THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable Robin B. Stilwell

Appellate Case No. 2017-001585

The State, ... Appellant,

v.

Dwayne Cameron Tallent, ... Respondents.

INITIAL BRIEF OF APPELLANT

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June 11, 2018.

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STATEMENT OF THE ISSUES

1. Did the trial court err in denying the Appellant's motion to sever the charge of contributing to the delinquency of a minor from the trial of CSC and Lewd Act?

2. Did the trial court err in admitting evidence of the Appellant's manufacture, sale and use of cocaine, crack cocaine, and methamphetamine?

STATEMENT OF THE CASE

The Appellant was indicted by grand jury in Greenville County for Criminal Sexual Conduct With a Minor, First Degree (2014-GS-23-11873); Contributing to the Delinquency of a Minor (2014-GS-23-11874); Lewd Act Upon a Child (2014-23-CP-11875); and Criminal Sexual Conduct with a Minor, Second Degree (2014-23-GS-11877). A jury trial was held on July 17-19, 2017, the Honorable Robin B. Stilwell, presiding. The State was represented by Mark Moyer, Assistant Solicitor. The Appellant was represented at trial by Matthew J. Kappel. The jury returned a verdict of guilty on all charges and the Appellant sentenced to: CSC, 1st thirty years; CSC, 2nd twenty years; Lewd Act on a Minor fifteen years; Contributing to the Delinquency of a Minor three years. All sentences were concurrent. A timely notice of appeal was filed. J. Falkner Wilkes joined in the representation of the Appellant on appeal and this brief follows:

STATEMENT OF FACTS

The Appellant was tried on charges of CSC1st, CSC 2nd, and lewd act based on allegations of sexual acts committed against the prosecutrix over an period of approximately eleven years. The Appellant was also tried on a fourth indictment on a charge of contributing to the delinquency of a minor involving the prosecutrix and one of her two brothers. The Appellant moved to sever the contributing charge on the ground that it would cause undue prejudice by allowing in evidence that would be highly prejudicial on the far more serious charges involving criminal sexual conduct. T. p. 6-7. Of particular concern was the potential for the state to introduce highly inflammatory evidence of the Appellant's bad character through his involvement in the manufacture, sales and use of cocaine, crack cocaine, and methamphetamine, as well as other acts that had no substantial connection to the CSC or lewd act charges. R. p. 36-42. The trial court denied the Appellant's motion *in limine* to sever the contributing charge and allowed the State to proceed at trial on all charges. R. 41-42.

Prior to its admission before the jury the defense argued against the introduction of the Appellant's drug related activity. 169-174. The trial court again conducted an analysis but focused only on whether the drug related evidence would be admissible to support the elements of the contributing charge, rather than its prejudicial impact on the CSC and lewd act charges. 169-174. At the first introduction of the evidence the defense raised a contemporaneous objection which the court overruled but allowed to be considered as a continuing objection throughout the trial. 176; 264. (Additional facts in Argument).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GRANT A SEVERANCE OF CHARGES AND ADMISSION OF PREJUDICIAL EVIDENCE OF THE APPELLANT'S MANUFACTURE, USE, AND SALE OF COCAINE, CRACK COCAINE, AND METHAMPHETAMINE.

At the beginning of the trial the defense moved to sever the contributing to the delinquency of a minor charge arguing that evidence of the Appellant's unrelated drug activity that the State intended to offer under the contributing charge would create undue prejudice as to the other, and far more serious, CSC and lewd act charges. T. p. 6-7; 36; 169-177; 264. "A motion for severance is addressed to the sound discretion of the trial court." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." *Id.* "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id. at* 613, 629 S.E.2d at 395. In analyzing the issue in the Appellant's case the trial court failed to properly apply the law. The denial of the Appellant's motion therefore constitutes an error of law.

Under appropriate circumstances separate indictments can be tried together. 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. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). Conversely, offenses which 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, e.g.*, State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (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 they required different evidence); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct.App.1985) (finding that joint trial on identical but unrelated forgeries violated defendant's right to a fair trial). Here, given the evidence that was offered, the record fails to show how the contributing charge is the same general kind of charge, or related in kind, place or character sufficiently to be tried with the sexual offense charges.

The majority of the evidence offered under the contributing charge related to the Appellant's manufacture, sales, and use of cocaine, crack cocaine and methamphetamine. Although arguably relevant to the contributing charge, this evidence was unrelated and overly prejudicial in regards to the CSC and lewd act charges. Pursuant to the defense's motion to sever the trial court was required to conduct an analysis of the evidence in relation to the CSC and lewd act charges separate and apart from contributing charge. "In cases where the defendant argues prejudice from the admission of evidence of the other charges tried in the same case, our courts have analyzed whether evidence of one or more charges would be admissible in a trial involving only the other charge." State v. McGaha, 404 S.C. 289, 298–99, 744 S.E.2d 602, 606–07 (Ct. App. 2013). Here, rather than determining whether the Appellant's drug related activity would be admissible if the CSC or lewd act charges were tried alone, the trial court looked only to see whether the drug related evidence would be admissible to establish elements of the contributing to the delinquency of a minor charge. 172-173. As a result, the court held that all of the evidence proving the Appellant's drug related activity, including the manufacture, sales,

and use of cocaine, crack cocaine, and methamphetamine, was admissible as it proved the elements of contributing to the delinquency of a minor. T. p. 173. This was clear error.

At issue was an overwhelming amount of evidence that would have been inadmissible in the CSC or lewd act cases had they been tried separately from the contributing charge. At the onset of the Appellant's trial the state announced its intention to introduce evidence of "manufacturing drugs in the home" and "drug sales in the home" and "open drug use in the home by the Defendant." T. p. 40. The solicitor specifically stated "it is the State's intention to go into all of that testimony" on the claiming that it was "certainly relevant to support this charge." "This charge" clearly being the contributing to the delinquency of a minor. Then during the direct examination of the prosecutrix the State announced to the court that it was about to start getting into the drug activity discussed previously which was related to the contributing charge. 169-170. This included everything from using drugs in front of the prosecutrix to the manufacture, use and sales of drugs which later turned out to be cocaine, crack cocaine and methamphetamine. The defense again objected pointing out that even if admissible to the contributing charge, the evidence would not be admissible as to the other charges and served only to place the defendant's bad character in front of the jury on the CSC and lewd act charges. T. p. 169. The defense specifically raised the issue as to what the drug evidence was intended to prove as to the CSC and lewd act charges. T. p. 170-171. The state's response was that the testimony of sexual abuse "creates such a high level of putting the Defendant in such a bad light ... the fact that drugs being in the home are really -- doesn't take it too much to a greater level." T. p. 172. Despite the trial court indicating some difficulty with accepting the State's argument, it nevertheless allowed the testimony without conducting the proper analysis.

The vast majority of drug related evidence in the Appellant's case has no relevance to the CSC and lewd act charges. The one minor exception to the overall lack of probative value of any of the drug related evidence to the CSC and lewd act charges involves testimony that the Appellant gave the prosecutrix marijuana and alcohol. And even this is tenuous. While the State argued that the jury could "take" that the Appellant provided drugs and alcohol to the prosecutrix as "part of the grooming process" to make her more compliant with the "sexual favors he was getting," it failed to offer any testimony that would support such a conclusion. T. p. 171. Yet even assuming *arguendo* that providing marijuana and alcohol to the prosecutrix were relevant to the CSC and lewd act charges, evidence of the Appellant's manufacturing, sales and use of cocaine, crack cocaine, and methamphetamine, and other bad acts involving others remain inadmissible under a proper State v. McGaha and 403/404 analysis.

In its analysis, while the trial court seemed to recognize that the drug related evidence would not be appropriate if to show action and conformity with the defendant's character, the court held that evidence of drug activity would be admissible to establish the offense of contributing to the delinquency of a minor. T. p. 172. The court failed to go further and determine whether that evidence would be admissible if the CSC and lewd act were tried separately from the contributing charge, which is the required analysis. *See* State v. McGaha, 404 S.C. 289, 298–99, 744 S.E.2d 602, 606–07 (Ct. App. 2013). Had the trial court conducted the proper analysis under McGaha the evidence would have been excluded as the record fails to show how evidence of the Appellant's manufacture, use and sale of cocaine, crack cocaine, and/or methamphetamine involving third parties would be admissible in a separate trial on the CSC and lewd act charges alone. As a result, the trial court's ruling on the Appellant's motion to

sever the contributing charge was based on an error of law, and as a result, wrong.

The record in this case fails to show any relevance in the Appellant's manufacture, sales and use of cocaine, crack cocaine, and methamphetamine to the CSC and lewd act charges. As to the CSC and lewd act charges, the drug evidence is simply evidence of the Appellant's bad character. "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." SCRE 404(B). Under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), clear and convincing evidence of other relevant crimes is admissible to prove: 1) motive; 2) intent; 3) absence of mistake or accident; 4) a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other; or 5) identity. Regardless of any relevance it may have to the contributing charge, the drug evidence fails at issue fails to prove any of the foregoing as to the CSC and lewd act charges. But even if it did have some relevance, it would still fail when any probative value is weighed against its prejudicial effect as to the CSC and lewd act charges. *See* State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998). "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) (*emphasis added*). The court may exclude the 404(b) evidence if the

probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.* State v. Spears, 403 S.C. 247, 252–53, 742 S.E.2d 878, 880–81 (Ct. App. 2013).

The prejudicial effect of evidence is evident where it stands to suggest a decision on an improper basis. By potentially insinuating a that the Appellant is a drug dealer the testimony could unfairly impugn the Appellant's character and cloud the issues. The risk of confusion or misdirection therefore required an analysis under Rule 403, SCRE, which the trial court failed to perform. Given the tenuous probative link between the drug related evidence and the CSC and lewd act charges, the prejudicial effect of proving the Appellant a drug dealer outweighs any value the evidence may hold. *See* State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207–08 (Ct. App. 2008).

Here the trial court failed to properly consider the prejudicial effect of the drug related testimony in relation to the CSC and lewd act charges in isolation of the contributing charge. The trial court made no specific findings on the record as to why the drug related testimony had probative value as to the CSC and lewd act charges, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Given the record it is neither implicit or apparent that the trial court considered whether the probative value of the cocaine, crack cocaine and methamphetamine manufacturing, sales and use testimony was substantially outweighed by unfair prejudice. The trial court gave no indication that it considered Rule 403 solely in regards to the CSC and lewd act charges. The court's failure to conduct a proper an on-the-record Rule 403 balancing test constitutes an error of law requiring remand or reversal. *See* State v. Spears, 403 S.C. 247, 254, 742 S.E.2d 878, 881

(Ct. App. 2013).

Given the record as a whole the error in the Appellant's case can not be considered harmless. In the Appellant's case there was no physical evidence offered in the case as to the sexual offense charges. The case was made on the testimony of the prosecutrix and a 404(b) witness, along with testimony of the prosecutrix's two brothers. But for the issue of undue prejudice, the allegations based on sexual misconduct would have turned on the credibility of witnesses. As to credibility, there was evidence offered that could have caused the jury to doubt the testimony of State's witnesses. The record shows that prosecutrix had multiple opportunities to report the allegations yet did not. The prosecutrix was interviewed by the police in January of 2002 and denied that any abuse had occurred. 194-195. She was later interviewed by DSS and again denied any sexual abuse. T. p. 198. Approximately ten years after the alleged abuse when the allegations were made the prosecutrix was present during the police interview with her brother where she repeatedly corrected her brother and added statements for her brother to agree with throughout the entire interview. T. p. 310-326. The 404(B) witness, who also claimed sexual abuse by the defendant, also had extensive contact with DSS over the course of many years and yet never disclosed any of alleged sexual abuse by the Appellant despite numerous opportunities to do so. T. p. 345-358. The 404(B) witness further testified that she had been contacted by the prosecutrix prior to trial, and as a result had been communicating with her prior to making her own allegations of abuse. T. p. 344. Given the record as a whole, the evidence of guilt can not be said to be overwhelming. The prejudicial impact of the evidence showing the Appellant's bad character is therefore substantial. Absent physical evidence, given the repeated denials of abuse by the prosecutrix, and the case turning on the credibility of the State's

witnesses the trial court's improper admission of drug related evidence can not be deemed harmless error. *See* State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94–95 (2011).

Here the trial court failed to conduct a proper analysis and determine whether the evidence offered under the contributing charge would also be admissible in a separate trial for CSC and lewd act. This includes the failure to place on the record its analysis and findings as to the probative value versus the prejudicial impact of the drug related testimony as to the CSC and lewd act charges, separate and apart from the contributing to the delinquency of a minor charge. As a result, the trial court erred in denying the Appellant's motion for a severance. The Appellant was prejudiced by the court's erroneous ruling by the admission of evidence that was unduly prejudicial, and therefore, the Appellant's convictions should be reversed. *See* State v. Smith, 322 S.C. 107, 109–11, 470 S.E.2d 364, 365–66 (1996).

CONCLUSION

Based on the foregoing the convictions and sentences of the Appellant should be reversed and set aside.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that on June 11, 2018, I served the Initial Brief of Appellant on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as indicated below, and to others if so indicated:

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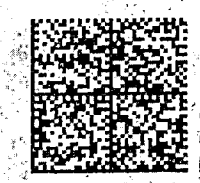

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