

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

DWAYNE CAMERON TALLENT,

Appellant.

Appellate Case No. 2017-001585

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Because the offenses were offenses against minors and therefore of the same nature, and evidence for the offenses relied primarily on the same three witnesses, and mostly occurred during the same time period in the same household, the trial court did not abuse its discretion by denying the motion for severance.

STATEMENT OF THE CASE

The Greenville County grand jury indicted Appellant Tallent for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree, lewd act on a child, and contributing to the delinquency of a minor. A jury convicted Tallent of all charges following trial on July 17-19, 2017, before the Honorable Robin B. Stillwell. Judge Stillwell sentenced Tallent to thirty years imprisonment for CSC 1st, and concurrent sentences of twenty years imprisonment for CSC 2nd, fifteen years imprisonment for lewd act, and three years for contributing to the delinquency of a minor.

STATEMENT OF FACTS

Victim was twenty-nine years old at the time of trial. She was around five years old when Tallent began sexually abusing her. Tr. pp. 146-47. Victim testified it began when she was little and she was bored. She ran into the bedroom and plopped down on him. Tallent had an erection and began to rub up against Victim through the blanket. Tr. p. 147. This occurred in a trailer in Deer Road Run. Tr. pp. 134-35. Victim's biological mother and father divorced before she was two years old and he had a limited role in her life. On the other hand, Tallent was her father figure from when she was eighteen months old until she would finally move away at fourteen years old. Tr. pp. 133-34.

Victim was already sexually abused by someone else before Tallent began sexually abusing her. Victim explained a family friend named "Mikey" stayed at the house sometimes when the family lived at Deer Run Road. Mikey would take her from her bed at night and lay her on his sleeping bag and rub his genitals against Victim. Tallent somehow learned about the abuse and in later years told Victim that he beat Mikey up back then. She does not know Mikey's last name or where he is, although she told law enforcement about it years later. Tr. pp. 142-45.

Victim testified the family later moved to Seneca, where Tallent continued to abuse her. She remembered him masturbating while Victim was in the room, but she found it hard to remember details. Tr. pp. 149-50. The family moved to Tallent's mother's farmhouse when she was eight or nine years old; they lived in an attachment to the house. Tr. pp. 138-39. Subsequently, when by her estimate she was ten or eleven years old, Tallent, Victim, and her mother moved to a doublewide trailer on the same property. Tr. pp. 138-39.

Victim testified she was nine years old when Tallent masturbated while touching, but not penetrating, Victim's vagina. Tr. p. 150. Victim explained it became a normal thing that he would massage her vagina while he masturbated. Tr. p. 151. Eventually, he began to rub his penis between Victim's legs without entering her body. He used her thighs against her genitals to ejaculate. Tr. pp. 151-52.

The contact escalated to him putting either his fingers or the tip of his penis in her rectum. He would also kiss Victim's breasts and perform oral sex on Victim while masturbating. Tallent started making Victim perform oral sex on him. All this conduct began before Victim turned eleven years old and continued thereafter. Tr. pp. 152-53. She specifically recalled the first time he made her perform oral sex on him, she had to put her mouth on him and he told her to "just suck on it like a sucker." Tr. p. 159.

She recounted an incident when she was nine years old and Tallent was on top of her. She was face down and Tallent rubbed his penis between her legs and it brushed up against her vagina. It slipped and went in her vagina to the extent it hurt and she bled. Tr. pp. 160-61.

She testified at this age, she did not know any better. She loved and cared for Tallent. Tallent wasn't always bad. He was caring and took the family camping and fishing. Tr. pp. 153-54. Tallent told her the conduct was their secret. Tr. p. 155, lines 9-11.

Victim told Tallent's sister about the abuse once. The sister ran after Tallent. Tallent later glared at Victim as if she were in trouble. He later told her people would not understand and it was their secret. It was something special they had. Tr. pp. 155-56.

When she was about eleven years old, her two brothers, Christopher and Joseph, moved into

the doublewide. Her brothers were not in her life much before then: for several years they lived in Nevada and later compliance for their visitation with her mother was sporadic. Tr. p. 136; pp. 140-41. After her brothers moved in, the sexual abuse continued despite the challenges for Tallent to find opportunities. However, the abuse would occur when her mother was gone. It usually still happened at least once a week. Tr. pp. 157-58.

As Victim was older, she began to realize what was happening was wrong, but explained, “I didn’t know how to stop it because the older I got, the more of a girlfriend to him is the relationship that was created. And I would – I was scared to tell him that I didn’t want that, so I played along.” Tr. p. 162, lines 10-13.

Victim was not allowed to be alone with the brothers unless Tallent was present: “He kept me around him.” Tr. p. 163, lines 9-17. Victim recalled being around marijuana in the household as early as five years old. Victim was curious and Tallent let her try marijuana when she was twelve years old. From that point on, she continued to smoke marijuana provided by Tallent. He also let her drink alcohol. Tr. pp. 76-79. Crack cocaine and other kinds of drugs were present in the household. She described what she saw:

I seen them make little white rocks out of little glass vials. I remember them making stuff in the kitchen. They were scraping it out of a bowl, a white substance. And they would snort stuff, too. They would walk around with the little tin foils and smoke it.

Tr. p. 179, lines 7-11. Tallent made crack cocaine and showed her brothers how to make crack too. Strangers came into the house to use crack cocaine. Tallent used the drugs in front of Victim. Tr. p. 179, lines 13-24; p. 180, lines 2-9.

One day, Tallent was masturbating and rubbing Victim’s vagina in the bedroom when her

brother walked in the room. He asked, “[H]ow long has this been going on?” Then Tallent chased him out of the room. Later officers came to the house and Victim told them nothing happened. Tr. pp. 163-65. She explained why:

I was scared of any and all consequences that could – I didn’t want people to know. I feared what people would have thought of me. I feared at what if they didn’t believe me, and whether or not if I said something and they didn’t believe, he would try to hurt people I cared about.

Tr. p. 165, lines 13-18. She also admitted at the time she felt some blame for what was happening.

Tr. p. 165, lines 19-22. She later denied abuse to law enforcement and to a forensic interviewer, but she explained she was not telling the truth back then. Tr. pp. 166-67.

Victim and mother moved to a house (trailer) on Painter Road when she was fourteen years old. One day, Tallent came to their home after she stayed home from school. Tallent “fully put himself, his penis, in [Victim’s] rectum.” Tr. p. 162, line 24 – p. 163, line 3. Several months later Tallent also moved in and he continued sexually abusing Victim. Tr. pp. 167-68. The abuse ended when she moved in with her biological father. It was the last time she saw Tallent until trial. Tr. p. 168.

Victim reported the abuse when she was twenty-six years old. Tr. p. 180, line 25 – p. 181, line 4. She also was with her brother when he spoke with law enforcement. Refuting a defense claim, she testified she did not tell the brother what to say. Tr. p. 181. She explained the reason she reported: “It got to a point where, really, it was over-willing me. I was having nightmares.” I just – I couldn’t put it behind me and I couldn’t keep it closed.” Tr. p. 182, lines 1-3.

Joseph Greco, Victim’s oldest brother, testified his parents separated when he was six or

seven years old. He lived with his father until he moved in with his mother and Tallent in tenth grade. At the time, Tallent seemed alright, and he enjoyed going camping with him. Tr. pp. 230-33.

Joseph noticed Tallent hugged Victim alot and always had “skin” contact. “He’d always have his hands on her.” Tr. p. 234. He would pat her on the butt. Tallent spent a lot of time in the bedroom with Victim and always called for her. Tr. pp. 234-35. Joseph told the jury all Tallent did was lay in bed. Tr. p. 238, lines 10-11. He might call Joseph and his brother in the bedroom to smoke a cigarette or marijuana. Joseph testified everyone smoked marijuana around Victim. Tr. pp. 235-36. Victim usually wore a nightgown-type of tee-shirt. Tr. p. 237.

One time he walked into the bedroom and Tallent “shot up like a deer in the headlights, you know, wide-eyed, like didn’t know I was there.” Tr. p. 236, lines 20-24. Joseph explained before Tallent shot up, Victim was on the bed and Tallent was on top of her, towards her feet. Tr. pp. 236-37. He also recalled on another occasion seeing them both under the covers and Tallent moving his hand “pretty funny” around his crotch area, which “weirded” Joseph out. Tr. p. 238.

Joseph’s brother was in a car wreck and came into a lot of money. Another friend also came into the house with a lot of money. They started using the money to buy cocaine and methamphetamine. They gave Tallent the money and he would buy the drugs. Tr. p. 243. They started to freebase cocaine but their noses started bleeding. Tr. pp. 243-44. Tallent then taught them how to make crack cocaine, which they made right in the kitchen. Tr. pp. 244-45. Vicitm was there while it was made and while it was used. Tr. p. 245.

Things changed the day Joseph’s brother walked into Tallent’s bedroom and Joseph heard him shout and come out of the room with Tallent chasing him out of the house. Tr. p. 239. On the

way out he said, “Dude, Dwayne’s molesting [Victim].” Tr. p. 240, lines 12-13. The brothers moved out of the house afterwards. Joseph would not see Tallent again for another fifteen years. Joseph and his brother told their father about the incident. Their father reported it to law enforcement, and the brothers told law enforcement what they saw. Tr. pp. 240-41.

Christopher Greco testified he and his brother moved in with Tallent around the time he turned eleven years old. Christopher had trouble getting along with Tallent. Tallent seemed awkward and distant. Christopher noticed Tallent always touched Victim, rubbing her inner thigh. He found it awkward and inappropriate. Tr. pp. 256-57. He testified it was not uncommon for Victim to be in bed with Tallent. Tr. p. 258. The only time Christopher was invited into the bedroom was to use drugs. Tr. p. 259.

Christopher described the marijuana use in the household as all day, every day. Tr. p. 263. He saw Tallent give Victim and her friend marijuana one time. Tr. p. 264. Tallent also gave marijuana to Christopher from the time he was eleven. He confirmed they consumed other drugs and converted cocaine to crack cocaine. They were using cocaine when he was seventeen years old, but they did not start manufacturing crack until he was eighteen. Tr. pp. 264-66.

Christopher was up to use the bathroom when he heard a slight moaning. He looked through the keyhole of the bedroom and saw Tallent and Victim under the covers. Tallent was touching himself and Victim with his other hand. He told her “that is how you do it.” Christopher kicked open the door and demanded to know how long it had been going on. He called Tallent sick. Tallent “freaked out” and jumped out of bed. Tallent chased Christopher outside, threw coolers at him, and told Christopher that Christopher could ruin his whole world. Tr. p. 260; p. 274, lines 18-24 (direct

quote). When asked if they were clothed, Christopher testified Tallent was in his boxers, he could not tell whether Victim was dressed or not. Tr. p. 262. Christopher and his brother moved out afterwards. They told their father and Christopher told DSS about what happened. Tr. p. 261.

CR provided Lyle testimony. She was fifteen years old when she testified at trial. Her and her mother moved in with Tallent. Tallent was a father figure in CR's life. At the time of trial, she lived with her sister's grandfather since being placed there by DSS. Tr. p. 331. She lived at both Tallent's mother's farmhouse and Tallent's doublewide trailer. At the time, she was close to Tallent's mother. She is not anymore. Tallent started touching CR when she was around five years old, and she did not know it was wrong. As she later realized the abuse was wrong, she kept it to herself because she was scared. Tr. pp. 336-38. She explained she still loved Tallent and even told the jury Tallent is a good person. Nonetheless, she explained Tallent would touch around her vagina. The abuse would continue until Tallent moved away when CR was eleven years old. Tr. pp. 339-40. Tallent also touched CR's chest and kissed her on the lips. Tr. pp. 340-41. Sometimes the abuse occurred with the clothes on and sometimes Tallent took her clothes off. Tr. p. 341. Tallent told her not to tell because nobody would understand it and that nobody would understand his love for her. Tr. p. 343, lines 7-9. She explained she did not want to tell anyone because she was worried she would lose the only family she had, and she noted that is exactly what happened, she lost her family after she disclosed and was living with her sister's grandfather. Tr. p. 343.

Deputy Richter visited her at school – she did not know he was going to visit. Although tempted to disclose the abuse, she decided she did not want to tell Richter because it would ruin her school day, and ruin her family. Tr. pp. 344-45. She later disclosed the abuse to a DSS caseworker.

Tr. pp. 345-46.

The prosecutor asked if her life was easier or harder since she disclosed, and she replied, “It was so much harder on me.” Tr. p. 349, lines 9-11. She explained why:

Because knowing that I came out, I knew that right then and there, the place that I was at as not a safe environment. I knew that I would be [taken] from my home. I knew that I would be [taken] away from my family, which I, basically, have been.

Tr. p. 349, lines 13-23. CR explained she was afraid she would lose her family, and in the end, it was worse than she feared. She admitted Tallent’s family put pressure on her to change her story.

Tr. p. 350, lines 1-15.

The first defense witness, Selena Brunson, and her future husband lived with Tallent for four months in 1991 when she was seventeen or eighteen. She said she never saw anything wrong and testified there was no “Mikey” living there at the time. Tr. pp. 364-75.

Lenore Brissey, Tallent’s mother, testified. She used to go horseback riding with Victim. She testified when Victim and her mother left Tallent, Victim told her she did not want to leave and hugged her. Tr. pp. 383-88. Victim never told her Tallent was doing anything. Brissey testified if she did, Brissey would have called the police. Tr. p. 389. Brissey testified she also had a close relationship with CR. Tr. pp. 390-91. CR never told her Tallent was touching her inappropriately either. Tr. p. 398.

Tallent’s sister, Diana Rogers, testified Victim never disclosed any abuse to her. Tr. p. 404. Likewise, Tallent’s other sister, Debbie Seymore, testified she did not see any inappropriate touching and Victim never disclosed abuse to her. Tr. p. 411.

ARGUMENT

Because the offenses were offenses against minors and therefore of the same nature, and evidence for the offenses relied primarily on the same three witnesses, and mostly occurred during the same time period in the same household, the trial court did not abuse its discretion by denying the motion for severance.

Tallent complains the trial court erred in denying his motion for severance. However, Victim was a victim in all four charges, and her brother was also a victim for the contributing charge. Victim and her brother were the primary witnesses for the sexual assault offenses and the contributing charge. The evidence comprising the contributing charge occurred while Tallent was still sexually abusing Victim and occurred in the same household. The offenses were proved by the same evidence. The offenses, all against minors, were of the same general nature and no real right of Tallent's was infringed upon. Therefore, the trial court did not abuse its discretion.

Standard of Review

A motion for severance is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1967); 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. 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); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002) (stating a motion for severance is addressed to the trial court and should not be disturbed unless abuse of discretion is shown). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.

State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005).

Pre-trial and in camera arguments

During Tallent's pretrial motion to sever, the trial court, expressly indicated it was not addressing testimony of drug manufacture or drug transactions being admissible under Rule 403. analysis, but noted "given what I know as I sit here that it was all part of a continuing relationship between the Defendant and all these other persons. And they are interconnected and interwoven that it is appropriate to try them together." Tr. p. 41, line 18 – p. 42, line 14. The trial court noted certain testimony might be excluded if it was unduly prejudicial. Tr. p. 42, lines 11-14.

During trial, in the middle of Victim's direct-examination, the prosecution requested the jury be sent out of the courtroom, and to seek clarification on the trial court's ruling regarding testimony about illegal drugs. The prosecution noted the evidence concerning the illegal drugs included testimony Tallent provided her with marijuana, drugs were used in her presence, drugs were shared with other people visiting the house, and crack cocaine was made in the home. Tr. pp. 169-70. In response, Tallent's counsel argued the drug evidence was too prejudicial under Rule 403, SCRE, and his client would not have a fair trial. Tr. pp. 170-71. In response, the prosecution noted some of the drug activity was relevant to the grooming process and it was all relevant to the charge of contributing to the delinquency of a minor for both Victim and Christopher. Tr. p. 171. The trial court found, based on the proffer, the evidence was admissible to prove contributing to the delinquency of a minor. He advised defense counsel that defense counsel would need to make specific objections to any evidence he believed was too prejudicial. Tr. p. 174, lines 3-8. Trial counsel indicated he would object to whatever comes in, and argued evidence of providing marijuana

and alcohol should be sufficient to prove the elements of contributing to the delinquency of a minor without evidence of the other drugs. Tr. p. 174, lines 9-18.

When Victim subsequently testified about marijuana being present in the house as early as five years old, defense counsel objected and asked for a continuing objection, to which the trial court indicated “was fine by me.” Tr. p. 176, lines 15- 25. When counsel objected to testimony about drug deals, the trial court sustained the objected and provided a curative instruction. Tr. p. 180, lines 17-23.

Discussion

Criminal charges may be tried together where 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 real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). 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 discretionary power to order the indictments tried together if the defendant’s substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); State v. Sullivan, 277 S.C. 35, 43-44, 282 S.E.2d 838, 843 (1981) (where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place and character, the trial judge has authority, in his discretion, to order indictments tried together over the objection of the defendant absent a showing that the defendant’s substantive rights were violated); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating “[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the

trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced."").

In State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996), the Supreme Court found the charges of murder and burglary were interconnected because the reason Tucker burglarized a church was to avoid capture for the murder charge. The Court found severance was not warranted because the crimes arose out of a single chain of circumstances, evidence of the break-ins were admissible as evidence of flight and identity for the murder, and the crimes were of the same general nature.

Recently, this Court found joinder of charges for first-degree burglary and possession with intent to distribute methamphetamine proper because the burglar's vehicle was parked on the burglarized property and during an inventory search of the vehicle, officers found methamphetamine in the vehicle and the burglar in the house. State v. Davis, 422 S.C. 472, 482, 812 S.E.2d 423, 429 (Ct. App. 2018). This Court noted the offenses originated from the same chain of events and required the same witnesses. Id.

In State v. McGaha, 404 S.C. 289, 297, 744 S.E.2d 602, 606 (Ct. App. 2013), this Court found, "Thus a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other. Even though some of the evidence related only to one child, we find the evidence described above supports the trial court's determination that the separate charges would be proven by the same evidence."

In the instant case, the offenses are of the same general nature: they are offenses against

children. Further, all the offenses rely on the same three principle witnesses, Victim and her brothers. The brothers were witnesses to sexual abuse and provided probative evidence of the nature of the relationship between Tallent and Victim. They also witnessed a portion of the evidence constituting the contributing to delinquency of a minor charge as to Victim. Victim was a witness to the evidence constituting contributing to the delinquency of a minor against Christopher. Further, the offenses were closely related in time. The sexual abuse continued while the brothers lived in the home and the drug use proving contributing to the delinquency of a minor was ongoing during this time.

Additionally, the drug evidence was admissible as *res gestae*. Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). Under the *res gestae* theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘*res gestae*’ “ or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be

fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

Tallent concedes the probative worth of Victim's marijuana and alcohol use. The use and manufacture of other drugs in the household is likewise relevant and admissible as res gestae evidence because it constitutes the environment Victim lived in before the brothers left the household. The brothers were only allowed in the bedroom to smoke drugs. Victim was shoed away at least some of the time in a half-hearted attempt to shield her from the household environment of heavier drugs. It also explains the limitations on the brothers' limited opportunity to observe sexual abuse of Victim.

In the instant case, the trial court did not err in denying the motion to sever the charges. Victim and the two brothers were the primary witnesses for both the sexual and the drug-related offenses. The offenses were of the same character, both involved offenses against minors who were in Tallent's custody. The sexual assaults were ongoing at the time the brothers moved in and the use of drugs occurred at the same time after the brothers moved into the house. The offenses also all occurred at the same location, Tallent's home. Tallent begrudgingly concedes the probative value of testimony he shared marijuana and alcohol with Victim. This evidence is admissible for both the sexual assault charges and the contributing to Victim's delinquency and therefore is admissible evidence in both cases. The use of cocaine and methamphetamine, the production of crack cocaine,

and allowance of strangers to use drugs inside the house all are probative evidence of the contributing charge. They also provide the context of the responsible-parent free environment in which Victim was always in Tallent's bedroom in a nightgown, Tallent lay in bed all day, drugs were freely used by the children, and Victim filled the role of Tallent's girlfriend.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

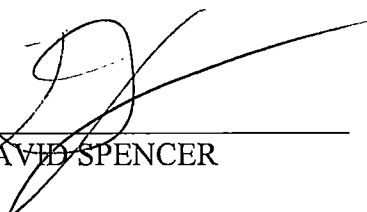
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THE STATE,

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Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to each of his attorneys of record:

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I further certify that all parties required by Rule to be served have been served.
This 10th day of October, 2018.



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