the objection to the prior bad act evidence.

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

[1] At the end of the State's case, the State "withdrew" indictment #2013-GS-17-710, engaging a child in sexual performance and indictment #2013-GS-17-328, criminal sexual conduct with a minor first degree, involving Minor 2. (R. p. 367, lines 8-16).

> 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 Appellant never touched him and he never touched Appellant. (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 was not supported by probable cause. Rule 3.8(a) Rules 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 consistently 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 lacking in probable cause. The fact that the indictment was "withdrawn" does not cure the prejudice.

4. The trial judge erred in refusing to direct a verdict of acquittal on the three dissemination of obscene material charges when the State did not introduce in evidence any purported obscene material and relied only on the testimony of the child witnesses.

At the close of the State's case Appellant moved for a directed verdict of acquittal as to all three dissemination of obscene material charges, indictments #2013-GS-17-291, 293 and 294. (R. pp. 368-375). The judge denied the motion stating, "Well, the record will speak for that. Right now I'm going to overrule the objection. However, on that 291 I may come back a revisit that later on." (R. p. 375, lines 8-10). The trial judge erred.

The three indictments for dissemination of obscene material were based solely on the testimony of the minors. The police never searched for or recovered any obscene material from Appellant's house. Minor 1 testified, "He [Appellant] showed me a magazine with naked girls and naked boys." (R. p. 184, lines 2-3). Minor 2 testified that Appellant 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 that on one occasion Appellant showed him a nasty magazine with girls and boys with their clothes off humping. (R. p. 237, lines 11-24).

The minors' testimony does not establish that the material shown constituted obscene material pursuant to S.C. Code §16-15-305. In State v. Brouwer, 346 S.C. 375, 379, 550 S.E.2d 915, 917 (Ct. App. 2001), the South Carolina Court of Appeals wrote, "In considering a directed verdict motion, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). On appeal of a criminal case, the reviewing court considers the evidence in the light most favorable to the State. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). If any direct or substantial circumstantial evidence exists which reasonably tends to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced, this

Court must find the trial court properly submitted the case to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000). Viewing the evidence in the light most favorable to the State, the testimony of the minors is simply not sufficient to establish that the material they testified to seeing obscene material pursuant to the statute. The trial judge erred in refusing to direct a verdict of acquittal for the dissemination charges.

CONCLUSION

Based on the arguments contained in issues one, two and three, the convictions and sentences should be reversed and the cases remanded for a new trial. Based on the argument in issue four, the three dissemination charges should be reversed and a directed verdict of acquittal ordered.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMMY LEE SCARBOROUGH,

APPELLANT

APPELLATE CASE NO. 2013-002458

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of February, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of February, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.