THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of General Sessions
Paul M. Burch, Circuit Court Judge

Opinion No. 2016-UP-074 (S.C. Ct. App. filed February 24, 2016)
Appellate Case No. 2016-000918

State of South Carolina, ... Respondent,

v.

Sammy Lee Scarborough, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals properly affirm the trial court's grant of the State's motion to consolidate the three victims' cases because they arose out of a single chain of circumstances, were proved by the same evidence, were of the same general nature, and because Petitioner's substantive rights were not prejudiced?

II. Did the Court of Appeals properly affirm the trial court's admission of testimony of prior and other bad acts by Petitioner because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)?

III. Did the Court of Appeals properly affirm the trial court's denial of Petitioner's motion for mistrial because even though Victim 2 denied the allegations in one indictment and did not disclose abuse to the forensic interviewer or investigator and the State subsequently withdrew that indictment, the consolidation of the three cases was proper based on what the State believed, in good faith, the evidence would show?

IV. Did the Court of Appeals properly affirm the trial court's denial of Petitioner's directed verdict motion on the three dissemination of obscene material charges because S.C. Code § 16-15-305 does not require that the actual obscene material be introduced and because the evidence presented, the victims' testimony, reasonably tended to prove the guilt of the accused?

STATEMENT OF THE CASE

Procedural History

A Dillon County Grand Jury indicted Petitioner for three counts of first-degree criminal sexual conduct (CSC) with a minor, three counts of dissemination of obscene material, and one count of engaging a child in sexual performance. (R.459-71) On November 4–6, 2013, Petitioner proceeded to a trial before the Honorable Paul M. Burch and a jury. Kyle M. Hobbs, Esquire, represented Petitioner, and Assistant Solicitor Shipp Daniel and Assistant Attorney General Kelly W. Hall represented Respondent (the State). After the State rested, it withdrew two indictments: 2013-GS-17-710, engaging a child under 18 for sexual performance, and 2013-GS-17-328, first-degree CSC with a minor as to Victim 2. The jury found Petitioner guilty of all remaining charges, and Judge Burch sentenced him to two concurrent life sentences for the two counts of first-degree CSC with a minor and three concurrent five-year sentences for the three counts of dissemination of obscene material. (R. 455) Petitioner timely filed a notice of intent to appeal his conviction and sentence as well as a brief in support of his appeal, and the State filed a brief in response.

On February 24, 2016, the South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. *State v. Scarborough*, Op. No. 2016-UP-074 (S.C. Ct. App. filed February 24, 2016) (App.1–3). Petitioner filed a petition for rehearing on March 4, 2016, which was denied on April 4, 2016. (App.4–16, 18). A Petition for Writ of Certiorari to the Court of Appeals was submitted on May 4, 2016, and this Return follows.

Factual Background

On May 25, 2012, Q. Murphy (Mother) reported to the City of Dillon Police Department that her sons, Victim 1 and Victim 2, had been sexually molested. (R. 100, line 19-R. 101, line 6.) After interviewing the victims, Detective Jason Turner obtained warrants on Petitioner and

unsuccessfully attempted to arrest him at his home. (R. 108, line 13-R. 109, line 3.) The Department was finally able to locate Petitioner in Virginia around February 2013 and he was arrested and returned to South Carolina. (R. 114, line 19-R. 115, line 1.) He was charged with three counts of first-degree CSC with a minor, three counts of dissemination of obscene material, and one count of engaging a child in sexual performance and proceeded to trial in November 2013.

Pretrial, the State moved to consolidate the cases involving all three victims, arguing they were of the same general nature, that each victim was a necessary witness for the others, and that they were closely related in kind, place, and character in accordance with *State v. Jones*, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996). (R. 9, line 20-R. 11, line 22.) Defense counsel argued allowing the cases to be tried together would create substantial prejudice against Petitioner. (R. 11, line 24-R. 13, line 18.) After listening to the arguments of both counsel, the trial judge granted the motion to consolidate based on the factors from the *Jones* case and in the interest of judicial economy. (R. 17, lines 3-7.)

Next, the State moved to allow a fourth victim to testify under *Lyle*[1] regarding sexual abuse by Petitioner that was previously handled in the Family Court. (R. 17, line 20-R. 18, line 4.) The State called Victim 4 outside the presence of the jury. (R. 18, lines 4-8.) Victim 4 testified that when he was three years old, Petitioner made him put Petitioner's "private" in his mouth while they were in his truck at a store. (R. 25, line 19-R. 26, line 21; R. 28, lines 15-20.) The State then argued Victim 4's testimony should be admitted under *Lyle* because, in accordance with the Wallace[2] case, the similarities outweighed the dissimilarities. (R. 30, line 5-R. 31, line 14.) Specifically, the State pointed out the following similarities between the

[1] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).
[2] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

evidence it would present at trial regarding the three victims and the testimony from Victim 4: (1) manner of sex (oral), (2) age of victims, (3) gender of victims, and (4) position of authority of Petitioner over victims. (R. 31, line 11-R. 32, line 2.) The State acknowledged the only dissimilarity was the location because the three victims all said it happened at the same place while Victim 4 testified it happened in a different place. (R. 32, lines 4-7.) Defense counsel argued a three-year-old would not be able to remember what happened to him and disagreed that the matters were highly similar. (R. 34, lines 20-25; R. 36, lines 21-23.) He also argued psychological and physical differences exist between three-year-olds and six-year-olds. (R. 38, lines 12-21.) However, he conceded the gender and ages of the boys were similarities. (R. 40, line 23-R. 41, line 1.)

The trial court granted the State's motion, finding the testimony Victim 4 provided was straightforward and concise and determined it met the clear and convincing standard to allow the testimony to be admitted under *Lyle*. (R. 46, line 16-R. 47, line 15.) At that point, defense counsel asked the trial court to elaborate on its ruling based on *Wallace*. (R. 47, lines 17-21.) The trial court specifically named degree of control and authority of an adult over children who were put in his care and said the rest of the similarities had been argued adequately for appellate review. (R. 47, line 22-R. 48, line 3.) Right before the trial began, Petitioner renewed his *Lyle* motion, and the trial judge stood by his previous ruling. (R. 83, line 15-R. 84, line 7.)

Larry Jason Turner of the City of Dillon Police Department testified regarding Mother's reporting of her sons' molestation. (R. 100, line 19-R. 1012, line 6.) He testified that he interviewed each victim separately, obtaining enough information to start an investigation. (R. 102, line 6-R. 105, line 20.) Each victim disclosed that he was abused and described where the abuse happened, and Turner was able to isolate the abuse to a range of dates based on when the

family moved in beside Petitioner. (R. 102, line 19-R. 103, line 10; R. 103, line 24-R. 105, line 11.) Turner opined without objection that it was not uncommon for children to be unable to identify an exact date for abuse. (R. 104, lines 12-22.) He arranged forensic interviews for both victims for May 29, 2012, and drove the family to the Care House in Florence for the interviews. (R. 106, lines 6-15.) As a result of the interviews, Turner learned of a third victim, whom he interviewed as soon as he returned to the police station. (R. 107, lines 13-22.) Victim 3 disclosed abuse, where the abuse happened, and the date he reported it to his mother. (R. 108, lines 2-12.) Turner testified he signed warrants for Petitioner on June 13, 2012, based on information received from the three victims. (R. 108, lines 13-20.) On cross-examination, Turner admitted he did not search Petitioner's house for obscene materials. (R. 124, line 24-R. 126, line 1.)

Victim 1 and 2's grandmother (Grandmother) testified next. (R. 137, lines 16-23.) She testified her daughter came to her and asked her to talk to the victims to find out whether they were telling the truth. (R. 141, line 18-R. 142, line 6.) When she talked to Victim 1, he did not disclose sexual abuse at first. (R. 142, lines 15-22.) After she asked him again, he disclosed he had been touched inappropriately at Petitioner's house. (R. 143, lines 9-21.) She testified Victim 1 acted nervous and scared and looked down a lot while they talked. (R. 142, line 23-R. 143, line 3; R. 144, lines 3-12.) Victim 2 did not make a disclosure about sexual abuse to Grandmother. (R. 144, lines 13-20.) She reported the victims were not exposed to sexual things at her house. (R. 144, line 21-R. 145, line 13.) She testified Victim 1 sometimes screams at night, saying, "Stop. Get away." (R. 145, line 23-R. 146, line 3.)

Next, Victim 1 took the stand and testified that Petitioner "put his ding a ding in my throat and made me choke" in Petitioner's barn. (R. 181, lines 10-16; R. 186, lines 5-12.) He

also testified Petitioner showed him pictures of naked girls and boys in a magazine. (R. 183, line 22-R. 184, line 5.) He denied that his cousin Stefan ever touched him or tried to make Victim 1 touch Stefan. (R. 187, lines 1-11.) He testified Petitioner gave him balloons. (R. 187, lines 18-22.) On cross-examination, Victim 1 described the barn as red with a white edge across it and again testified Petitioner "made me suck his ding a ding." (R. 192, lines 10-22.)

Victim 2 testified Petitioner showed him pictures of gay boys with their clothes off humping. (R. 210, line 9-R. 212, line 15.) He testified he saw his cousin Stefan touch Victim 1's penis and saw Petitioner touch Victim 1's penis. (R. 212, line 16-R. 213, line 12.) He testified Petitioner gave him candy and balloons and that he played kickball and basketball at Petitioner's house. (R. 205, lines 8-14; R. 213, lines 20-25.)

Victim 3's mother testified the neighborhood children all spent time at Petitioner's house, including the three victims. (R. 219, lines 10-24.) She testified Petitioner gave the children candy, balloons, and a football. (R. 219, line 25-R. 220, line 9.) She reported that her son, Victim 3, disclosed in November 2011 that he had been sexually abused in the backyard at Petitioner's house. (R. 220, lines 10-17.) She admitted she did not go to the police. (R. 220, lines 18-23.)

Victim 3 testified Petitioner tried to hump him in Petitioner's backyard. (R. 232, lines 17-21.) He reported Petitioner gave him a football and a balloon. (R. 233, lines 3-4.) He testified he saw Petitioner's "turtle" when he was at the back of Petitioner's yard. (R. 235, lines 18-24.) He further elaborated that Petitioner tried to put his "turtle" in Victim 3's butt and that it hurt. (R. 236, lines 4-12.) He also testified Petitioner showed him a nasty magazine with boys and girls humping with their clothes off. (R. 237, lines 11-24.) He stated that when Petitioner was humping him, Petitioner touched Victim 3's "turtle" and squeezed it, which he testified hurt.

(R. 238, lines 5-11.) He further testified Petitioner tried to make him suck Petitioner's "turtle" but he did not. (R. 240, lines 9-19.) On cross-examination, Victim 3 admitted he told the lady he talked to (the forensic interviewer) that Petitioner had not touched his butt and that he had never taken his clothes off around Petitioner. (R. 243, lines 1-6.) However, he agreed that he was now saying Petitioner did touch his butt. (R. 243, lines 7-9.) He also testified Petitioner put his head to Petitioner's "thing." (R. 243, lines 10-16.)

After Victim 3 finished testifying, Petitioner renewed his objection to the *Lyle* evidence, arguing that the State had not presented evidence that all three victims were sexually abused because Victim 2 denied any abuse. (R. 245, line 21-R. 246, line 23.) He also moved for a mistrial. (R. 246, lines 24-25.) The State argued Petitioner was essentially making a directed verdict motion and should wait until the appropriate time. (R. 247, lines 4-6.) The State admitted children say different things at different times and argued the fact the cases were consolidated based on what the State believed the evidence would show demonstrated good faith and that the mistrial motion should be denied. (R. 247, line 6-R. 248, line 14.) The trial court agreed and denied the motion. (R. 249, line 12.)

Victim 4's mother testified Petitioner is her uncle by marriage and that Victim 4 spent a lot of time around Petitioner, seeing him almost every day. (R. 258, line 7-R. 259, line 6.) Petitioner babysat Victim 4 for about a year between the ages of two and four. (R. 259, lines 7-12.) When Victim 4 was four years old, he reported sexual abuse to his mother.[3] (R. 259, lines 13-17.) She testified he told her it happened in Petitioner's truck. (R. 259, lines 18-21.) She confronted Petitioner about the abuse and he started laughing. (R. 260, lines 6-10.) She then reported it to the police and took Victim 4 to the Care House for a forensic interview. (R. 260,

[3] Although Victim 4's mother testified Victim 4 was four years old when he reported the sexual abuse, Victim 4 testified he was three years old when it occurred.

lines 18-25.) Criminal charges were never brought, and the matter was addressed in the Family Court. (R. 261, lines 2-11.)

Victim 4 testified that he saw Petitioner's "private part" while they were in his truck. (R. 279, lines 11-18.) He stated that Petitioner had his pants unbuttoned with his "private part" sticking out of the pants and that he made Victim 4 touch it with his lips. (R. 280, lines 3-14.) Victim 4 testified Petitioner's "private part" was in his mouth for a second and that it made him feel bad. (R. 280, lines 17-24.)

Sally Williamson, the forensic interviewer from Care House, testified regarding her interviews with Victims 1, 2, and 3. Victims 1 and 2 did not disclose sexual abuse to her. (R. 296, lines 10-11; R. 311, lines 10-15.) Victim 3 did disclose sexual abuse to her. (R. 302, lines 3-5.) Valerie Williams, the investigator from the SC Attorney General's Office, testified she met all the victims as part of the State's preparation for trial. (R. 317, line 19-R. 319, line 17.) Victim 1 disclosed sexual abuse to her, but Victim 2 did not. (R. 320, lines 19-21; R. 321, lines 14-16.) Victim 3 also disclosed sexual abuse to her. (R. 321, line 17-R. 322, line 1.)

Gaye Allen Cook testified next as an expert in child abuse assessment. (R. 344, line 7-R. 345, line 13.) She testified children do not always report sexual abuse and explained how disclosure is a process. (R. 346, line 9-R. 347, line 19.) She also explained delayed disclosure and opined that 95-96% of the children she has treated delayed disclosure of their abuse. (R. 347, line 20-R. 349, line 3.)

After the State rested, it withdrew two of the charges: engaging a child under 18 for sexual performance and first-degree CSC with a minor as to Victim 2. (R. 367, lines 8-16.) Petitioner then moved for a directed verdict on the first-degree CSC with a minor charge as to Victim 3 because Victim 3 admitted he told the forensic interviewer Petitioner did not touch him.

(R. 367, lines 18-25.) The State argued direct evidence was presented by Victim 3 that Petitioner put his "turtle" in his butt and it hurt. (R. 368, lines 8-13.) The trial court denied the motion. (R. 368, lines 14-15.) Petitioner then moved for directed verdict on the obscene dissemination charge as to Victim 3, arguing no material was presented into evidence. (R. 368, line 16-R. 369, line 24.) The State argued the statute does not require the obscene material to be introduced and that Victim 3's testimony was sufficient. (R. 369, line 25-R. 370, line 5.) The trial court denied the motion. (R. 372, lines 18-19.) Subsequently, Petitioner moved for directed verdict on the other two obscene dissemination charges as to Victims 1 and 2. (R. 372, line 20-R. 373, line 15.) The State argued there was more detail provided in Victim 1 and 2's testimony than Victim 3's. Specifically, the State pointed out the victims talked about pictures of gay sex, boys and girls without clothes on, and boys and girls humping. (R. 373, line 16-R. 374, line 14.) The trial court denied that motion too. (R. 374, line 15.) Finally, Petitioner moved for directed verdict on the first-degree CSC with a minor charge as to Victim 1, arguing Victim 1 testified initially on the stand that nothing occurred, and then later testified something did occur, in direct contradiction to the forensic interviewer's statement that he had never disclosed any sexual abuse. (R. 375, line 24-R. 376, line 12.) The trial court denied the motion, noting it was for the jury to decide. (R. 376, lines 13-15.) Petitioner then renewed his motion for a mistrial in regard to the *Lyle* evidence, which the trial court again denied. (R. 376, line 16-R. 378, line 13.)

In his charge to the jury, the trial judge went over the limitations of evidence of other crimes or prior bad acts and read the statutes to the jury, including the one for dissemination of obscenity. (R. 428-434.) The jury found Petitioner guilty of all five charges, and Judge Burch sentenced him to life imprisonment for each of the two first-degree CSC with a minor charges

and five years' imprisonment for each of the three dissemination of obscene material charges. (R. 455.)

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court's grant of the State's motion to consolidate the three victims' cases because they arose out of a single chain of circumstances, were proved by the same evidence, were of the same general nature, and because Petitioner's substantive rights were not prejudiced.

On appeal to the Court of Appeals, Petitioner argued the trial judge abused his discretion in refusing to sever seven different indictments naming three different child victims, claiming the State failed to demonstrate that the three groups of alleged offenses were of the same general nature, arose out of a single chain of circumstances, and were provable by the same evidence. He also argued Petitioner was prejudiced by the joint trial. The State submits the trial judge correctly consolidated the cases and the Court of Appeals properly affirmed the grant of the State's motion to consolidate.

A defendant has "no inalienable right" to be tried separately for each indicted offense when charged with multiple crimes. *McCrary v. State*, 249 S.C. 14, 38, 152 S.E.2d 235, 247 (1967). "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. Rice*, 368 S.C. 610, 614, 629 S.E.2d 393, 394 (Ct. App. 2006); *State v. Smith*, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996); *State v. Jones*, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *State v. Beekman*, Op.

No. 27623 (S.C. Sup. Ct. filed Apr. 13, 2016) (Shearouse Adv. Sh. No. 15 at 39, 42); *State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)); *State v. Carter*, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996); *State v. Anderson*, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). "The court's ruling will not be disturbed on appeal absent an abuse of that discretion." *Simmons*, 352 S.C. at 350, 573 S.E.2d at 860 (citing *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265); *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993); *State v. Deal*, 319 S.C. 49, 459 S.E.2d 93 (Ct. App. 1995). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002).

The fact that the indictments involved three different victims did not require severance of the charges. In *Jones*, "the offenses charged were of the same general nature involving allegations of a pattern of sexual abuse involving the two minor victims . . . [who] had been taken to the same location . . . ." *Id.* at 315, 479 S.E.2d at 520. In *State v. Cutro*, 365 S.C. 366, 369-75, 618 S.E.2d 890, 891-95 (2005), this Court affirmed the circuit court's denial of Petitioner's motion to sever charges involving three victims, where Cutro was charged with two counts of homicide by child abuse and one count of assault and battery involving incidents all occurring at different times with different children. Here, the cases were closely related in kind, place, and character. Furthermore, each victim was a necessary and material witness to the other victims' cases. All victims were between the ages of four and six when the abuse occurred.[4] All were subjected to oral or anal sex and were shown pornographic material. The abuse occurred in Petitioner's backyard or barn area, and all the victims had similar relationships with Petitioner as

[4] The State argued to the trial judge during its motion to consolidate that the age range of the victims at the time of the abuse was between five and eight years of age, but the record indicates the ages were between four and six.

a close neighbor with whom they spent time and from whom they received gifts such as candy and balloons. The offenses charged were of the same general nature and were interconnected. Moreover, the trial judge's consolidation of the charges was consistent with principles of judicial economy while also ensuring that the minor victims would not be unnecessarily subjected to repeated appearances in court for multiple trials to testify multiple times about the abuse they suffered at Petitioner's hands.

Pretrial, Petitioner argued consolidating the cases would create a substantial prejudice against Petitioner. Specifically, he argued all the victims denied they were sexually battered and, thus, the cumulative effect of their testimony—"It wasn't me. It was him. It wasn't me."—would invoke emotion in the jury to believe something occurred and wrongfully convict Petitioner. (R. 12, lines 16-22.) On the contrary, the State explained in its motion to consolidate that all the victims were subjected to acts of abuse to include oral and anal sex. And during the trial, Victim 1 and Victim 3 testified to being sexually abused by Petitioner, while Officer Turner testified Victim 2 disclosed to him that he was sexually abuse by Petitioner. The testimony demonstrated each of the three victims made a disclosure of sexual abuse at the hands of Petitioner. Therefore, Petitioner's argument that he was prejudiced because of the victims' denial of sexual battery is without merit. Thus, he has not shown prejudice as a result of the consolidation of cases.

In *State v. Grace*, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002) (*cert. denied*), the Court of Appeals addressed the issue of consolidation. The Court determined the circuit court properly exercised its discretion in joining Grace's charges of criminal sexual conduct and lewd act. The Court based its decision on the fact that the charges were of the same general nature, finding they were all sexual misconduct crimes, they occurred in the same location, the evidence showed a

pattern of abuse, and most of the witnesses were the same. *Id.* at 24, 564 S.E.2d at 333. Here, the charges were also of the same general nature: all were sexual misconduct crimes, occurred in Petitioner's backyard or barn, showed a pattern of abuse involving oral and anal sexual abuse, and shared the same witnesses. Additionally, similarities existed among the victims: all boys between the ages of four and six when the abuse occurred. Just as the trial court was correct in its decision to consolidate the charges in *Grace*, so it was here. Because motions concerning consolidation and severance will not be reversed absent an abuse of discretion, the Court of Appeals was correct in affirming the trial court's decision.

In *State v. McGaha*, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013), the Court of Appeals addressed when charges can be joined in the same indictment and tried together based on this Court's opinion in *State v. Harris*, 351 S.C. 643, 572 S.E.2d 267 (2002). Separate charges can be tried together when 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 [substantive] right of the defendant has been prejudiced." *McGaha*, 404 S.C. at 293–94, 744 S.E.2d at 604 (quoting *Harris*, 351 S.C. at 652, 572 S.E.2d at 272).

Petitioner argues the Court of Appeals erred in basing its opinion on *McGaha*. Specifically, he makes much of the fact that the Court in *McGaha* noted the time periods "overlapped almost precisely" and points out that here the indictment involving Victim 1 was between January 1, 2010, and May 25, 2012, whereas the indictment involving Victim 3 was between November 1, 2011, and May 25, 2012. The State submits the overlap of the timeframes here was very similar to the one in *McGaha*. Just as here, in *McGaha* one victim's abuse began earlier than the others but they both ran through the same date. (In *McGaha*, Dana was abused between March 2009 and August 2010, and Elaina between May 2009 and August 2010.) The

main difference was that in *McGaha*, the timeframes began only a couple of months apart while here, the timeframes began over a year apart. However, the fact remains that a portion of the abuse overlapped in both cases and neither had the exact same timeframe. Thus, the difference noted by Petitioner is of no moment.

Next, Petitioner argues "the varying allegations in the present case" were not identical like he claims the allegations were in *McGaha*. However, our appellate courts have never required allegations to be "identical"; rather, the charges must be "of the same **general** nature." Again, Petitioner's attempt to distinguish *McGaha* fails.

Finally, Petitioner claims different evidence was used to prove the allegations of Victims 1 and 3 and argues *McGaha* is distinguishable because the charges there were proven by the same evidence through the same witnesses. As noted above, each victim here was a necessary and material witness to the other victims' cases. Additionally, Officer Turner's testimony involved all victims. The Court of Appeals properly affirmed the trial court's consolidation ruling and the petition for a writ of certiorari should be denied.

II.

The Court of Appeals properly affirmed the trial court's admission of testimony of prior and other bad acts by Petitioner because the acts were admissible as part of a common scheme or plan under Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

On appeal to the Court of Appeals, Petitioner contended the trial court erred in allowing the State to admit the testimony of Victim 4 regarding other bad acts by Petitioner. He argued Victim 4's testimony was irrelevant and did not fit the common scheme or plan exception to Rule 404(b), SCRE. He continues to advance this argument in his petition for a writ of certiorari. The State submits that Petitioner's argument is without merit because the trial court properly considered and subsequently allowed the evidence of Victim 4's sexual abuse by

Petitioner as part of a common scheme or plan based on the similarities to the acts charged. The Court of Appeals properly affirmed the trial court's ruling and this Court should deny certiorari.

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). Proof of prior bad acts must be clear and convincing if they are not the subject of a conviction. *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997); *State v. Weaverling*, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999). Even if the evidence is clear and convincing and falls within a *Lyle* exception, the trial judge must exclude the evidence if 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).

Prior to trial, the State moved *in limine* to admit the testimony of Victim 4 regarding sexual abuse by Petitioner. Victim 4 testified in camera that Petitioner was known to him as an uncle, though he was not certain they were actually related. When Victim 4 was three years old, Petitioner made Victim 4 put his penis in his mouth while they were in Petitioner's truck outside a store.

Victim 4's allegations were clear and convincing. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). In *Fletcher*, the Court found clear and convincing evidence did not exist when no testimony named Fletcher as the person who handcuffed the victim or placed him in the attic. *Id.* Here, the State

provided direct evidence through Victim 4's testimony that Petitioner made him put Petitioner's penis in his mouth. Victim 4 provided particular details of the abuse, recalling it happened in Petitioner's truck outside a store. (R. 25, line 19-R. 26, line 21.) Additionally, the State asked the trial court to take judicial notice that the Family Court found by a preponderance of the evidence that Petitioner committed sexual abuse and consequently placed him on the central registry. (R. 30, lines 13-21.) This was sufficient to meet the clear and convincing standard of proof.

"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 277-78. In *Wallace*, this Court provided some factors to consider including: (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. *Id.* at 433-34, 683 S.E.2d at 278.

Victim 4's testimony was sufficiently similar to the testimony of the three victims to be admissible. All four testified to being similar ages during the sexual abuse, from age three to age six. The type of abuse was similar because it involved oral and anal sex. Each victim was male. Petitioner was in a position of authority over each of the victims. Petitioner was an uncle by marriage of Victim 4 and babysat him on a regular basis and was a neighbor to the other victims, regularly keeping them and having them over to his house to play. (R. 31, lines 17-24; R. 219, lines 19-24; R. 258, line 21-R. 259, line 12.) The only dissimilarity was the location where the

abuse occurred. The three victims were abused in Petitioner's backyard or barn, while Victim 4 was abused in Petitioner's truck outside a store. The similarities in this case certainly outweigh the slight difference of where the abuse occurred. Notably, Petitioner conceded the ages and genders of the victims were similarities. (R. 40, lines 24-R. 41, line 1.)

Petitioner argued to the Court of Appeals that the testimony by Victim 4 was not relevant and only showed Petitioner must have committed the crimes charged because he was connected to a prior bad act. Petitioner argues "[t]here is nothing unique or connecting which makes the prior bad act with [Victim] 4 relevant." (Petition p.15–16.) However, due to the similarities between Victim 4's sexual abuse and the abuse that happened to the other three victims—young boys between the ages of four and six, Petitioner having a position of authority over them, and the types of abuse: anal and oral—there were unique characteristics that connected the three victims to Victim 4.

The trial judge found Victim 4's testimony clear and convincing, noted the similarity in the victims' ages, and agreed with the State that Petitioner had a degree of authority over the child victims. He appropriately admitted the *Lyle* evidence based on his judgment that the similarities outweighed the dissimilarities. The Court of Appeals correctly concluded the trial court properly allowed Victim 4 to testify under the common scheme or plan exception to Rule 404(b), SCRE. The petition for a writ of certiorari should be denied.

III.

The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for mistrial because even though Victim 2 denied the allegations in one indictment and did not disclose abuse to the forensic interviewer or investigator and the State subsequently withdrew that indictment, the consolidation of the three cases was proper based on what the State believed, in good faith, the evidence would show.

Petitioner argued to the Court of Appeals that the trial judge abused his discretion in refusing to declare a mistrial after Victim 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 Victim 2 had earlier denied the allegations contained in the indictment. Specifically, he maintains the State had a duty to refrain from prosecuting a charge it knew was not supported by probable cause. However, Officer Larry Jason Turner testified Victim 2 disclosed to him that he was sexually abused. The State submits that Petitioner's argument is without merit because the State brought the charge based on the evidence it possessed at the beginning of the trial and did not know that Victim 2 would fail to disclose the abuse during his testimony. Furthermore, the State acted in good faith based on the evidence it possessed and subsequently made a prudent decision not to go forward on the charge based on what was ultimately presented by Victim 2 at trial. The trial court properly denied the motion for mistrial and the Court of Appeals properly affirmed its ruling.

The "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007). "The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show **both error and prejudice** in order to be entitled to a mistrial." *Id.* at 585-86, 698 S.E.2d at 865 (emphasis added). "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *Id.* at 586, 698 S.E.2d at 865

(citation and internal quotation marks omitted). "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Id.* at 586, 698 S.E.2d at 865-66 (citation and internal quotation marks omitted). The trial court is in the best position to ascertain the potential prejudicial effect of any offending testimony and the Supreme Court favors the exercise of wide discretion of the circuit court in ruling on a motion for mistrial in each individual case. *State v. Jones*, 325 S.C. 310, 324, 479 S.E.2d 517, 524 (Ct. App. 1996).

Here, the State based its charges against Petitioner on the initial report prepared by the police, which included a disclosure by Victim 2 of sexual abuse by Petitioner. Petitioner based his argument for mistrial on the fact that Victim 2 did not testify at trial to being sexually abused. (R. 246, lines 18-25.) Petitioner stated in his brief and again in his petition for a writ of certiorari, "This is not a case where the prosecution was surprised because a witness changed his story on the stand." (App. Br. 21; Petition p.22.) It is true that the State admitted it was well aware from the beginning that the case involved "little children who say different things almost every time you talk to [them]." (R. 247, lines 6-9.) The State further admitted it was well aware it may have to pull the indictment against Victim 2 based on what he said before trial. (R. 247, lines 12-15.) However, simply because the State knew there was a possibility Victim 2 might not disclose on the stand does not mean it should not have attempted to prosecute a crime it knew occurred based on Victim 2's statement to police.

During the motion to consolidate, Petitioner had the opportunity to argue Victim 2 had not disclosed abuse. However, rather than specifically arguing about Victim 2's failure to disclose to his grandmother, his aunt, the forensic interviewer, and the investigator from the Attorney General's Office—as he argued in his brief to the Court of Appeals—Petitioner only made a broad, general argument that "none of those children allege that they were actually

sexually battered." (R. 12, lines 6-7.) This is a very different argument from the one he made to the Court of Appeals and continues to make now, namely that Victim 2 denied the allegations of sexual abuse and the State knew this and had a duty to refrain from prosecuting. Petitioner focused on the fact that based on the information he had prior to trial, no victim referred to penetration. He never argued Victim 2 did not disclose at all. This indicates Petitioner knew Victim 2 disclosed to the police and was only concerned about whether the disclosure contained information supporting penetration. Thus, it is likely both parties were surprised by Victim's denial of the allegations when he took the stand. Victim 2 disclosed the abuse to his mother, who reported it to Officer Turner, who testified Victim 2 also disclosed to him. Disclosing sexual abuse to one's mother and a police officer is certainly not denial.

During the consolidation motion, the State acknowledged discrepancies existed between what the victims told the forensic interviewer and what they were now testifying occurred and explained it would present expert testimony to talk about why children may say certain things during a forensic interview and something different at trial. The State presented expert testimony by Gaye Allen Cook, who testified that forensic interviews can be very difficult for children. (R. 355, line 10-R. 357, line 4.) She explained children can be reluctant to disclose sexual abuse in such an environment and often do not disclose in that setting.

The Court of Appeals was correct in finding the trial court did not err in denying Petitioner's motion for mistrial based on Victim 2's failure to disclose sexual abuse when he took the stand at trial. Because Officer Turner had already testified Victim 2 had disclosed the sexual abuse to him, the trial court properly denied the motion. Furthermore, Petitioner has shown no prejudice resulting from the denial. *See Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865 ("A mistrial should only be granted when absolutely necessary, and a defendant must show **both**

error and prejudice in order to be entitled to a mistrial." (emphasis added)). At trial, he argued he was prejudiced because "we have lumped all of these accusations together, and now we're going to admit *Lyle* evidence based on this case but not that case." Even though Victim 2's indictment was withdrawn, the evidence from Victims 1 and 3 were sufficiently similar to Victim 4's testimony to allow it to come in under *Lyle*. Therefore, removing Victim 2's indictment did not affect the use of Victim 4's testimony and did not prejudice Petitioner. Indeed, rather than prejudice Petitioner, withdrawing the indictment based on Victim 2's inability to testify to the sexual abuse actually may have benefited Petitioner by indicating to the jury the State did not believe it had enough to convict him of a crime against Victim 2. Also, Victim 2's failure to disclose could lead the jury to question the credibility of the other two victims, also inuring to Petitioner's benefit.

The Court of Appeals correctly affirmed the trial court's ruling, and certiorari should be denied.

IV.

The Court of Appeals properly affirmed the trial court's denial of Petitioner's directed verdict motion on the three dissemination of obscene material charges because S.C. Code § 16-15-305 does not require that the actual obscene material be introduced and because the evidence presented, the victims' testimony, reasonably tended to prove the guilt of the accused.

On appeal to the Court of Appeals, Petitioner argued the trial judge erred in denying his directed verdict motion on the three dissemination of obscene material charges because the State did not introduce in evidence any purported obscene material and relied only on the testimony of the child victims.

Section 16-15-305 of the South Carolina Code provides:

> (A) It is unlawful for any person knowingly to disseminate

obscenity. A person disseminates obscenity within the meaning of this article if he:

(1) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, digital electronic file, or other representation or description of the obscene;

(2) presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene;

(3) publishes, exhibits, or otherwise makes available anything obscene to any group or individual; or

(4) exhibits, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, present, rent, or to provide: any motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, video tapes and recordings, or any matter or material of whatever form which is a representation, description, performance, or publication of the obscene.

(B) 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.

. . .

(D) **Obscenity must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or groups.**

S.C. Code Ann. § 16-15-305 (2003) (emphasis added).

Nothing in the statute requires evidence of the obscene material itself to be introduced. Indeed, Petitioner concedes this point but argues the victims' testimony "did not establish that the material was obscene." (Petition p.25). Further, he argues 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 [scientific] value." (Petition p.25). In sum, he argues "[t]he State failed to meet its burden of proving that the material was obscene." (Petition p.25). However, evidence in the form of testimony from the victims was sufficient to establish the nature of the material such that the jury could determine whether Petitioner had violated the statute. In his charge to the jury, the trial judge read the statute so the jury was fully aware of its responsibility in making its own determination of whether the terms of the statute had been met. The language of the statute makes clear the average person or a reasonable person must judge the obscenity, and this role belongs to the jury. At the directed verdict stage, all the trial court had to do was determine whether sufficient evidence was presented to allow the jury to judge the obscenity of the material according to the guidelines of the statute.

According to the language of subsection (D), the jury is allowed to judge the obscenity with reference to children if it appears from "the circumstances of its dissemination to be especially for or directed to children . . . ." S.C. Code Ann. § 16-15-305 (2003). Based on the testimony of the victims, the jury could certainly have found the material was obscene by listening to the victims' description of the content and by the circumstances in which it was shown to the child victims. Victim 1 testified Petitioner showed him pictures of naked girls and boys in a magazine. (R. 183, line 22-R. 184, line 5.) Victim 2 testified Petitioner showed him

picture of gay boys with their clothes off humping. (R. 210, line 9-R. 212, line 15.) He also testified Petitioner showed him a "nasty" magazine with boys and girls humping with their clothes off. (R. 237, lines 11-24.) Because each victim was a child and described what he saw in the magazines Petitioner showed him, the victims' testimony established the dissemination was directed to children and the jury thus could judge the materials accordingly based on the victims' descriptions.

While South Carolina has not addressed this particular issue, North Carolina addressed the issue of sufficiency of evidence in the form of the minors' testimony in reviewing the denial of a directed verdict in *State v. Hill*, 632 S.E.2d 777, 786 (N.C. Ct. App. 2006). Hill was charged with disseminating obscene material to minors. Though the issue in *Hill* revolved around Hill's defense that he was unable to provide pornographic materials to the minors because he was out of town, the court found testimony from the minors themselves that Hill provided pornography to them was sufficient to send the case to the jury to resolve.

Because no requirement to produce the actual obscene materials exists in the statute, as Petitioner now concedes, and because the State presented sufficient evidence through the victims' testimony such that the jury could find the materials the victims viewed were obscene, the trial court properly denied Petitioner's motion for directed verdict. The testimony of the victims was sufficient direct evidence to withstand the directed verdict motion and allow the case to go to the jury. The Court of Appeals properly affirmed the trial court's denial of Petitioner's directed verdict motion and this petition for a writ of certiorari should be denied.

CONCLUSION

Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

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May 24, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DILLON COUNTY
Court of General Sessions
Paul M. Burch, Circuit Court Judge

Opinion No. 2016-UP-074 (S.C. Ct. App. filed February 24, 2016)
Appellate Case No. 2016-000918

State of South Carolina, ... Respondent,

v.

Sammy Lee Scarborough, ... Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for A Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney , Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia. SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 24th day of May, 2016.

ANGELA BENNETT
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