VOLUME II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

RICHARD BURTON BEEKMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001012

APPENDIX

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

Pages 501-559

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VTG

WITNESSES

Teddi Palis

Pickens County Sheriff's Office

8/9/2008

ARREST WARRANT NUMBER

J487852

ACTION OF GRAND JURY

~~TRUE BILL~~

Date SEP 15 2009

Foreperson of Grand Jury

VERDICT

July 28, 2011

Foreperson of Petit Jury *Date:*

DOCKET NO. 2009-GS-39- 1405 WDR

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2009

THE STATE

vs.

RICHARD BURTON BEEKMAN

Indictment for

0385

CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

VIOLATION § 16-03-0655(A)(1)

Certified Copy
Clerk of Court
Pickens County, SC
Dated Feb 2017

501

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

At a Court of General Sessions, convened on the Grand Jurors of Pickens County present upon their oath:

That RICHARD BURTON BEEKMAN did in Pickens County, between June 1, 2006 and July 31, 2008, commit a sexual battery on T. W., who was less than eleven years of age. This is in violation of §16-3-655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended

Certified Copy
Harold P. Wellman
Clerk of Court
Pickens County, SC
Dated Feb 2011

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Pickens)
STATE VS.)
Richard Burton Beekman)
AKA:)
Race: WHITE Sex: M Age: 55)
DOB: [redacted]-1955 SS#:)
Address: [redacted])
City,State,Zip: Liberty, SC 29657)
DL#: SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS3901404
A/W#: J487851
Date of Offense: 7/7/2008
S.C. Code § : 16-15-140
CDR Code #: 2468

SENTENCE SHEET 0-15yrs

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Burwick, Jenny 76027 SC Bar# _____ Defendant John W. DeLoach Attorney for Defendant 001620 SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2009 GS 39-1405
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ begi[illegible]
$ _____ paid to Public Defender Fund
Other: _____

Certified Copy
Clerk of Court
Pickens County, SC
Dated Feb 2017

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Harold P. Welborn Jr.
Court Reporter: Danette Hand

Presiding Judge _____
Judge Code: 2
Sentence Date: 7/28/11

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA)
COUNTY OF 504 Pickens)
STATE VS.)
Richard Burton Beekman)
AKA:)
Race: WHITE Sex: M Age: 55)
DOB: [redacted]-1955 SS#:)
Address: [redacted])
City,State,Zip: Liberty, SC 29657)
DL#: SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS3901405
A/W#: J487852
Date of Offense: 6/15/2006
S.C. Code § : 16-03-0655(A)(1)
CDR Code #: 0385

SENTENCE SHEET 25 yrs - life

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐PLEADS
TO: Sex / Criminal sexual conduct with minor - victim under 11 yrs of age - First degree

in violation of § 16-03-0655(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0385
☐ NON-VIOLENT ☒ VIOLENT ☐SERIOUS ☒MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Barwick, Jenny 76123 SC Bar# _____ Defendant /s John W. Detry Attorney for Defendant 69626 SC Bar#

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____ _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beg. Certified Copy
$ _____ paid to Public Defender Fund
Other: Harold P. Welborn
Clerk of Court
Pickens County, SC
Dated 8/8/2017

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(I) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Harold P. Welborn JR.
Court Reporter: Darlene Hanks
Presiding Judge: C. Edward Wellmaker
Judge Code: 2 3 7
Sentence Date: 7/28/11

SCCA/217 (03/2011)

ARREST WARRANT 08

J-487851 3115

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Pickens

THE STATE 08-17247

against

Richard Burton Beekman

Address: [redacted]

Liberty, SC 29657-

Phone: SSN:

Sex: M Race: W Height: 6 4 Weight: 220

DL State: DL #:

DOB: [redacted]1955 Agency ORI #: SC0390000

Prosecuting Agency: Pickens County SheriffS Office

Prosecuting Officer: Teddi Palis - 516

Offense: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

Offense Code: 2468

Code/Ordinance Sec: 16-15-0140

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of . The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Richard Beekman on 8-9-08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Liberty - Pickens County Summary Court
147 B Kay Holcombe Rd
Liberty, SC 29657

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Pickens)

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

AFFIDAVIT

Personally appeared before me the affiant Teddi Palis who being duly sworn deposes and says that defendant Richard Burton Beekman did within this county and state on or about 07/07/2008 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Pickens) in the following particulars:

DESCRIPTION OF OFFENSE Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts

THE AFFIANT HAS A STATEMENT FROM THE VICTIM, L[redacted] W[redacted], AGE 12, INDICATING THAT ON 7/7/08 THE DEFENDANT DID WILFULLY AND INTENTIONALLY COMMIT A LEWD ACT AGAINST HER. THE VICTIM WAS ASLEEP ON THE COUCH AT HER RESIDENCE.THE DEFENDANT, WHO IS THE VICTIM'S STEPFATHER, PULLED HER PANTS AND UNDERWEAR DOWN. THE VICTIM AWOKE AND SAW AND FELT THE DEFENDANT'S HAND ON HER VAGINA. IT WAS THE INTENT OF THE DEFENDANT TO AROUSE, APPEAL TO, OR GRATIFY THE SEXUAL LUST OR PASSIONS OF HIMSELF OR THE CHILD. THIS INCIDENT OCCURED WITHIN PICKENS COUNTY. 1. INCIDENT REPORT #08-17247. 2. STATEMENT FROM VICTIM.

Signature of Affiant Teddi Palis

Affiant's Address 216 Lec Road
Pickens, SC 29671-

Affiant's Telephone (864)898-5500

Certified Copy
Clerk of Court
Pickens County, SC
Dated 8/20/08

ENTERED
AUG 2008
RETURNED
PICKENS COUNTY
SHERIFF'S OFFICE

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Pickens

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 7/7/2008 defendant Richard Burton Beekman did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Pickens) as set forth below

DESCRIPTION OF OFFENSE: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 08/08/2008

(L.S.)

Signature of Issuing Judge

Bruce E Anders

Judge Code: 7064

AUG 20 2008

Judge's Address 147 B Kay Holcombe Road
Liberty, SC 29657-1543

Judge's Telephone (864)843-5821

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

505

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

_____

PRELIMINARY HEARING held by

Judge _____

on _____

Defendant Attorney: _____

Decision: _____

_____

_____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

_____ _____

_____ _____

_____ _____

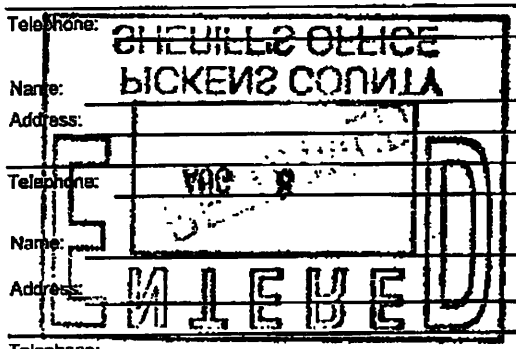
WITNESSES

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address. _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____



Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

CODEFENDANTS

_____

_____

Certified Copy
Hazel P. Williams
Clerk of Court
Pickens County, SC
Dated 2/6/2017

ARREST WARRANT

08
J-487852 3116

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Pickens

THE STATE 08-17247

against

Richard Burton Beekman

Address: [redacted]

Liberty, SC 29657-

Phone: SSN:

Sex: M Race: W Height: 6 4 Weight: 220

DL State: DL #:

DOB: [redacted]1955 Agency ORI #: SC0390000

Prosecuting Agency: Pickens County Sheriff'S Office

Prosecuting Officer: Teddi Palis - 516

Offense: Sex / Criminal sexual conduct with minor - victim under 11 yrs of age - First degree

Offense Code: 0385

Code/Ordinance Sec.: 16-03-0655(A)(1)

This warrant is CERTIFIED FOR SERVICE in the

[ ] County/ [ ] Municipality of

. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Richard Beekman on 8-9-08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Liberty - Pickens County Summary Court
147 B Kay Holcombe Rd
Liberty, SC 29657

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Pickens)

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 318

Personally appeared before me the affiant Teddi Palis who being duly sworn deposes and says that defendant Richard Burton Beekman did within this county and state on or about 06/15/2006 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Pickens) in the following particulars:

DESCRIPTION OF OFFENSE Sex / Criminal sexual conduct with minor - victim under 11 yrs of age - First degree

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

BETWEEN THE DATES OF 6/06 AND 7/08 THE DEFENDANT DID WILFULLY AND INTENTIONALLY ENGAGE IN A SEXUAL BATTERY AGAINST THE VICTIM, T[redacted] W[redacted] AGE 8. THE DEFENDANT, WHO IS THE VICTIM'S STEPFATHER COMMITTED A SEXUAL BATTERY AGAINST THE VICTIM ON AT LEAST ONE OCCASION DURING THIS TIME PERIOD. THE INCIDENTS OCCURED WITHIN PICKENS COUNTY.
1. INCIDENT REPORT #08-17247. 2. FORENSIC INTERVIEW OF VICTIM.

Certified Copy
Hunt P. Williams
Clerk of Court
Pickens County, SC
Dated 8-12-08

ENTERED
RETURNED
PICKENS COUNTY
SHERIFF'S OFFICE

Teddi Palis
Signature of Affiant

Affiant's Address: 216 Lec Road
Pickens, SC 29671-

Affiant's Telephone: (864)898-5500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 6/15/2006 defendant Richard Burton Beekman did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Pickens) as set forth below:

DESCRIPTION OF OFFENSE: Sex / Criminal sexual conduct with minor - victim under 11 yrs of age - First degree

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 08/08/2008 (L.S.)

Signature of Issuing Judge

Bruce E Anders

Judge Code: 7064

AUG [illegible] 2008

Judge's Address: 147 B Kay Holcombe Road
Liberty, SC 29657-1543

Judge's Telephone: (864)843-5821

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

507

ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

_____

PRELIMINARY HEARING held by

Judge _____

on _____

Defendant Attorney: _____

Decision: _____

_____

_____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

_____ _____

_____ _____

_____ _____

WITNESSES

Name: _____
Address: _____
_____
Telephone: _____

Name: _____
Address: _____
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Telephone: _____

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Telephone: _____

Name: _____
Address: _____
_____
Telephone: _____

CODEFENDANTS

_____

_____

Certified Copy
Hewitt P. Williams
Clerk of Court
Pickens County, SC
Dated 12/9/21

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD BURTON BEEKMAN,

PETITIONER.

APPELLATE CASE NO. 2013-002002

BRIEF OF PETITIONER

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUE PRESENTED

The Court of Appeals erred in affirming the Trial Court's refusal to sever Petitioner's charges of criminal sexual conduct with a minor and lewd act upon a child where: the alleged sexual abuse involved two victims; the offenses did not arise out of a single chain of circumstances and were not provable by the same evidence; the evidence pertaining to each child would not have been admissible in separate trials; and Petitioner was prejudiced by its improper influential effect on the jury.

STATEMENT OF THE CASE

On September 15, 2009, Petitioner Richard Burton Beekman was indicted by the Pickens County Grand Jury for (1) first degree criminal sexual conduct (CSC) with a minor in violation of S.C. CODE ANN. § 16-3-655(A)(1) (2008); and (2) lewd act upon a child in violation of S.C. CODE ANN. § 16-15-140 (2008). R. 373-373, 375-376.

On July 25, 2011, Petitioner proceeded to trial before the Honorable G. Edward Welmaker and a jury. R. 1. Petitioner was represented by John W. DeJong, and the State was represented by Assistant Solicitor Jenny L. Barwick. R. 1. The jury found Petitioner guilty as charged. R. 362, ll. 11-22.

On July 28, 2011, Judge Welmaker sentenced Petitioner to (1) thirty years imprisonment for the CSC with a minor conviction and (2) fifteen years imprisonment for the lewd act upon a child conviction. R. 369, ll. 17-23. The sentences were ordered to run consecutively for a total of forty-five years imprisonment. R. 369, ll. 22-23.

On June 26, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Beekman*, Opinion No. 5145 (S.C. Ct. App. filed June 26, 2013). App. 1-11. Petitioner subsequently filed a petition for rehearing on July 11, 2013. App. 12-16. The South Carolina Court of Appeals issued an Order denying the petition for rehearing on August 22, 2013. App. 17.

Petitioner filed a petition for writ of certiorari with this Court seeking review of the Court of Appeals' Opinion on November 22, 2013. On July 25, 2014, this Court granted Petitioner's petition for writ of certiorari to review the Court of Appeals' decision, with all five Justices of the Court granting the writ.

STATEMENT OF FACTS

This case arises out of allegations that Petitioner committed a lewd act upon his twelve-year old stepdaughter (the "Stepdaughter") and first degree criminal sexual conduct on his eight-year old stepson (the "Stepson").

The Stepdaughter testified that her mother met and eventually married Petitioner. The mother, Stepdaughter, and Stepson moved in with Petitioner. R. 59, ll. 2-7. Tina Aiken, the children's mother, confirmed that she and her children moved in with Petitioner around October 2005 and that she married Petitioner on June 3, 2006. R. 146, ll. 5-17.

The Stepdaughter testified that on the July 4, 2008 weekend, she and her family, including Petitioner, her mother, and the Stepson, went on a family trip to Charleston. The Stepdaughter recalled one incident on that trip where she locked Petitioner out of the hotel room. R. 61, l. 6 – 62, l. 10.

The family returned from Charleston that Sunday, July 6, 2008. R. 62, ll. 11-13. The night the family returned back home, the Stepdaughter did not sleep in her bed but rather slept on a couch in the living room because her room was messy. R. 62, l. 14 – 63, l. 5. The Stepson also slept on a separate couch in the living room that night because his room was likewise messy. R. 63, ll. 6 – 11; 89, ll. 8-10.

The Stepdaughter believed that she slept with two blankets on top of her, but she was not sure. She was wearing her underwear, cheerleader bloomers, and pajama pants. R. 64, l. 25 – 65, l. 8. She said she turned off the light before she fell asleep and remembered that the Disney Channel was playing on the television. R. 65, ll. 14-19. The Stepdaughter had a hard time sleeping, so she got up and asked her mother for some

melatonin, which is medicine her doctor gave her that helps her fall asleep. R. 65, l. 20 – 66, l. 4. It was the middle of the night when she asked her mother for some melatonin. She took one and went to sleep after that. According to the Stepdaughter, the blankets were on her and tucked into the side of the couch when she fell back asleep. R. 66, ll. 5-17.

The Stepdaughter claimed she woke up because Petitioner was allegedly touching her private area. She alleged that her underwear and bloomers were around her knees and the blankets were on the floor. She claimed Petitioner was touching her but never put his hands inside of her. R. 66, l. 18 – 68, l. 16. The Stepdaughter alleged this incident with Petitioner occurred between four and four thirty in the morning. R. 90, ll. 13-24.

The Stepdaughter said when she woke up, a news program was on the television. The lamp was on. After she woke up, Petitioner allegedly jumped up and asked where the remote to the television was located. The Stepdaughter said she grabbed the remote off of a trunk being used as a coffee table and threw it at Petitioner. According to the Stepdaughter, Petitioner then walked out of the room and she went back to sleep. R. 68, l. 21 – 69, l. 21.

The Stepdaughter told her mother about the alleged touching on July 7, 2008 when her mother returned home from work. R. 70, ll. 1-5; 75, l. 2 – 76, l. 3. Her mother took the Stepdaughter to her grandmother's house. R. 76, ll. 8-25. The Stepdaughter stayed at her grandmother's house that night, while her mother and brother did not. Her mother and brother moved out of Petitioner's house the next day. R. 77, ll. 12-24.

The Stepdaughter told her biological father about the alleged incident approximately a week later. R. 77, ll. 8-11. After she told her father, the Stepdaughter and the father reported the incident to law enforcement on July 14, 2008. R. 78, ll. 10-25; 194, ll. 2-20.

The Stepdaughter claimed that while the family was living at the grandmother's house, the Stepson disclosed to her at one point that he had been sexually abused. The Stepdaughter could not remember how long it was after the family moved out of Petitioner's house when the Stepson made this purported disclosure. R. 79, l. 19 – 81, l. 2. After the Stepson told the Stepdaughter what had happened to him, she then told him what Petitioner had allegedly done to her. This was the first time that she had ever told her brother about what had happened to her. R. 82, l. 3 – 83, l. 22. Apparently after she told her brother, he then disclosed more details about his alleged abuse to her. R. 84, ll. 12-17.

On cross-examination, the Stepdaughter said she was twelve years old and her brother was eight years old when the incident happened in July 2008. R. 85, ll. 17-22. She also testified that during the early morning hours of July 7, 2008, when the alleged incident occurred, her mother was at home at the time and that her mother never left the house that night. R. 86, l. 23 – 87, l. 24. Her mother slept in the bedroom with Petitioner in the bedroom belonging to both the mother and Petitioner. R. 87, l. 25 – 88, l. 5.

The Stepdaughter testified that Petitioner normally got up for work around four in the morning and her mother would get up a little later. Petitioner and her mother would then usually have coffee together, although she could not remember what time they would have their coffee. R. 88, l. 9 – 89, l. 3. The Stepdaughter also acknowledged that Petitioner liked to watch the news and was a bit of a news buff. R. 89, ll. 4-7. There were four televisions in the house – in the living room, Petitioner and her mother's bedroom, and the two children's bedrooms. R. 96, ll. 17-23. The Stepdaughter testified that when the alleged incident occurred, Petitioner was dressed for work. R. 104, ll. 21-24.

The Stepdaughter admitted that she did not go to the police until about a week after the incident and only after she told her father about it. She had spoken to her mother several times about the incident before she ever went to the police. R. 99, l. 3 – 100, l. 25.

At trial, the Stepson claimed that Petitioner had touched him in inappropriate ways, including touching his private parts underneath his clothing. R. 123, l. 25 – 125, l. 11. The Stepson alleged that Petitioner told him not to tell anyone about the touching. The Stepson contended that the touching occurred twice in Petitioner's bedroom while a news program was on the television. R. 124, l. 22 – 126, l. 11. The Stepson also claimed that he touched Petitioner. R. 126, l. 14 – 127, l. 4.

The Stepson accused Petitioner of penetrating the Stepson's rectum during another incident. The Stepson said this incident occurred in Petitioner's bedroom while a news program was on television. The bottom half of the Stepson's clothing was apparently pulled down. According to the Stepson, he was already in Petitioner's bedroom watching the news on television before Petitioner even came into the room and allegedly assaulted him. R. 127, l. 21 – 128, l. 24; State's Ex. 5 (video of forensic interview). Petitioner allegedly told the Stepson not to tell anyone because Petitioner might get in trouble. R. 129, ll. 20-25. Petitioner also purportedly made threats to the Stepson that he would hurt the Stepson's family if the Stepson told. R. 130, ll. 1-6. The Stepson testified his sister told him what happened to her first before he told about what had happened to him. R. 132, ll. 9-11.

The Stepson said the incidents occurred when he was eight years old. The Stepson turned eight at the beginning of November 2007. R. 134, ll. 11-25. The Stepson was not more specific as to the dates of the alleged incidents.

The Stepson also testified that the first person he actually told about the incidents was not his sister, but his cousin. The Stepson said that when he told his cousin about the alleged sexual abuse, he already knew of his sister's allegations against Petitioner because his sister had told him. R. 136, ll. 8 – 25. This was different, however, than what the Stepson told forensic interviewer Shauna Galloway-Williams. The Stepson told the forensic interviewer that he told his cousin before he knew about his sister's allegations against Petitioner. State's Ex. 5 (video of forensic interview).

The Stepson also confirmed that there were many televisions in the house – one in the living room, his bedroom, his sister's bedroom, and Petitioner and his mother's bedroom. R. 137, ll. 15-19.

Tina Aiken, the mother of the Stepdaughter and the Stepson, testified that the Stepdaughter disclosed the alleged sexual abuse to her on July 7, 2008. R. 150, ll. 6-10. The weekend before the disclosure, the family had been in Charleston. Tina remembered that while they were in the hotel room, the Stepdaughter stormed through the door and locked it, locking Petitioner out of the room. There was apparently some sort of incident outside of the hotel room with some yelling and perhaps another man wanting to beat Petitioner up because of something that was said. Tina said she could not remember the details of the Charleston incident. R. 150, l. 11 – 151, l. 24.

Tina acknowledged that on the night of the alleged incident between Petitioner and the Stepdaughter, the Stepdaughter had woken up around one or two o'clock in the morning to tell her mother that she could not sleep. Tina gave the Stepdaughter half of a melatonin pill. R. 154, l. 16 – 155, l. 8; 173, ll. 10-17.

Tina also admitted to not taking the Stepdaughter to the police after the Stepdaughter told Tina about the incident. She thought the incident would just go away. R. 162, ll. 13 – 20. Tina acknowledged that it was the Stepdaughter's father who pursued the matter with law enforcement. R. 163, ll. 11-16.

Tina said her son made a disclosure about two weeks after the Stepdaughter's disclosure and told her some things about what Petitioner allegedly did. R. 163, ll. 17-22. The Stepson had been acting out, banging his head and scratching his skin. He also apparently drew some pictures, including one of Petitioner hanging, and showed his mother the pictures but had trouble talking to her. Tina then had his cousin Savannah come over to discuss the pictures. After the Stepson's conversation with Savannah, Tina called law enforcement. R. 163, l. 23 – 167, l. 13. Tina brought her Stepson to the Sheriff's Office on July 21, 2008. R. 200, ll. 3-6.

On cross-examination, Tina, who is a pharmacist, acknowledged that sleeping medications can have side effects such as vivid dreams. R. 172, ll. 2-17. She also admitted that during the family's trip to Charleston the weekend immediately before the Stepdaughter's disclosure, there was some incident between the Stepdaughter and Petitioner out in the parking lot of the hotel that ended up with the Stepdaughter locking Petitioner out of the hotel room. R. 173, l. 23 – 174, l. 18.

On July 7, 2008, the morning of the alleged incident with the Stepdaughter, Tina said she woke up around 5:30 a.m. and noticed the Stepdaughter asleep in the living room. The Stepdaughter was sound asleep, and Tina did not notice anything usual. Tina observed

that the television was on the local news channel, the channel that Petitioner usually watched. R. 177, ll. 1-24.

Tina also testified that Petitioner often watched television with the children such as news and nature programs. R. 147, ll. 8-13. She also confirmed that the normal routine for her and Petitioner was to watch the news on television and drink coffee before work in the mornings. R. 152, ll. 11-13. She testified that Petitioner like to watch the local news channel both morning and afternoon. R. 174, l. 19 – 175, l. 5. According to Tina, Petitioner usually watched the local news. R. 177, ll. 23-24.

Savannah Mauldin, the cousin of the Stepdaughter and the Stepson and who was nineteen years old in July 2008, remembered going over to her grandmother's house sometime after the July 4, 2008 weekend, around the 19th of July. She said that Tina, the Stepdaughter, and the Stepson were all at the grandmother's house. She saw some of the Stepson's pictures and asked the Stepson if he had been sexually abused. He disclosed to Savannah that he had been abused, but Savannah claimed that he did not disclose to her all the abuse. R. 210, l. 9 – 212, l. 21; 214, l. 22 – 215, l. 1.

Savannah said that after this disclosure by the Stepson, the Stepdaughter went into the room with the Stepson while Savannah stood right outside the room. Savannah heard the Stepdaughter disclose her abuse to the Stepson, after which the Stepson told them about more things that had happened to him. R. 213, l. 4 – 214, l. 10.

Dr. Nancy Henderson examined the Stepson on July 31, 2008. R. 221, ll. 6-9. She performed a rectal exam on the Stepson and determined that the results of his exam were normal. R. 226, l. 8 – 227, l. 12. Dr. Henderson testified that some redness found on the

Stepson's buttocks and penis was not any indication of sexual abuse. R. 232, l. 23 – 233, l. 24.

Shauna Galloway-Williams conducted a forensic interview of the Stepson on July 29, 2008. R. 263, ll. 3-8. She testified that the Stepson said he was eight years old when he was sexually abused. R. 285, ll. 14-22. She did not determine a specific date when the abuse may have happened, just that it allegedly happened sometime from the beginning of November 2007 when the Stepson turned eight years old and July 2008 when the disclosures were made. Therefore there could have been an eight month time period when the alleged incidents between Petitioner and the Stepson occurred. R. 312, l. 10 – 313, l. 2.

ARGUMENT

The Court of Appeals erred in affirming the Trial Court's refusal to sever Petitioner's charges of criminal sexual conduct with a minor and lewd act upon a child where: the alleged sexual abuse involved two victims; the offenses did not arise out of a single chain of circumstances and were not provable by the same evidence; the evidence pertaining to each child would not have been admissible in separate trials; and Petitioner was prejudiced by its improper influential effect on the jury.

A. Petitioner's pre-trial motion to sever the separate indictments

During pre-trial motions, Petitioner moved to sever the two indictments against Petitioner – the CSC with a minor charge involving the Stepson and the lewd act upon a child involving the Stepdaughter. R. 14, ll. 23-24. Petitioner argued that the two indictments did not arise out of the same chain of circumstances and were rather "two totally unrelated chain of circumstances if there is indeed a chain." R. 15, ll. 12-20. Petitioner highlighted that the two indictments involved different types of sexual abuse, different victims, and different times. He noted that it was hard to address the different times of the alleged incidents because it was unknown when the alleged incidents involving the Stepson even occurred. R. 15, ll. 9-12. Petitioner argued that the only similarities were that the alleged incidents both involved Petitioner and allegedly both happened at his house where he lived with the Stepdaughter and the Stepson. R. 15, l. 21 – 16, l. 4.

In addition, Petitioner disagreed that the evidence was the same for both charges against Petitioner: "The evidence is not the same. The evidence with regard to the lewd act is a different time, a whole different set of circumstances, whole different set of allegations from that which is alleged on the criminal sexual conduct in the first degree." R. 16, ll. 5-10. Petitioner further argued:

> The same general nature, again, the only thing you can say about the same general nature of the indictment is that they both include sexual offenses. But, again, ***different victims, different times, and I submit different witnesses***. The facts of one case do not so overlap the facts of the other case - - I think what the State's going on there is that on July the 7th . . . . The alleged offense date with regard to a lewd act is July the 7th of 2008. Yes. The allegations arose on July the 14th of 2008 with regarding to the lewd act indictment. The allegation on the criminal sexual conduct case did not arise until July 21st. The State seems to be hanging their hat on trying these cases together, that the allegations were - - I hate to use the word disclosed, but that's the only word I can come up with - - that the allegations were disclosed within a short time frame. I don't think that goes either to chain of circumstances or the same general nature.

R. 16, l. 23 – 17, l. 14 (emphasis added).

Petitioner also emphasized to the Trial Court that trying the two cases together would be "highly prejudicial" and there was no doubt that Petitioner was obviously prejudiced by the State trying together two sexual charges against two separate victims. R. 15, ll. 7-9; 17, ll. 15-21.

Petitioner also rejected any suggestion by the State that the allegations pertaining to each different alleged victim would be admissible in separate trials as a common scheme or plan and referenced back to his earlier argument to the Trial Court on common scheme or plan. R. 17, ll. 22-25; 19, ll. 6-9. In that argument, Petitioner asserted to the Trial Court:

> 404(b) says common scheme or plan, and if you go back and read Lyle[1], which we're not going to go through all the litany of cases on 404(b) and Lyle, because they are impossible to reconcile. But if you go back to that, the common scheme or plan is more along the lines, if I steal a car in Greenville and I use that car and I go to Georgia and rob a bank, that's part of the common scheme or plan.

R. 10, ll. 4-11.

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[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

In her response argument, the Solicitor essentially conceded that if the State could not try the two cases together, the State's case on each indictment in separate trials would be unconvincing:

> As far as *res gestae*, if the jury can't hear how [the Stepson] disclosed, they're missing a big chunk. ***That's all the evidence the State has in this case is each of the children's disclosing. We don't have any physical evidence.*** All we have is their evidence. ***That's the only direct evidence the State has.*** If you were to take out how the disclosure came about, the jury would miss half the case.

R. 20, l. 22 – 21, l. 3 (emphasis added).

In response, Petitioner stressed that disclosure was not an element of the State's proof in either of the cases and the only reason the State wanted to admit evidence of how both children disclosed was solely to prejudice Petitioner:

> When did disclosure and the circumstances surrounding the disclosure become an element of proof in a case, a CSC case? That's not an element. What the State has to prove is that there was a sexual battery, that he did it, and that's the victim. And in this case, age. What's disclosure got to do with that? ***Why do they need to prove disclosure? They want to prove this disclosure business because they want to prejudice [Petitioner].*** That's what that's all about. That disclosure, how it was disclosed, all of that nonsense has nothing to do with this case, has nothing to do with the State's proof of this case. ***By their own admission now, all they have is basically the similarities and the times of disclosure. And as I've already argued, that's highly prejudicial and that is exactly what the State wants to do, because they know they've got to prejudice [Petitioner] in the eyes of this jury to prove their case, by their own statement.*** And that is wrong. You can't bring that in under 404(b), under the elements of the crime, or anything else. It's pure-T we want to prejudice [Petitioner] with this jury because we want a conviction. We can't prove it. That, Your Honor, is not the way our judicial system works. And it's wrong. If they've got the proof, put it up. Motive is not an element in this crime. Disclosure is not an element in this crime. ***They know what the elements are and now they have said we really can't prove them. So we've got to have all of this disclosure nonsense, how this twelve-year-old discloses and then the eight-year-old discloses and somehow that is proof beyond a reasonable doubt? They shouldn't***

> ***even get to the jury, in my opinion, Your Honor. It's ludicrous. And I submit that they should be severed and that should not come in.***

R. 21, l. 24 – 23, l. 5 (emphasis added).

The Trial Court denied Petitioner's motion to sever the two separate indictments, ruling that the indictments arose out of the same chain of circumstances. The Trial Court believed there would be "certainly a great overlap of evidence that will be presented between the two case[s] that are certainly of the same general nature, as far as the sexual abuse of children, be it a lewd act or a criminal sexual conduct." The Trial Court further found that while Petitioner would naturally be prejudiced from trying the two charges together, that prejudice did not override the criteria for consolidating the separate charges. R. 36, l. 20 – 37, l. 10.

B. <u>The Opinion of the Court of Appeals</u>

The Court of Appeals affirmed the Trial Court's denial of Petitioner's motion to sever the two separate indictments. In its Opinion, the Court of Appeals first held the fact that the indictments involved two different victims did not require severance of the charges. The Court of Appeals additionally held that "the evidence established [Petitioner] embarked upon a series of actions aimed at the sexual abuse of his two prepubescent stepchildren over the course of an eight month period." The Court Appeals therefore found that "the two charges against [Petitioner] arose from, in substance, a single course of conduct or connected transactions" and declined to give "a restrictive reading of the phrase 'single chain of circumstances.'" The Court of Appeals further determined there was a great overlap of evidence between the two charges and that the two charges were provable by the same evidence. App. 1-5.

The Court of Appeals held that Petitioner was not prejudiced by the joinder of the two separate indictments because evidence of his alleged sexual abuse of each of the stepchildren would have been admissible in separate trials to show a common scheme or plan because the similarities of the two alleged incidents outweighed the dissimilarities. The similarities referenced by the Court of Appeals were that Petitioner was the stepfather of both alleged victims and each incident of alleged abuse occurred in the family home. The Court of Appeals also found that both children were prepubescent, the children were biological siblings, Petitioner had allegedly inappropriately touched the genitalia of both children, a news program was on the television when Petitioner allegedly committed the sexual abuse against the children, and the incidents occurred within an eight month period. The Court of Appeals additionally determined the last abuse of the Stepson occurred close in time to the incident involving the Stepdaughter, even though the State did not produce any evidence at trial as to exactly when the alleged incidents with the Stepson occurred other than that the incidents occurred between November 2007 and July 2008. App. 5-6; R. 312, l. 10 – 313, l. 2.

Finally, the Court of Appeals concluded that the danger of unfair prejudice did not outweigh the probative value of the prior bad act evidence. In sum, the Court of Appeals held the Trial Court did not err in refusing to sever the two separate indictments against Petitioner where "the offenses charged in the separate indictments are of the same general nature involving connected transactions closely related in kind, place and character; they arise out of a single chain of circumstances; they are provable by the same evidence; and [Petitioner's] substantive rights have not been prejudiced." App. 6.

The Court of Appeals erred in affirming the Trial Court's denial of Petitioner's motion to sever because the two separate charges did not arise out of a single chain of circumstances, were not sufficiently similar, and were not provable by the same evidence. In addition, Petitioner was significantly prejudiced by the trying of the two separate charges together where the evidence pertaining to each child would not have been admissible in separate trials and where the evidence only served to improperly bolster each child's credibility and suggest to the jury that Petitioner had a propensity to commit sexual offenses on children.

C. Impropriety of joinder where offenses of the same nature do not arise out of a single chain of circumstances and are not provable by the same evidence

The general rule is that the trial judge has discretion to order separate charges to 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 " and "the defendant's substantive rights would not be prejudiced." State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). "Offense are considered to be of the same general nature where they are interconnected." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002).

"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." Id. at 350-51, 573 S.E.2d at 860-61; see also State v. Middleton, 288 S.C. 21, 23-24, 339 S.E.2d 692, 693 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial

judge erred in consolidating the charges for one trial where the crimes "did not arise out of a single chain of circumstances, and required different evidence for proof"); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial).

In Petitioner's case, the issue is whether the Trial Court abused its discretion in finding a relationship between the two separate charges sufficient to permit the State to try Petitioner on both charges at a single trial. If these two charges against Petitioner did not arise out of a single chain of circumstances and were not provable by the same evidence, then the Trial Court had no discretion to try the two charges together.

First, there was no single chain of circumstances as the two separate charges against Petitioner did not involve connected transactions closely related in kind, place and character or a single course of conduct. See Tate, 286 S.C. at 464, 334 S.E.2d at 290. The two charges against Petitioner involved distinct incidents with numerous dissimilarities:

1. the two charges involved two different victims;

2. the victims were of different sexes;

3. the ages of the victims were not the same – twelve years old versus eight years old;

4. the two charges involved different types of alleged conduct – the touching of a female's genitals and male anal penetration;

5. the Stepdaughter alleged only one incident, while the Stepson alleged several instances of sexual conduct;

6. while the alleged incidents occurred in the family home, the Stepdaughter alleged that her incident occurred in the living room while the Stepson alleged that his incidents occurred in Petitioner's bedroom;

7. the Stepdaughter alleged that when she was assaulted, the Stepson was asleep in the living room with her, while the Stepson said only he and Petitioner were in the Petitioner's bedroom when the alleged assaults against him occurred;

8. the incident involving the Stepdaughter occurred the day after the Stepdaughter and Petitioner had some sort of dispute while away on a family vacation; and

9. the Stepson alleged that Petitioner told him not to tell anyone about the incidents and made threats to him while the Stepdaughter did not make any such allegations.

More importantly, there was no evidence at trial establishing that these alleged incidents occurred close in time; thus there was no evidence of a single course of conduct or connected transactions. The Stepdaughter testified that the alleged incident involving her occurred on July 7, 2008 around four or four thirty in the morning. The Stepson provided no details about when his alleged abuse occurred, and the forensic interviewer admitted that the incidents involving the Stepson could have occurred anywhere between November 2007 and July 2008. R. 312, l. 10 – 313, l. 2; cf. Simmons, 352 S.C. at 351, 573 S.E.2d at 861 (noting joinder may be proper where crimes occur "very close in time").

Not only did the two separate indictments not arise out of a single chain of circumstances, but the two separate charges required different proof contrary to the Court of Appeals' holding that "there was a great overlap of evidence between the two charges." In fact, there was very little overlap of evidence between the two charges.

The Stepdaughter's case involved her testimony and testimony from her mother and father as to when she told each of them about the alleged incident with Petitioner. R. 150, ll. 6-10; 159, ll. 4-14; R. 187, l. 23 – 188, l. 18. Officer Cory Baker of the Pickens County Sheriff's Department testified that he was the first officer to speak to the Stepdaughter when

her father brought her in on July 14, 2008. R. 193, l. 22 – 197, l. 10. Detective Cynthia Palis testified she was assigned the case, spoke with the Stepdaughter and her mother, and took a statement from the Stepdaughter. R. 198, l. 4 – 199, l. 24. That was the extent of the evidence in the Stepdaughter's case.

The Stepson's case involved his testimony and testimony from his mother and father about his disclosures of the alleged incidents. R. 163, l. 17 – 167, l. 13; 190, l. 8-11. Detective Palis also testified that she spoke to the Stepson and referred him to a forensic interview. R. 199, l. 25 – 200, l. 16. The Stepson's cousin, Savannah Mauldin, testified that he disclosed the sexual abuse to her. R. 210, l. 9 – 212, l. 6. Dr. Henderson testified that she examined the Stepson and conducted a rectal examination upon him and found that the results of that exam were normal. R. 221, ll. 6-9; 226, l. 8- 227, l. 12. Finally, Shauna Galloway-Williams testified that she conducted a forensic interview with the Stepson and this interview was played for the jury. R. 263, l. 2-8; 292, l. 7 – 293, l. 11; State's Ex. 5 (video of forensic interview). While during this forensic interview there were a few references made by the Stepson of alleged touching by Petitioner on the Stepdaughter, those references could be easily redacted in a separate trial.

The State's evidence on each indictment is clearly distinct and independent from the evidence pertaining to the other indictment, and the two indictments are not inextricably intertwined. The only witnesses who might be needed to testify in both separate trials would be the mother, the father, and Detective Palis. Even then, their testimony would be different in separate trials – confined to the Stepdaughter in a trial on the lewd act charge and confined to the Stepson in a trial on the CSC with a minor charge.

The State contends the charge against the Stepdaughter was integrally connected to the charge against the Stepson because it was the "vehicle through which" the other charge was discovered. That is not entirely correct though. After the Petitioner's mother noticed the Stepson acting out and drawing some disturbing pictures, she asked his older cousin Savannah to come over to talk to him. R. 164, l. 7 – 167, l. 13. His cousin was the first person to whom the Stepson disclosed his allegations of sexual abuse. R. 136, ll. 11-12. While the Stepson and his sister may have then told each other what allegedly happened to them, the Stepson's first disclosure was to his cousin.

Moreover, disclosure is not an element the State needs to prove in either a lewd act upon a child case or a first degree CSC with a minor case. See S.C. CODE ANN. § 16-15-140 (2008) ("It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent to arousing, appealing to, or gratifying the lust of passions or sexual desires of the person or of the child."); § 16-3-655(A)(1) (2008) ((A) A person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age . . . .").

The only possible reason the State would want to include this evidence would be to suggest to the jury that if Petitioner committed sexual abuse upon one child, he must have done it on the other, which is, of course, improper propensity evidence. See, e.g., State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983).

The State also relies upon the case of State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) for its contention that joinder in this case is proper. Jones involved the alleged sexual abuse of two minor victims. The Court of Appeals found consolidation was proper because the victims were together on one occasion of abuse. Id. at 316, 479 S.E.2d at 519-20. The Stepdaughter and the Stepson were not allegedly abused together at the same time. There is a lack of connection like the court found in Jones.

The Trial Court therefore committed reversible error in allowing the two charges to be tried together over Petitioner's objection because the two alleged incidents did not arise out of a single chain of circumstances and were not provable by the same evidence. Crimes which do not arise out of a "single chain of circumstances" and which require "different evidence for proof" fail to "meet the requirements for consolidation." Middleton, 288 S.C. at 22; 339 S.E.2d at 693. Joinder of the two separate indictments against Petitioner was improper, and the Trial Court had no discretion to consolidate these distinct cases into one trial. On this basis alone, the Trial Court's consolidation of the two indictments into a single trial was erroneous, and Petitioner is entitled to two new and separate trials.

D. Even if the Trial Court had discretion to try the two separate indictments together, Petitioner's substantive rights would be prejudiced where it was highly probable that the jury inferred that because two children alleged sexual abuse by Petitioner, Petitioner had a propensity to commit these types of acts

As asserted above, Petitioner asserts that the Trial Court did not have discretion to try the two separate indictments together as the indictments did not arise out of a single chain of circumstances and were provable by different evidence. If, however, this Court concludes that the indictments could be tried together in the Trial Court's discretion,

"offenses charged in separate indictments [that] are of the same general nature involving connected transactions closely related in kind, place and character" cannot be tried together "if the defendant's substantive rights" would be prejudiced. State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996).

There is no question that Petitioner's substantive rights were prejudiced by the joinder of the two indictments into a single trial. It is highly likely that the jury might have inferred criminal disposition based on evidence of one alleged incidence of sexual abuse and on that basis alone found Petitioner guilty of the other incident. See State v. Tate, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (1985) (finding joinder of two unconnected forgery charges prejudicial because it was likely the jury would infer criminal disposition based on evidence of one forgery and find the defendant guilty of the other forgery on that ground alone).

Furthermore, the State itself admitted it had a weak case on each separate indictment and needed to try the two cases together:

> As far as *res gestae*, if the jury can't hear how [the Stepson] disclosed, they're missing a big chunk. ***That's all the evidence the State has in this case is each of the children's disclosing. We don't have any physical evidence.*** All we have is their evidence. ***That's the only direct evidence the State has.*** If you were to take out how the disclosure came about, the jury would miss half the case.

R. 20, l. 22 – 21, l. 3 (emphasis added). The State therefore conceded to the Trial Court that it could not try the cases separately without the allegations of both children because it did not have any other physical or direct evidence. The State built its case around its hope that the jury would find Petitioner's propensity to commit one act meant that he committed the other and vice versa.

The State sought to enhance the credibility of each child by having the jury to hear that Petitioner was accused of sexually abusing another child instead of standing on the credibility of each child alone in separate trials. In many criminal cases, the jurors must access the credibility of the alleged victim in determining whether a defendant is guilty or not guilty and often times there may not be any physical or other evidence against the defendant. A child sexual abuse case should be treated no differently, and the State should not be allowed to strengthen the credibility of an alleged child victim with propensity evidence simply because it has no other evidence against the defendant. The jury in this case was instructed that the testimony of the alleged victim did not need to be corroborated with other evidence; therefore, there was no need for the State to corroborate the children's testimonies with the disclosure evidence which amounted to nothing more than inadmissible propensity evidence. R. 352, ll. 2-3; see S.C. CODE ANN. § 16-3-657.

As such, Petitioner was substantially prejudiced by the joinder of the two separate indictments because the jury was likely encouraged to convict Petitioner because of his alleged propensity to commit such crimes without regard to whether Petitioner was actually guilty of each distinct crime charged. The prejudicial effect of consolidating Petitioner's sexual abuse charges was extremely high where (1) there was no physical evidence to support the Stepdaughter's and the Stepson's allegations; and (2) the Stepson's rectal examination "was normal" and showed no signs of penetration. R. 226, l. 8 – 227, l. 12. Accordingly, even if the Trial Court had discretion to try the two cases together, the Trial Court erred in doing so where Petitioner's substantive rights were prejudiced.

1. **Evidence of the alleged sexual abuse of each sibling would not have been admissible in separate trials under Rule 404(b), SCRE as a common scheme of plan**

The State argues, and the Court of Appeals held, that Petitioner was not prejudiced by the joinder because evidence regarding his alleged sexual abuse of each child would have been admissible in separate trials to show a common scheme or plan.

"[E]vidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charge." State v. Lyle, 125 S.C. 406, 415, 118 S.E. 803, 807 (1923). In Lyle, this Court long ago recognized the prejudicial effect of the admission of other similar crimes to the indicted charge on trial: "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." Id.

However, there are certain well-established exceptions to this general rule:

> [E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

Id.; see Rule 404(b), SCRE ("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. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

Historically, "the common scheme or plan" exception required "that the relationship between the acts must have established such a connection between them as would logically exclude or tend to exclude the possibility that the person crime could have been committed by another person." State v. Rivers, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979) (holding where the only common elements in the sexual activities involving the defendant's wife and those involving the complainant were apparent sexual frustration and violence and where the alleged activities involving the wife had no tendency to establish a subsequent scheme by the defendant to forcibly abduct and assault the complainant, the trial court committed prejudicial error when it received testimony from the defendant's wife concerning the defendant's alleged sexual practices).

In State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983), this Court clarified that the "common scheme or plan" required more than the "mere commission of two similar crimes by the same person." Rather there "must be some connection between the crimes" and if there was "any doubt as to the connection between the acts, the evidence should not be admitted." Id. The connection required between the prior bad act and the crime charged must be "more than just a general similarity." State v. Smith, 322 S.C. 107, 110, 470 S.E.2d 364, 366 (1996). This Court reiterated in State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) that a "common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."

In cases involving sexual crimes, this Court initially applied the common scheme or plan exception "where evidence of acts prior and subsequent to the act charged in the

indictment [tended] to show ***continued illicit intercourse between the same parties.***" State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 712 (1955) (emphasis added).

In State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984), this Court applied the common scheme or plan exception to permit the admissibility of prior acts even though the prior acts involved different victims. This Court upheld the admission of evidence from the defendant's other daughters about prior sexual abuse in a case where he was charged with criminal sexual conduct against his younger daughter. This Court found evidence of a common scheme or plan where (1) the defendant began his attacks on each daughter around the age of twelve; (2) the defendant would enter each daughter's bedroom late at night, waking them, and taking one of them to his bedroom; and (3) the defendant would also explain to each daughter the Biblical verse that children are to "Honor thy Father" and would indicate to each of them that he was teaching them how to be with their husbands." Finding the method of attack was common to all three daughters, this Court observed "[i]t would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence." Id. at 391-92, 323 S.E.2d 773-74.

In this Court's 2009 State v. Wallace opinion, this Court held that a "close degree of similarity" would establish the required connection between two alleged sexual acts and that no further connection need be shown for admissibility. 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009); cf. Cutro, 332 S.C. at 103, 504 S.E.2d at 325 (requiring connection between the crimes). This Court set forth a list of factors to be considered in determining whether there is a close degree of similarity between the bad act and the crime charged in sexual offense cases: "(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." If the similarities outweighed the dissimilarities, the bad act evidence would be admissible under Rule 404(b). Id. at 433, 683 S.E.2d at 278.

Using these factors, this Court concluded in Wallace that the charged offense and the defendant's prior bad act of sexually abusing the victim's sister were sufficiently similar to show a common scheme or plan where the similarities included the defendant's relationship to the victims (his stepdaughters), abuse beginning at about the same age (seventh grade), abuse occurring in the family home when the mother was absent, and an admonishment not to tell because no one would believe them. Id. at 431-34, 683 S.E.2d at 276-78.

In Petitioner's case, the dissimilarities of the two separate accusations overwhelmingly outweigh any similarities:

1. the two charges involved two different victims;

2. the victims were of different sexes;

3. the ages of the victims were not the same – twelve years old versus eight years old;

4. the two charges involved different types of alleged conduct – the touching of a female's genitals and male anal penetration;

5. the Stepdaughter alleged only one incident, while the Stepson alleged several instances of sexual conduct;

6. while the alleged incidents occurred in the family home, the Stepdaughter alleged that her incident occurred in the living room while the Stepson alleged that his incidents occurred in Petitioner's bedroom;

7. the Stepdaughter alleged that when she was assaulted, the Stepson was asleep in the living room with her and her mother was asleep in another bedroom, while the Stepson said only he and Petitioner were in the Petitioner's bedroom when the alleged assaults against him occurred;

8. the incident involving the Stepdaughter occurred the day after the Stepdaughter and Petitioner had some sort of dispute while away on a family vacation;

9. the Stepson alleged that Petitioner told him not to tell anyone about the incidents and made threats to him while the Stepdaughter did not make any such allegations; and

10. the Stepdaughter was very specific as to the time and date of the alleged incident involving her – July 7, 2008 at around four in the morning – while the Stepson could provide no specifics as to when he was allegedly abused and the evidence established a wide time period in the alleged incidents involving him could have occurred – November 2007 to July 2008.

Unlike Wallace and McClellan, there was no common method of alleged attack by Petitioner where the separate offenses were significantly dissimilar. The State did not show any continuous pattern of sexual abuse conducted in the same manner and under similar circumstances. Cf. State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009) (holding victim's testimony regarding four prior incidents of uncharged sexual misconduct was admissible as evidence of a common scheme or plan where the misconduct was directed at the same victim and "[e]ach of the incidents established a pattern of escalating abuse which ultimately culminated" in the lewd act upon the child").

The State points to the following similarities: (1) the alleged victims were biological siblings who were the stepchildren of Petitioner; (2) they were both prepubescent when Petitioner alleged abused them, although their ages were four years apart; (3) the alleged abuse occurred in the family home when the children's mother was not present in the room; (4) the alleged abuse began with touching and the Petitioner

allegedly never totally undressed the children but just pulled down their clothing; and (5) there was a news program on the television when the alleged abuse occurred.

These similarities have very little probative value of a common scheme or plan. That the Stepdaughter and the Stepson are siblings whose mother married Petitioner is not indicative of whether Petitioner employed a common scheme or plan to commit sexual assaults. That the alleged abuse occurred in the family home is also not indicative of a common scheme of plan since most interactions between Petitioner and his stepchildren would have occurred in the home where they lived together. That the children's mother was not in the room when the alleged assaults occurred also does not establish evidence of a common scheme or plan. In pretty much every sexual abuse case, there is not going to be a disapproving adult in the room. In addition, that the children's clothes were pulled down is another factor that is likely present in most sexual assault cases and has no bearing on whether Petitioner allegedly embarked upon a common scheme or plan. These similarities are so banal that they have limited to no probative value of a common scheme or plan.

While the State tried to link a news program being on the television as part of Petitioner's alleged common scheme of attack, the evidence at trial showed (1) most rooms of the house had a television; (2) Petitioner was a news buff and watched the local news in the mornings and afternoons; (3) Petitioner routinely watched the local news in the morning before work – the time that the Stepdaughter alleged her attack occurred; (4) Petitioner often watched news programs with the children; and (5) the Stepson was already watching the news on television in Petitioner's bedroom before Petitioner

allegedly entered the room and assaulted him. R. 89, ll. 4-7; 96, ll. 17-23; 137, ll. 15-19; 147, ll. 8-13; 152, ll. 11-13; 174, l. 19-175, l. 5; 177, ll. 23-24; State's Ex. 5 (video of forensic interview).

There was no evidence that Petitioner would "set the stage" by turning on the news before allegedly abusing the children. A news program being on the television was not evidence of some sort of *modus operandi* by Petitioner. Rather, the evidence merely showed that the news was on the television most of the time at the family home.

Furthermore, while the Court of Appeals recognized that the Stepson reported threats and coercion while the Stepdaughter did not, the Court of Appeals found that the alleged incident involving the Stepdaughter was halted before Petitioner had the opportunity to use threats or coercion. The Court of Appeals then diminished the importance of this dissimilarity. However, there is no reason that Petitioner could not have said these things to the Stepdaughter when she woke up just as he allegedly told the Stepson after the incidents to not say anything to anyone. The Stepson alleged that Petitioner made threats while the Stepdaughter did not, and that is a difference which negates any common scheme or plan under this Court's holding in Wallace.

Where it is clear that the dissimilarities outweigh any similarities, the State cannot make a compelling argument that the alleged sexual abuse of each stepchild would have been admissible in separate trials under the common scheme or plan exception to the rule prohibiting the admission of prior bad acts. In State v. Fonseca, 383 S.C. 640, 649-50, 681 S.E.2d 1, 5-6 (Ct. App. 2009), affirmed by this Court in 393 S.C. 229, 711 S.E.2d 906 (2011), the Court of Appeals found it was error to allow the victim to testify about a

previous incident of sexual abuse where the State could not show a close degree of similarity between the prior bad act and the crime charged to admit the prior bad act under the common scheme or plan exception.

In Fonseca, the defendant was married to the victim's older sister, and the assaults occurred when the victim was visiting to help care for her sister's children. In 2001, when the victim was ten years old, the victim was lying on the couch when the defendant approached her and asked if she wanted to see his penis. The victim declined, but the defendant exposed it to her anyway after which the victim retreated to a bedroom and pretended to be asleep. The defendant followed her to the bedroom, laid beside her, touched her beneath her underwear, and began feeling and groping her genitals. The victim did not immediately tell anyone of this incident. Id. at 643-44, 681 S.E.2d at 2.

The crime charged arose out of a 2003 incident when the victim was now twelve year old and visiting her sister's home. Her sister asked the victim to retrieve something from another room where the defendant followed her, and when the victim bent over to pick up an item, the defendant pushed her down, pulled her legs apart, and while clothed, put his genitals up against hers in a manner simulating intercourse. The defendant ceased the assault when the victim began to scream. Id. at 644, 681 S.E.2d at 2.

Even though both incidents involved the same victim, occurred at the victim's sister's home when the victim was helping her sister, occurred after the defendant followed the victim into another room, and involved similar acts of touching the victim's private area in a sexual manner, those similarities were not enough to establish a common scheme or plan to permit the admissibility of the 2001 incident as evidence in the trial of

the 2003 incident. Id. at 649-60, 681 S.E.2d at 5-6. Much as the similarities were not sufficient in Fonseca to establish a common scheme or plan, the few similarities in the instant case are not sufficient to overcome the numerous dissimilarities in the alleged separate incidents to permit the admissibility of the alleged sexual abuse of each sibling in separate trials.

If this Court determines that that the other bad act evidence would have been admissible in separate trials as a common scheme or plan under Rule 404(b), SCRE, then it must determine whether the Trial Court properly admitted such evidence under Rule 403, SCRE which provides: "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 . . . ." To be admissible, Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant. Wallace, 384 S.C. at 435, 683 S.E.2d at 278-79; see also State v. Brooks, 341 S.C. 575, 33 S.E.2d 325 (2000) ("[E]ven though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.").

While the Court of Appeals concluded that the probative value of the prior bad act evidence outweighed the danger of unfair prejudice to Petitioner, it never stated what the evidence was probative of except that implicitly because Petitioner may have sexually abused one child, he must have abused the other as a part of the "common scheme or plan." The only apparent probative value of the evidence was Petitioner's propensity to commit the crimes.

However, propensity evidence is generally inadmissible. In fact, "the rationale for excluding evidence of prior 'bad acts' is to prevent the jury from considering an accused's inclinations rather than his actual conduct in the incident before the court." Stokes, 279 S.C. at 193, 304 S.E.2d at 815.

Furthermore, should this Court accept the State's argument that the separate incidents alleged against Petitioner exhibit a "close degree of similarity," the more similar a prior bad act is to the charged offense actually enhances the prejudice to Petitioner. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"); State v. Taylor, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct. App. 2012) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime").

Where the prior bad act is similar to the offense for which a defendant is being tried, a jury may determine a defendant's guilt on an improper basis by relying on the prior bad act testimony as propensity evidence. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity.").

Therefore, any similarity of the underlying allegations of the two separate charges against Petitioner actually creates unfair prejudice to Petitioner that outweighs whatever

little probative value the evidence may hold. In these child sexual abuse cases, using the standard of a "close degree of similarity" between the alleged acts of sexual misconduct as the touchstone for whether a "common scheme or plan" exists under Rule 404(b) in effect creates an exception to the rule's exclusion of propensity evidence. See Wallace, 384 S.C. at 436, 683 S.E.2d at 279 (Pleicones, J. dissenting).

In summary, even if the evidence pertaining to each child would have been admissible in separate trials under Rule 404(b) as a "common scheme or plan," the prejudicial effect of such evidence would substantially outweigh any probative value of the evidence because any similarity could encourage a jury to infer Petitioner's alleged propensity for child sexual abuse where the State bolstered its case by stacking the charges together. See State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) ("[C]ertain prior bad act testimony is inadmissible [because] it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial.").

The prejudicial effect of consolidating Petitioner's sexual abuse charges was elevated where there was no physical evidence to support the children's allegations and where the Stepson's rectal examination was normal and showed no signs of penetration. Even the State admitted that it had no physical evidence and needed to essentially prejudice Petitioner by having a jury hear evidence of each child's disclosures. R. 20, l. 22 – 21, l. 3.

Accordingly, the Trial Court erred in trying together the two separate indictments against Petitioner where the evidence pertaining to each indictment would not have been admissible in separate trials as a common scheme or plan. Even if the evidence somehow

established a common scheme or plan, the limited probative value of this evidence would have been substantially outweighed by the unfair prejudice to Petitioner.

Finally, Petitioner raises the concern to the Court that if a common scheme or plan can be established based on the mere similarity of two crimes, even a close similarity, then all that the common scheme or plan proves is that if a defendant committed an act in the past, then that makes it more likely that he committed the charged crime. That type of evidence is nothing more than character and propensity evidence which is inadmissible under Rule 404.

This Court long ago held in Lyle that "[w]hether [a] crime was committed as part of a common plan or system was wholly immaterial, ***unless*** proof of such system would serve ***to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent.*** Proof of a common plan or system, therefore, in this connection ***is merely an evidential means*** to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged." Lyle, 118 S.E. at 811 (emphasis added).

Here, the State is not trying to establish a "common scheme or plan" to prove identity or criminal intent. There was obviously no issue with identity and because Petitioner denied that any contact ever occurred, intent was not a material issue either. See State v. Nelson, 331 S.C. 1, 11, 501 S.E.2d 716, 721 (1998) ("In the trial of sex offenses, extrinsic evidence of intent is admissible only in those cases where there is no challenge to the occurrence of the physical contact itself, but the intent of the actor is at

issue because the nature of the contact is subject to varying interpretations.") (internal citations omitted); State v. Fonseca, 383 S.C. 640, 648-49, 681 S.E.2d 1, 5 (Ct. App. 2009) ("[B]ecause Appellant denied that the contact ever occurred, intent was not made a material issue."). The State's purpose of offering this evidence under the guise of a "common scheme or plan" is simply to paint Petitioner as someone who has a propensity to molest children, which of course is inadmissible under Rule 404(b).

Furthermore, the two disparate acts alleged against Petitioner are not mutually dependent. The different acts allegedly committed against the two children do not tend to show that Petitioner had any sort of plan because the alleged commission of one act does not hinge on the occurrence of the other. See State v. Melcher, 678 A.2d 146, 150 (N.H. 1996) (holding defendant's prior uncharged sexual conduct could not be admitted to demonstrate a plan where these acts did not show defendant had a plan; "the purported goal of the plan – the act with which the defendant was charged – clearly did not hinge on their occurrence").

The purpose of the common scheme or plan exception should be to require proof of a scheme or plan which connects the prior misconduct with the crime charged. "Liberal use of the exception had led to a distortion of the original purpose of this exception." See State v. Bernard, 849 S.W.2d 10, 13-14 (Mo. 1993) (describing the misuse of the common scheme or plan exception in cases involving sexual abuse of children). For this additional reason, the allegations pertaining to each child would not have been admissible in separate trials under the "common scheme or plan" exception and it was therefore improper for the Trial Court to try the two separate charges together.

2. Evidence of the alleged sexual abuse of each sibling would not have been admissible in separate trials under Rule 404(b), SCRE to show the absence of mistake or accident

The State additionally argues that evidence of the Stepson's alleged abuse would have been admissible in a separate trial regarding the Stepdaughter under the absence of mistake or accident exception of Rule 404(b). The State contends that Petitioner placed into issue his intent or motive by trying to suggest that the touching of the Stepdaughter was a mistake or accident that occurred while he was searching for the television remote. Petitioner, however, did not raise that defense. Rather, these were just more allegations made by the Stepdaughter in addition to her allegations that Petitioner inappropriately touched her. R. 68, l. 24 – 69, l. 13; 117, ll. 11-17. Petitioner denied all allegations made by the Stepdaughter. Petitioner never once raised this defense of mistake or accident in his closing argument to the jury. R. 331, l. 13 – 342, l. 20.

Prior bad act evidence is not admissible under Rule 404(b) to show the absence of mistake or accident where a defendant denies any sexual contact with the alleged victim. See State v. Nelson, 331 S.C. 1, 12, 501 S.E.2d 716, 722 (1998) (determining that where petitioner denied any sexual contact with the victim, it was highly questionable whether the element of intent was even a material issue); State v. Fonseca, 383 S.C. 640, 648-49, 681 S.E.2d 1, 5 (Ct. App. 2009); cf. State v. Smith, 337 S.C. 27, 29-34, 522 S.E.2d 598, 599-601 (1999) (holding defendant's prior domestic violence conviction was admissible to show intent to kill and absence of mistake or accident where defendant claimed the shooting was an accident); State v. Key, 277 S.C. 214, 215-16, 284 S.E.2d 781, 782 (1981) (holding evidence that defendant had threatened victim's associate two or three

times with a gun and actually drew it on one occasion was admissible to show absence of mistake or accident where defendant claimed he discharged his gun accidentally).

Petitioner did not raise any defense that he mistakenly or accidentally touched the Stepdaughter; he denied it. The allegations of abuse against the Stepson would not have been admissible to show absence of mistake or accident in a separate trial of the Stepdaughter's allegations. Once again, joinder was improper.

3. Evidence of the alleged sexual abuse of each sibling would not have been admissible in separate trials under the *res gestae* doctrine

Finally, the State contends that evidence regarding Petitioner's alleged abuse of the other sibling would have been in admissible in separate trials under the *res gestae* doctrine because such evidence was necessary for a full presentation of the case. The State argues that how, why, and when the siblings disclosed was critical evidence in the State's case and was relevant to complete the "whole, unfragmented story" of the alleged sexual abuse of the siblings. The State's argument is unpersuasive.

First, as explained herein, disclosure is not an element the State needs to prove in either a lewd act upon a child case or a first degree CSC with a minor case. See infra p. 20. Second, this disclosure evidence was not necessary to provide a complete picture of the alleged of sexual abuse or the context in which the sexual abuse occurred. This Court has recognized that the *res gestae* doctrine or "complete picture" exception seldom has application in child sexual abuse cases. State v. Nelson, 331 S.C. 1, 12-14, 501 S.E.2d 716, 722-23 (1998).

The evidence of each child's disclosures could only be relevant to show the "context" of the alleged crimes ***only if*** the assumption is made that because one child disclosed that Petitioner abused her, then the other child's disclosure must mean that Petitioner abused him also. This is just a cleverly disguised way of getting impermissible propensity evidence before the jury. See Nelson, 331 S.C. at 14, 501 S.E.2d at 722-23. "Context, in this instance, is merely a synonym for propensity." State v. Melcher, 678 A.2d 146, 150 (N.H. 1996) (rejecting the State's argument that prior sexual misconduct was relevant to show the context in which the sexual assault charged occurred, stating "[t]o infer from this contact . . . an understanding of how the charged act could have occurred, we must necessarily assume that the defendant acted on the occasion of the charged act in conformity with his prior conduct; this assumption is the inescapable link between the charged and uncharged crimes) (further holding that when "an assumption based upon the defendant's propensity toward certain action is the essential connection in the inferential chain supporting relevance, the evidence is inadmissible under Rule 404(b)) (internal citations omitted).

Besides, each child has his or her own story about what allegedly happened to him or her and nothing else is needed to complete the child's story. The Stepdaughter has alleged that Petitioner abused her on July 7, 2008 and that she disclosed to her mother that same day, to her father later in the week, and then to law enforcement. The Stepson has separately alleged that Petitioner abused him sometime between the beginning of November 2007 and July 2008, that his mother observed him acting out and drawing some disturbing pictures, that his mother called his cousin to come over to discuss the

pictures with him, and that he then disclosed to his cousin the abuse which he then later disclosed to law enforcement and a forensic interviewer.

These are two distinct and complete stories for which no other evidence is necessary for a full presentation of the case. For this addition reason, joinder of the lewd act charges involving the Stepdaughter and the CSC charges involving the Stepson was improper where the evidence as to each sibling would not have been admissible in separate trials as a part of the *res gestae*.

CONCLUSION

For the reasons set forth herein, Petitioner Richard Burton Beekman respectfully requests this Court to reverse the Opinion of the Court of Appeals and his convictions and remand the case for separate new trials on each charge.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of September, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

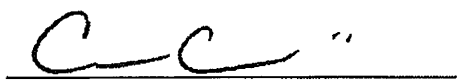
RICHARD BURTON BEEKMAN,

PETITIONER.

APPELLATE CASE NO. 2013-002002

CERTIFICATE OF SERVICE

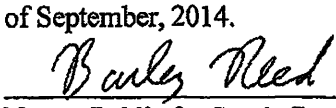
I certify that a true copy of the brief of petitioner, in this case has been served on Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of September, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of September, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

WESTLAW

Original Image of 785 S.E.2d 202 (PDF)

415 S.C. 632
Supreme Court of South Carolina.

State v. Beekman
Supreme Court of South Carolina. · April 13, 2016 · 415 S.C. 632 · 785 S.E.2d 202 *(Approx. 7 pages)*

v.

Richard Burton BEEKMAN, Petitioner.

Appellate Case No. 2013-002002.
No. 27623.
Heard April 22, 2015.
Decided April 13, 2016.

Synopsis

Background: Defendant was convicted in the Circuit Court, Pickens County, G. Edward Welmaker, J., of criminal sexual conduct and lewd act upon a child. Defendant appealed. The Court of Appeals, Huff, J., 405 S.C. 225, 746 S.E.2d 483, affirmed. Defendant petitioned for writ of certiorari.

Holdings: The Supreme Court, Kittredge, J., held that:
1 offenses arose from single chain of events, as required for joinder of charges, and
2 offenses were supported by same evidence, as required for joinder of charges.

Affirmed.

Pleicones, C.J., filed dissenting opinion in which Beatty, J., joined.

West Headnotes (4)

Change View

1 **Criminal Law** Joint or Separate Trial of Separate Charges
Indictment and Information Different Offenses in Same Transaction
Charges can be joined in the same indictment and 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.

2 **Criminal Law** Discretion of court
Criminal Law Preliminary proceedings
A motion for severance of charges is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown.

3 **Criminal Law** Joint or Separate Trial of Separate Charges
Offenses of first-degree criminal sexual conduct, arising from defendant's conduct with respect to stepson, and lewd act upon a child, arising from defendant's conduct with respect to stepdaughter, arose from single chain of events, as required for joinder of charges, even though incidents underlying charges occurred at different times; victims were siblings, molestation occurred at same place and over same eight-month period of time, and with same modus operandi, in that defendant took advantage of victims' habit of watching television with him.

Criminal Law Joint or Separate Trial of Separate Charges

SELECTED TOPICS

Criminal Law

Trial
Evidence of Defendant Sexual Abuse of Victim
Joint Trial of Separate Counts or Indictments

Secondary Sources

Joinder of offenses under Rule 8(a), Federal Rules of Criminal Procedure

39 A.L.R. Fed. 479 (Originally published in 1978)

...This annotation collects and analyzes the federal cases which have discussed questions concerning the joinder or misjoinder of two or more offenses in the same indictment or information under Rule 8(a)...

s 222. Prejudicial Joinder of Offenses

1A Fed. Prac. & Proc. Crim. § 222 (4th ed.)

...Rule 8 allows the prosecutor to bring multiple charges against a defendant in a single trial where the charges are of a same or similar character; are based on the same act or transaction; or, are part...

Consolidated trial upon several indictments or informations against same accused, over his objection

59 A.L.R.2d 841 (Originally published in 1958)

...The present annotation deals with the consolidation for trial of several indictments or informations against the same accused, over his objection. Included are decisions involving the consolidation for...

See More Secondary Sources

Briefs

Brief for the United States

1957 WL 87774
Sam ACHILLI, petitioner, v. United States of America.
Supreme Court of the United States
Apr. 26, 1957

...Note: Table of Authorities page numbers missing in original document The opinion of the Court of Appeals (No. 430, R. 1223-1236, 1268-1271) is reported at 234 F. 2d 797. The opinion of the district cou...

Brief for Appellant

2017 WL 56816
UNITED STATES OF AMERICA, Appellee, v. Clifford WARES, Appellant.
United States Court of Appeals, Third Circuit.
Jan. 03, 2017

...FN1. "App." followed by a number denotes the relevant page of the appendix to the bref. The Presentence Investigation Report and Statement of Reasons for the sentence have been filed separately and un...

Brief for the Petitioners

1960 WL 98775
H. A. LOTT, Lee Blocker and Lorn D. Frazier, Petitioners, v. The United States of America, Respondent.
Supreme Court of the United States
Dec. 27, 1960

...The opinion of the Court of Appeals (R. 107-116) is reported at 280 F. 2d 24. The

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4 Offenses of first-degree criminal sexual conduct, arising from defendant's conduct with respect to stepson, and lewd act upon a child, arising from defendant's conduct with respect to stepdaughter, were supported by same evidence, as required for joinder of charges, even though each offense was a distinct crime and was not proven by completely identical evidence; there were glaring similarities in defendant molesting both of his stepchildren in the same place, over the same time period, and in a similar manner, and testimony from many of the same witnesses would be used to prove both charges.

Attorneys and Law Firms

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Attorney General, Alan M. Wilson and Assistant Attorney General, Christina C. Bigelow, both of Columbia, for respondent.

Opinion

Justice, KITTREDGE.

*634 Petitioner Richard Burton Beekman was convicted of committing first-degree criminal sexual conduct (CSC) with a minor on his stepson (Stepson) and a lewd act upon a child on his stepdaughter (Stepdaughter). We granted a writ of certiorari to review the court of appeals' decision affirming the trial court's denial of Beekman's motion to sever the charges. We affirm.

I.

In June 2006, Beekman married Mother, who shared joint custody of Stepdaughter and Stepson with her ex-husband. On July 7, 2008, Stepdaughter reported to Mother that Beekman had sexually abused her. Mother took Stepdaughter to the children's grandmother's house for the night, and she and Stepson moved there the next day. At the grandmother's house, Stepson began acting out—scratching his skin, banging his head, hyperventilating, and drawing pictures of Beekman dying. Eventually, a cousin came over to talk to Stepson, and he disclosed to her that he had also been sexually abused by Beekman.

Beekman was subsequently charged with committing CSC on Stepson and a lewd act on Stepdaughter. The State sought *635 to prosecute both indictments in a single trial. Beekman moved to sever the two charges, arguing they did not arise from the same chain of circumstances, would not be proved by the same evidence, and were not of the same general nature. He further argued he would be substantially prejudiced if the cases were tried jointly. The trial court denied the motion, finding that the events arose out of the same chain of circumstances and there was a "great overlap of evidence."

The case proceeded to trial. Stepdaughter **204 testified that on the evening of July 6, 2008,[1] she and Stepson slept on couches in the living room because their rooms were messy. She stayed up watching the Disney Channel awhile, but eventually fell asleep. She awoke later in the night to Beekman touching her "private area" beneath her clothes. The television was still on and the news was playing. Beekman was startled when Stepdaughter woke up, and he asked if she knew where the remote was. She threw it at him, and he left the room. According to Stepdaughter, she told Mother the next night about Beekman touching her, and they immediately moved into her grandmother's house.

Stepson also testified that, on two separate occasions within an eight-month period,[2] Beekman touched Stepson's penis while they were watching the news together. On both occasions, Beekman put his hands under Stepson's clothes and touched Stepson's bare skin. Stepson further stated that Beekman anally penetrated him on one occasion while Stepson was in Beekman's room watching the news.

After disclosing the abuse, Stepson was examined by Dr. Nancy Henderson, the head of Greenville Hospital System's section on child abuse and neglect and a physician board-certified in child abuse pediatrics. Dr. Henderson testified that Stepson informed her he had been touched on his genitals and that "someone had put his private part into [Stepson's] bottom." Although his rectal exam was normal and did not uncover any signs of scars or

tearing, Dr. Henderson noted that ninety percent of children have normal exams even when there is a history of penetration.

*636 The jury convicted Beekman of both crimes. He was sentenced to thirty years' imprisonment for CSC and fifteen years' imprisonment for the lewd act, to be served consecutively.

Beekman appealed arguing, in part, that the trial court erred in denying his motion to sever the charges. The court of appeals affirmed. *State v. Beekman,* 405 S.C. 225, 746 S.E.2d 483 (Ct.App.2013). We granted certiorari to review the court of appeals' opinion.

Beekman argues the court of appeals erred in affirming the trial court's denial of his motion to sever the charges because the crimes did not arise out of a single chain of circumstances and were not provable by the same evidence. Further, Beekman argues that trying the charges together unfairly prejudiced him because it allowed the jury to consider evidence the State would have been prevented from presenting in separate trials and likely created the impression in jurors' minds that Beekman had a propensity to sexually abuse children. Therefore, according to Beekman, this Court should reverse his convictions and remand his case for separate trials. For the reasons discussed below, we disagree.

II.

1 2 "Charges can be joined in the same indictment and 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, 164, 478 S.E.2d 260, 265 (1996) (citing *State v. Tate,* 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct.App.1985)). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *Id.* (citing *State v. Anderson,* 318 S.C. 395, 398, 458 S.E.2d 56, 57–58 (Ct.App.1995)).

III.

3 First, Beekman asserts the offenses did not arise from a single chain of circumstances. We disagree and, like the court of appeals, reject Beekman's "restrictive reading of the phrase 'a single chain of circumstances.' " *637 *Beekman,* 405 S.C. at 231, 746 S.E.2d at 486. Instead, we agree with the court of appeals that "the two charges against Beekman arose from, in substance, a single course of conduct or connected transactions." *Id.*

**205 In other cases, even though the charges did not arise out of a single, isolated incident, this Court and the court of appeals have allowed joinder when the crimes "involv[ed] connected transactions closely related in kind, place, and character." *State v. Cutro,* 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) (footnote and citations omitted); *see, e.g., Id.* at 373–75, 618 S.E.2d at 894–95 (finding no abuse of discretion in denying a motion to sever charges involving multiple victims of Shaken Baby Syndrome even though the charges stemmed from separate occurrences); *Tucker,* 324 S.C. at 163–65, 478 S.E.2d at 264–65 (permitting joinder of charges stemming from a multi-day crime spree that included a murder and multiple break-ins); *State v. McGaha,* 404 S.C. 289, 291–99, 744 S.E.2d 602, 603–07 (Ct.App.2013) (affirming, under facts almost identical to the present case, joinder of CSC with a minor and lewd act upon a child charges arising from the abuse of two sisters who were both abused by an individual in the same manner, in the same place, and during the same time frame); *State v. Jones,* 325 S.C. 310, 314–16, 479 S.E.2d 517, 519–20 (Ct.App.1996) (finding no abuse of discretion in consolidating child sexual molestation charges, even though the charges concerned two victims, when the offenses "were of the same general nature" and arose from the same "pattern of sexual abuse"); *see also City of Greenville v. Chapman,* 210 S.C. 157, 161–62, 41 S.E.2d 865, 867 (1947) (explaining that courts should avoid the "inflexible application" of the rule that charges must arise out of the same set of circumstances to warrant joinder and noting that if "it does not appear that any real right of the defendant has been jeopardized, [then] it would be a refinement not demanded by the law or by justice to require in all instances a separate trial"). There can be no dispute that Beekman's molestation of his two stepchildren "involv[ed] connected transactions closely related in kind, place, and character." *Cutro,* 365 S.C. at 374, 618 S.E.2d at 894 (footnote omitted). Specifically, Beekman's victims were siblings and the molestation occurred (1) at the same place—the victims' home; (2) over the same period of time—the eight-month period between *638 November 2007 and July 2008; and (3) with the same modus operandi—Beekman taking advantage of the children's habit of watching television with him. *Cf. Cutro,* 365 S.C. at 374 n. 4, 618 S.E.2d at 894 n. 4 (finding joinder proper where "the State produced evidence each offense involved the violent shaking of an infant at the [defendant's] home daycare"). Therefore, the same level

of interconnectedness of crimes that was sufficient to permit joinder in *Tucker, Cutro, McGaha,* and *Jones* is present here.

4 Beekman next argues that the molestation of each child was a distinct crime and that the two charges are not supported by the same evidence. Of course they are distinct crimes, but that in no manner diminishes the glaring similarities in Beekman molesting both of his stepchildren in the same place, over the same time period, and in a similar manner. *Cf. Cutro,* 365 S.C. at 369–75, 618 S.E.2d at 891–95 (affirming the trial court's refusal to sever charges involving multiple victims where the appellant was charged with two counts of homicide by child abuse and one count of assault and battery, each of which involved incidents occurring at different times with different children). Indeed, Beekman acknowledges that testimony from many of the same witnesses would be used to prove both charges.

The fact that the State did not present the exact same testimony to prove the molestation of each stepchild is not dispositive in considering whether joinder of the charges was proper. Beekman advocates for a rule that strictly requires all charges be proved by completely identical evidence, a requirement nowhere to be found in our precedents requiring that the crimes be "proved by the same evidence." *See, e.g., Tucker,* 324 S.C. at 164, 478 S.E.2d at 265 (citing *Tate,* 286 S.C. at 464, 334 S.E.2d at 290) (listing the joinder requirements).

For joinder of related offenses, our appellate courts have recognized that there may be evidence that is relevant to one or more, but not all, of the charges. *Tucker* is such an example. James Neil Tucker committed a murder and robbery; he subsequently broke into a church and a mobile home while on the run from police. *Id.* at 160–61, 478 S.E.2d at 263. This Court affirmed the denial of Tucker's ***206** motion to sever the ***639** charges. *Id.* at 163–65, 478 S.E.2d at 264–65. By arguing that the evidence of multiple crimes may not merely overlap but must be wholly identical to warrant consolidation for trial, Beekman ignores the fact that the evidence needed to prove Tucker committed the murder was necessarily different than the evidence needed to prove Tucker broke into the church and mobile home.

IV.

We affirm the court of appeals in finding no abuse of discretion in the joinder of the charges, for the charges arose out of a single course of conduct, were of the same general nature, and were proved by the same evidence. Further, joinder did not prejudice any of Beekman's substantial rights. *See Tucker,* 324 S.C. at 164, 478 S.E.2d at 265 (citing *Tate,* 286 S.C. at 464, 334 S.E.2d at 290). The decision of the court of appeals is affirmed.

AFFIRMED.

HEARN, J. and Acting Justice Jean H. Toal, concur.

PLEICONES, C.J., dissenting in a separate opinion in which BEATTY, J., concurs.

Chief Justice, PLEICONES.
I respectfully dissent. I would reverse the Court of Appeals' decision to affirm the denial of Petitioner's motion to sever his charges and remand for further proceedings.

"Charges can be joined in the same indictment and 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, 164, 478 S.E.2d 260, 265 (1996); *State v. Smith,* 322 S.C. 107, 109, 470 S.E.2d 364, 365 (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 power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced."). In order for charges to be ***640** combined in the same indictment and tried together, all four elements must be met. *Tucker,* 324 S.C. at 164, 478 S.E.2d at 265. As explained below, it is my view that the charges did not arise out of a single chain of circumstances and are not provable by the same evidence, and therefore, the Court of Appeals erred in affirming the denial of Petitioner's motion for severance. *State v. Cutro,* 365 S.C. 366, 618 S.E.2d 890 (2005) (Pleicones, J., dissenting).

Petitioner was tried for one charge of criminal sexual conduct—first (CSC) of his stepson and one charge of lewd act on a minor, his stepdaughter. Petitioner moved to sever the charges, but his motion was denied by the trial court. The Court of Appeals affirmed, finding Petitioner "embarked upon a series of actions aimed at the sexual abuse of his two

prepubescent stepchildren over the course of an eight month period." The Court of Appeals found the facts that supported trying the charges in the same trial where: each alleged incident of abuse occurred in the family home; both victims are prepubescent siblings[3]; the alleged abuse began in a similar manner by petitioner placing his hand on the unclothed genitalia of the victims; the news playing on the television during both alleged incidents of abuse; and the alleged incidents occurred during an eight month period.

As explained in *Tucker*, charges can be joined in the same indictment only when all four elements warranting a combined trial are present. *Id.* In my view, the charges do not arise out of a single chain of circumstances because there is no nexus between the crimes. *Compare State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986) (reversing the consolidation of charges of murder of one victim on June 9th, murder of a second victim in a similar manner on June 10th, and an attempted robbery on June 11th because the crimes did not arise out of a single chain of ***207** circumstances); *with Tucker*, 324 S.C. 155, 478 S.E.2d 260 (holding consolidation of murder, kidnapping, armed robbery, possession of a weapon during a crime, burglary, and larceny charges was proper because the crimes arose during a single chain of circumstances when the burglaries were committed to avoid capture for the crimes ***641** related to the murder). In my opinion, the trial court and the Court of Appeals applied an exceedingly broad view of the single chain of circumstances factor. While I recognize that similarities exist, such as the alleged abuse occurred in the same home and the victims are siblings, the alleged lewd act on the stepdaughter of touching her genitals while she was sleeping has no nexus to and does not arise out of the same chain of circumstances as the alleged anal penetration of stepson while watching television.

Additionally, the Court of Appeals erred by summarily concluding that each charge is provable by the same evidence without an analysis of the evidence advanced at trial. Although some testimony would be necessary to prove each charge, such as the testimony of the victims' mother, in my view the evidence necessary to prove each charge is different. For example, the State played a forensic interview of stepson and presented testimony of the doctor that examined stepson as evidence of the CSC charge, and this evidence is not relevant to the alleged lewd act on stepdaughter.

Because all four elements required to join charges in the same trial are not present, it is my opinion that the Court of Appeals erred in affirming the denial of Petitioner's motion to sever. Accordingly, I would find the trial judge abused his discretion in denying the motion to sever the charges, reverse the opinion of the Court of Appeals, and remand for further proceedings.

BEATTY, J., concurs.

All Citations

415 S.C. 632, 785 S.E.2d 202

Footnotes

1 Stepdaughter was twelve years old at the time.

2 During this time, Stepson was eight years old.

3 Stepdaughter was twelve years old and stepson was eight years old at the time of the alleged abuse.

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