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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable John C. Hayes, III, Circuit Court Judge

Opinion Number No. 2017-UP-158 (S.C. Ct. App. Filed April 19, 2017)

The State,

Respondent,

v.

Rion McKissick Rutledge, Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rion McKissick Rutledge, Appellant.

Appellate Case No. 2015-001408

Appeal From York County
John C. Hayes, III, Circuit Court Judge,

Unpublished Opinion No. 2017-UP-158
Submitted March 1, 2017 – Filed April 19, 2017

AFFIRMED

Stephen D. Schusterman, of Schusterman Law Firm, of Rock Hill, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

PER CURIAM: Rion Rutledge appeals his convictions of second-degree sexual exploitation of a minor and third-degree sexual exploitation of a minor, arguing (1) the trial court erred in denying his motion to sever, (2) the trial court erred in denying his motion for a directed verdict because the State failed to present

evidence he knew the content or character of the files, (3) the trial court erred in not declaring a mistrial when numerous grounds for a mistrial arose during the trial, and (4) he was deprived of a fair trial because the State's closing arguments were improper. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying his motion to sever: *State v. Caldwell*, 378 S.C. 268, 277, 662 S.E.2d 474, 479 (Ct. App. 2008) ("A motion for severance is addressed to the sound discretion of the trial court and the court['s] ruling will not be disturbed on appeal absent an abuse of that discretion."); *State v. Simmons*, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) ("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 [court] has the power, in [its] discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced."); *Caldwell*, 378 S.C. at 279, 662 S.E.2d at 480 (noting the defendant's argument he was prejudiced by the collective emotional testimony of child victims was without merit because if he were tried for each indictment separately he might "still be faced" with the collective testimony, and he failed to argue on appeal the testimony would be inadmissible in separate trials).

2. As to whether the trial court erred in denying his motion for a directed verdict: *State v. Gilliland*, 402 S.C. 389, 397, 741 S.E.2d 521, 525 (Ct. App. 2012) ("An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State."); *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *State v. Brouwer*, 346 S.C. 375, 379, 550 S.E.2d 915, 917 (Ct. App. 2001) ("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 [c]ourt must find the trial court properly submitted the case to the jury.").

3. As to whether the trial court erred in not declaring a mistrial: *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court."); *State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue."); *State v. Dicapua*, 383 S.C. 394, 399, 680 S.E.2d 292, 294 (2009) (providing the trial court lacks the authority to grant relief *sua sponte* based on grounds waived by the defendant); *State v. McEachern*, 399 S.C. 125, 146, 731 S.E.2d 604, 614 (Ct. App. 2012) (providing a party who received the relief requested could not be heard to complain on appeal).

4. As to whether he was deprived of a fair trial: *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130 (Ct. App. 2005) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review."); *id.* ("Failure to object to comments made during argument precludes appellate review of the issue.").

AFFIRMED.

WILLIAMS and KONDUROS, JJ., and LEE, A.J., concur.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

John C. Hayes, III, Judge, Sixteenth Judicial Circuit

2017-UP-158

State of South Carolina.....Respondent

v.

Rion McKissick Rutledge.....Appellant-Petitioner

PETITION FOR REHEARING
WITH
SUPPORTING CITATIONS OF AUTHORITY

On April 19, 2017, the Court of Appeals in State v Rion McKissick Rutledge, Opinion No, 2017-UP-158, affirmed the trial court's convictions of second-degree sexual exploitation of a minor and third-degree sexual exploitation of a minor. Appellant-Petitioner argued that the trial court erred in denying his motion to sever, denying his motion for a directed verdict due to the State failing to present evidence that he knew the content or character of the files, declaring a mistrial when numerous grounds arose during the trial and depriving him of a fair trial due to the State's closing arguments being improper. Petitioner would respectfully show this Court, pursuant to Rule 221(a), SCACR, the points which the Court of Appeals misapprehended or overlooked.

I.

Opinion of the Court

The Petitioner is seeking a rehearing as he is of the belief that this Court has misapprehended or overlooked his arguments.

I.

Severance

This Court overlooked or misapprehended the points of the Petitioner's arguments regarding severance of the charge of sexual exploitation of a minor in the third degree §16-15-410 (the possession of child pornography charges) from the charge of sexual exploitation of a minor in the second degree §16-15-405 (distribution or receipt of child pornography charges). This Court indicates in its Opinion that a motion for severance is in the sound discretion of this trial court and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. As explained below, the trial court did abuse its discretion in denying the motion for severance. Additionally, this Court failed to consider the prejudicial effect allowing the charges to be tried together would have on the Defendant.

The trial court abused its discretion because the decision to deny the motion was made without the benefit of any evidence but only by what the Court had been told by counsel. (R. p. 12, lines 11-13; T. p. 12, ll. 11-13). Additionally, the trial court specifically stated that it did not believe that any real right of the Appellant was violated (R. p. 12, lines 19-22), however the trial court was concerned that due to the multiple charges the jury could give more weight to the charges, despite the being told not to do so in the jury charge. (R. p. 13 lines 1-8). When the trial court expresses concern about the jury improperly giving more weight to charges than they should because the charges are tried together demonstrate that failure to sever these charges is

error. This Court, as well as the trial court, has overlooked the element of prejudice to the Appellant in allowing the indictments to be tried together. In *Drew v U.S.*, 331 F.2d 85, 88, 118 U.S.App.D.C. 11 (D.C. Cir. 1964), the Court determined that it was necessary to weigh the prejudice the Defendant may face by joinder of the charges. The Court in *Drew*, specifically stated "A defendant may be prejudiced [when a] jury may use the evidence of one of the crimes charged to infer criminal disposition...". *Id.* 'There is always a danger when several crimes are tried together that the jury may use the evidence cumulatively; that is, that although so much as would be admissible upon any of the one charges would not have persuaded them of the accused's guilt, the sum of it will convince them as to all'. *Id.* The statutes the Appellant is charged with clearly demonstrate that a jury could use the evidence cumulatively. If the jury finds, based upon the evidence, that the Appellant is guilty of distributing, transporting, exhibiting, receiving, selling, purchasing, exchanging or soliciting material containing a visual representation of a minor engaged in sexual activity, they had to find that the Appellant knew the content or character of the material It is implied in §16-15-405 that the individual possessed the material or he could not have done the acts prohibited by this Statute. As a result, the Appellant would also have to be guilty of Sexual Exploitation of a Minor Third Degree §16-15-410 because this statute requires element of knowledge and possession. However, if the cases were tried separately, this prejudice would be removed and the jury could not cumulate the evidence together or give more weight to the charges because there are multiple charges. This would seem to hold true in this case especially because out of the seven indictments three of the images are the basis for both indictments. Additionally, these basis for the charges come from two separate

investigations: one from the interception of data showing the download or sharing of a file and the other from the forensic examination of a laptop computer.

In *United States v. Lotsch,* 102 F.2d 35, 36 (2nd Cir.) cert denied., 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed 1500 (1939), the Court stated that when a trial as a whole has become too confusing to a jury, a motion to sever should be granted. In *Rutledge*, the trial court was faced with the situation of the jury, prior to deliberations, sending notes to the Judge, asking for clarification and other questions regarding the evidence. There is no greater evidence than these notes to demonstrate that the nature of this case and the technical testimony was very confusing to the jury. (R. p. 165 lines 5-10; T. p. 252, ll. 5-10) (R. p. 189, lines 15-19; T. p. 280, ll. 15-19). The trial court expressly indicated that this was a concern but still denied the motion to sever. As a result, the Petitioner submits to this Court that this denial was not only an abuse of discretion but also failed to take into consideration the prejudice the Defendant faced and confusion of the evidence to the jury.

II.

Directed Verdict

This Court overlooked or misapprehended the points of the Petitioners arguments regarding the Motion for Directed Verdict.

On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State. *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). The Petitioner submits to this Court that there was no evidence presented to the Court that he knew what the contents of these files were. The State's expert witness testified that the first file found on the laptop computer was downloaded on February 16,

2010 and was never opened or viewed on the computer. (Supp. R. p. 1, lines 5-25-pp. 118-120, lines 1-2; T. p. 154, ll. 5-25, pp. 155-157, ll. 1-2). The second file that was found on the laptop computer was downloaded on December 20, 2010 at approximately 10:20 a.m. and it was also never opened or viewed on that computer. (R. p. 121, lines 14-25; T. p. 159, ll. 14-25). The last file found on the laptop by the State's expert witness was downloaded on December 16, 2010 and also was not opened or viewed on that computer. (R. p. 122, lines 1-14; T. p. 160, ll. 1-14). Accordingly, a person cannot know the contents of something if they were never opened. The State, in its brief (p. 19-20), set forth the name of the file (and indicated the other files had similar names). The name of the file was "pictures from ranchi torpedo dloaded in 2009- pedo kdv kidzilla pthc toddlers 0yo 1 yo 2yo 3yo 4yo 5yo 6yo 9yo tara babyj (174).jpg". Although not argued at trial, the State indicates in its brief that "it would be impossible for someone not to know the character of this file from its name" This file name does not indicate any type of child pornography but appears to be more of a string of abbreviated characters making no sense to the lay person. The State's brief sets forth their opinion as to what this file name means but this evidence, to the best of the Petitioners knowledge, was not presented to the Court and the State failed to cite any testimony supporting this position. The trial court should have granted the Petitioner's motion for directed verdict on these indictments as the State failed to establish the element of "know" as required by the statute. Therefore, there is no evidence that can be viewed in the light most favorable to the State and the inference the State has made is not reasonable as it would only be made by someone who is familiar with pornography abbreviations.

As previously indicated, the file name does not indicate that the files contained depictions of a minor engaging in sexual activity. Therefore, the only way for someone to know what the

files contained was if they were opened. Repeated testimony, by both the State and the Petitioner, demonstrate that the files were never opened. Our Supreme Court has concluded that one may not shut his eyes to avoid knowing what would otherwise be obvious. *State v. Thompkins,* 263 S.C. 472, 484, 211 S.E.2d 549, 554 (1975). As previously stated, these files were not opened and the content of the files is not obvious based upon the name of the files.

Additionally, based upon the State's expert's testimony, the additional files that were found on the laptop were not actually on the computer but were actually some type of encrypted thumbnail which could only be ascertained by a forensic examination of the computer utilizing special software to obtain these files. . (R. p. 125 lines 4-8; T. p. 164, ll. 4-8).

"Knowing" is a necessary element in order to be guilty of the offense under §16-15-410. Mere possession of a laptop which was purchased used and used by others does not establish the element of knowing. In fact, the State was prohibited from entering evidence to show that the laptop was in Petitioners possession during the periods in question. (State's brief, page 6). Additionally, the State was unable to present evidence as to when these files where actually downloaded to the laptop. A directed verdict should be granted when the evidence presented by the State only raises a mere suspicion that the accused is guilty. *State v. Cherry* 348 S.C. 281, 285, 599 S.E.2d 297 (S.C. App. 2001). The Petitioner submits to this Court that it overlooked its argument regarding knowledge and the actual evidence presented by the State, rather than its opinion, does not even rise to the level of mere suspicion of his guilt.

III.

Mistrial/Unfair Trial

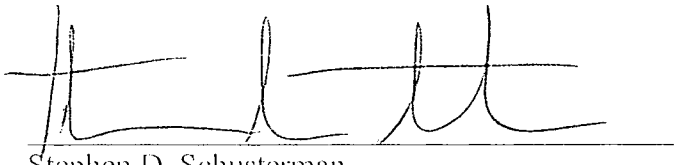
The Petitioner is of the belief that this Court overlooked or misapprehended his arguments in regard to the trial court refusing to grant a mistrial.

A mistrial may be declared without a defendant's consent or even over his objection especially when the ends of justice cannot be attained without discontinuing the trial. *Illinois v. Somerville*, 410 U.S. 458, 93, S.Ct. 1066, 1069, 35 L.Ed.2d 425 (1973). Several incidents occurred during the trial of this case that warranted a mistrial, even over the Defendant's objection. First, despite the Court ruling that certain evidence could not be admitted to the jury because its prejudicial value outweighed the probative value, the State still proceeded to present evidence of at least two dozen sexual-orientated videos, including those that mention minors, but were not part of the indictment. . (R. p. 14 lines 16-25-pp. 15-16 lines 1-10; T. p. 14, ll. 16-25, p. 15-16, ll. 1-10, R. p. 17, lines 7-11; T. p. 18, ll. 7-11, R. p. 101, lines 19-25-p. 102 lines 5-6; T. p. 135, ll. 19-25, p. 136. ll. 5-6). The State was given the opportunity to redact its exhibit, but they failed to do so, despite the Court's ruling. The un-redacted exhibit was shown to the jury during trial and submitted to the jury in the jury room. The Petitioner was highly prejudiced due to the fact that the jury was now aware, despite the Court's ruling, that additional child pornography files were present on the laptop. A curative instruction was given, but these files were also the basis of one of the juror's questions to the Court prior to deliberations. The jury also sent a note to the Court indicating that they were confused as to what evidence not to consider. (R. p. 165, lines 7-10; T. p. 252, ll. 7-10). It is apparent that the trial judge's curative instruction did not cure the prosecutorial error and the jury most probably considered evidence they never should have considered. When a curative instruction is ineffective, a mistrial should be granted.

The State also committed prosecutorial error in its closing argument that again went against the Court's initial ruling excluding the same evidence the State addressed in its closing argument. During the State's closing argument, the State, decided that despite the trial judge's ruling regarding the proffered testimony, despite not properly redacting the forensic report and despite them not offering any evidence to show that the laptop computer was not in the possession of the Appellant, they were going to draw the jurors attention to portions of the report that Investigator did not discuss. (R. p. 201, line 25-p.202-206, lines 1-13; T. p. 306, l. 25, p. 307-311, ll. 1-13). The State specifically drew the juror's attention to each and every one of the items that the Investigator Bomar testified to during his in camera testimony. Essentially, the State back-doored their way into getting the exact testimony they were prohibited to present to the jury because they failed to do so in their case-in-chief before the jury. The State exceeded the rules of fairness our laws require when presenting their closing argument and in doing so the Appellant was denied a fair trial. Additionally, this evidence, that the State failed to present in their case-in-chief, in effect denied the Appellant of a fair determination of his guilt or innocence. "The prejudicial effect of prosecutorial misconduct is determined by the cumulative effect of such misconduct, the strength of properly admitted evidence of the defendant's guilt and the court's curative instructions. *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31, 45 (S.C. 2012). The State repeatedly violated the trial court's exclusion of evidence by failing to redact an exhibit that had been given to the jury, by allowing non-admissible evidence to be presented to the jury and mentioning the same evidence in its closing argument. The Petitioner submits to this Court that it is obvious that the repetitive prosecutorial misconduct regarding the evidence it felt was necessary to secure a conviction, despite being ruled inadmissible, was prejudicial to the Petitioner.

WHEREFORE, the Petitioner asks that this Court grant this Petition for Rehearing and rehear this case and for such other relief as this Court may deem just and proper.

Respectfully submitted,



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APPEAL FROM YORK COUNTY
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The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001408

The State,

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v.

Rion McKissick Rutledge, Appellant,

CERTIFICATE OF SERVICE

I certify that I have served the PETITION FOR REHEARING WITH SUPPORTING CITATIONS OF AUTHORITY on The State of South Carolina by depositing a copy of it in Federal Express Mail, postage prepaid, on May 3, 2017, addressed as follows:

Mr. William Blitch, Esquire
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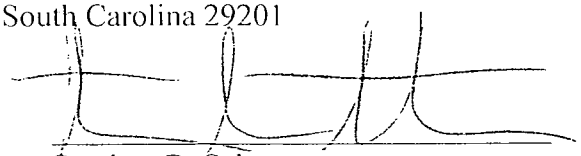

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The South Carolina Court of Appeals

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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ A.J.

Columbia, South Carolina

FILED
July 12, 2017

cc:
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The Honorable John C. Hayes, III