ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

G. Edward Welmaker, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RICHARD BURTON BEEKMAN,

APPELLANT

Appellate Case No. 2011-196688

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in refusing to sever Appellant's charges where: the alleged sexual abuse involved two victims; the offenses do not arise out of a single chain of circumstances and are not provable by the same evidence; and Appellant was prejudiced by its improper influential effect on the jury?

II. Did the trial court err in admitting alleged prior bad act evidence where the connection between the prior bad act and the crime was nothing more than just a general similarity and the probative value of the evidence was outweighed by its prejudicial effect?

III. Did the trial court err in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial?

STATEMENT OF THE CASE

On September 15, 2009, Appellant Richard Beekman was indicted by the Pickens County Grand Jury for (1) first degree criminal sexual conduct (CSC) with a minor and (2) lewd act upon a child. R. 372.

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

On July 28, 2011, Judge Welmaker sentenced Appellant 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 to run consecutively for a total of forty-five years imprisonment. R. 369, ll. 22-23.

This appeal follows.

STATEMENT OF FACTS

Background

Appellant was charged with having committed a lewd act upon his eleven year-old *stepdaughter*, Minor Child 1, based on her allegation that she was sleeping and when she woke up, Appellant was touching her "private area." R. 57, ll. 2-6; R. 62, l. 14 – 69, l. 25. Appellant was also charged with having committed a sexual battery upon his eight year-old *stepson*, Minor Child 2, based on his allegation that Appellant "stuck his worm in my butt." R. 121, ll. 5-10; R. 127, l. 21 – 129, l. 15. Minor Child 1 maintained that the sexual abuse occurred on July 7, 2008. R. 62, ll. 14-20. As for Minor Child 2, there was no evidence presented as to when the alleged sexual abuse occurred, except for that Minor Child 2 was eight years old, "*[s]o there was eight months where those incidents could have occurred.*" R. 285, ll. 21-22; R. 312, l. 10 – 313, l. 18 (emphasis added).

Notably: (1) there is no physical evidence to support Minor Child 1 and Minor Child 2's allegations; (2) Minor Child 2's rectal examination "was normal" and showed no signs of penetration; and (3) Minor Child 2 did not claim that he was sexually abused until after he had learned of his sister's sexual abuse allegation. R. 226, l. 8 – 228, l. 2.

Motion to Sever Charges

Pretrial, defense counsel moved to sever Appellant's CSC with a minor and lewd act upon a child charges and argued that "it's prejudicial to try these two cases together." R. 14, l. 23 – 51, l. 9. Specifically, defense counsel argued that Appellant's charges do not "arise out of a single chain of circumstances" because the charges involve "*different victims, different times, and . . . different witnesses.*" R. 15, ll. 7 – 17, l. 14 (emphasis added). Defense counsel further emphasized, "[Appellant] is prejudiced where you're trying two

sexual charges against separate victims." R. 17, ll. 17-18.

Conversely, the State maintained that Appellant's charges did arise out of a single chain of circumstances because the allegations are "integrally connected." R. 18, ll. 1-25. The State also claimed that Appellant would not be prejudiced by joinder of the charges because "even if Your Honor were to divide these trials, what happened to [Minor Child 1] would still come in to the trial through common [scheme] or plan or through res gestae." R. 19, ll. 6-9. The State further stated that the "defense [theory] is almost definitely going to be mistake or accident for the touching of [Minor Child 1]" and that "[i]f the State can prove to the jury that [Appellant] also touched [Minor Child 2], that seems to nullify any kind of accident or mistake. It proves [Appellant's] intent as well." R. 19, ll. 11-15.

Furthermore, the State admitted that "as far as res gestae[:]

> [I]f the jury can't hear about how [Minor Child 2] disclosed, they're missing a big chunk. *That's all the evidence the State has in this case is each of the children's disclos[ures]. 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).

After reviewing the evidence, the trial court found "that the indictments do arise out of the same chain of circumstances" and "that [the charges] are certainly of the same general nature, as far as the sexual abuse of children[.]" R. 36, l. 20 – 37, l. 4. The trial court also found that joinder of Appellant's charges would not be unduly prejudicial and based on its findings, the trial court denied defense counsel's motion to sever Appellant's charges. R. 37, ll. 5-10.

Prior Bad Acts Objection – Rule 404(b), SCRE

Defense counsel also objected pretrial under Rule 404(b), SCRE, arguing that the video of Minor Child 2's forensic interview improperly admits allegations of prior bad acts into evidence. R. 4, l. – 6, l. 18. In opposition, the State cited *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009), and maintained that the alleged crimes were similar and "establish[ed] a pattern of escalating abuse[.]" R. 7, ll. 22-25.

The trial court subsequently found "that the evidence is relevant" under Rule 401, SCRE. R. 37, ll. 11-22. The trial court also found, "[I]n light of the video that I've watch[ed], that [even though] I haven't heard any testimony, . . . I think that certainly [it] is sufficient for me to decide that [the] evidence establishing these prior acts would be shown by clear and convincing evidence." R. 38, ll. 9-13. The trial court further found "that the evidence does not substantially outweigh the danger of unfair prejudice to [Appellant]" and "that under [Rules] 401, 404(b), and 403[, SCRE,] that the evidence would be allowed." R. 38, 14 – 39, l. 11.

At trial, when the State asked Minor Child 2, who is now eleven years-old, "Did [Appellant] ever touch you in any inappropriate ways?" Defense counsel contemporaneously objected and referenced his pretrial argument. R. 123, l. 25 – 124, l. 3. The trial court then "noted and overruled" defense counsel's objection. R. 124, l. 4. Defense counsel also objected when the State sought to enter the video of Minor Child 2's forensic interview into evidence. R. 292, ll. 15-19. The trial court overruled defense counsel's objection and the tape was published to the jury. R. 292, l. 20 – 293, l. 11.

Hearsay Objection – Rule 801(d)(1), SCRE

Furthermore, when the State asked Tina Aiken, the mother of Minor Child 1 and Minor Child 2, "*Do you remember [Minor Child 1] telling you [Appellant] sexually abused her?*" defense counsel objected, arguing that the witness can only "testify as to place, time, opportunity and nothing else." R. 149, l. 22 – 150, l. 1 (emphasis added). The trial court replied, "All right. Okay. Ask your question again." R. 150, ll. 4-5. The State then asked, "Do you remember your daughter, [Minor Child 1], disclosing any sexual abuse to you?" and the mother replied, "Yes." R. 150, ll. 6-8. Two questions later, the State inquired, "Do you remember any kind of incident happening between [Appellant] and [Minor Child 1]?" and the mother stated, "I do not specifically. I'm not clear about what happened because I was in the [hotel] room."[1] R. 150, ll. 13-16.

Improper Bolstering Objection – Rule 608(a), SCRE

Additionally, after the trial court qualified Shauna Galloway-Williams as an expert in forensic interviewing and child counseling,[2] she testified that she conducted a forensic interview with Minor Child 1 and Minor Child 2. R. 246, l. 23 – 263, ll. 9; R. 285, ll. 3-11. Outside the presence of the jury, the State asked the trial court, "Am I able to ask about whether her disclosure was compelling in her expert opinion?" R. 280, ll. 5-6. Defense counsel subsequently objected and argued:

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[1] Prior to the alleged abuse, Minor Child 1 locked Appellant out of their hotel room while on vacation in Charleston, South Carolina. R. 61, ll. 6-24; R. 150, l. 20 – 151, l. 14.

[2] Galloway-Williams is the Executive Director of the Julie Valentine Center, which is formerly known as the Greenville Rape Crisis and Child Abuse Center. R. 246, l. 23 – 292, l. 3. Galloway-Williams had also previously been qualified as an expert in forensic interviewing as a licensed professional counselor. R. 247, l. 19 – 250, l. 2.

> [N]ow [the State] wants to go on and get the opinion. And I think Your Honor said the magic word here, to say that [the forensic interviewer is] credible. *That is simply . . . witness vouching for the credibility of another witness, Your Honor, and that's improper.*

R. 281, ll. 10-14 (emphasis added). The trial court denied the State's request to ask the forensic interviewer about her finding the Minor Child 2's disclosure compelling. R. 281, l. 15 – 281, l. 9.

Despite the trial court's ruling, the State asked the forensic interviewer, "When [Minor Child 2] made a disclosure . . . Do you have an opinion as to that disclosure?" R. 291, ll. 20-22. The forensic interview then testified:

> *Yes. I described [Minor Child 2's] disclosure as compelling disclosure because he was able to provide both those core and contextual details about what he was describing.* He able to say who, what, when, where, how. But he also gave a lot of pretty vivid description about what it felt like. *Probably one of the most compelling details that he shared was related to his body positioning*, how he was positioned when this incident occurred and how [Appellant] was when he performed this act, as well.

R. 291, l. 23 – 292, l. 6 (emphasis added).

The State then sought to introduce the video of Minor Child 2's forensic interview into evidence, and the trial court subsequently denied defense counsel's objection. R. 292, ll. 15-24. The video of the forensic interview was published to the jury. R. 293, ll. 10-11; State's Exhibit # 5 (video of forensic interview).

Closing Argument

During closing argument, the State directly addressed the credibility of Minor Child 2's testimony:

> Why lie? Why would a child want to lie about this? *There is*

> *no reason a child would want to lie about this*. . . . [T]here's certainly no reason for [Minor Child 2] to get up here yesterday and carry on a lie. . . . Why carry it on? *Because he's not lying.* He had nothing to gain out of this. Nothing.

R. 277, l. 11 – 323, l. 21. The State also addressed the credibility of both Minor Child 1 and Minor child 2's testimony:

> I wouldn't have known how to and to carry it along for this amount of time and be this consistent about the core details of what happened. They've been consistent from day one. They're consistent now. . . . *It's the truth. It was the truth then. It's the truth now.* If they really wanted to make up a lie, wouldn't [Minor 1] have said he raped me? Wouldn't [Minor 2] have been saying that it happened, the penetration happened more than once? . . . You can convict if you believe these children. And setting [Appellant] free would be the same as saying what these children told me was a lie.

R. 279, l. 7 – 325, l. 24 (emphasis added).

Jury Note

After deliberating for approximately one hour, the jury sent out a note requesting to "have a copy of [Minor Child 1's] testimony[.]" R. 310, ll. 20-22. The trial court complied with the jury's request and played the Minor Child 1's testimony to the jury. R. 265, l. 23 – 312, l. 18. The jury deliberated for about three and half more hours before rendering a verdict. R. 313, l. 8 – 316, l. 24.

ARGUMENT

I. **The trial court erred in refusing to sever Appellant's charges where: the alleged sexual abuse involved two victims; the offenses do not arise out of a single chain of circumstances and are not provable by the same evidence; and Appellant was prejudiced by its improper influential effect on the jury.**

"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."[3] *State v. Smith*, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). However, where the offenses are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. *See 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"); *see also 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).[4]

In this case, the trial court erred in failing to sever Appellant's CSC with a minor and lewd act upon a child charges because the charges *do not* arise out a single chain of circumstances and Appellant was prejudiced by the improper consolidation of the

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[3] The elements for consolidation of charges are conjunctive.

[4] *Cf. State v. Woomer,* 276 S.C. 258, 277 S.E.2d 696 (1981) (finding it proper to try together all crimes arising from a single uninterrupted crime spree).

charges. R. 36, l. 20 – 37, l. 10; *Smith*, 322 S.C. at 109, 470 S.E.2d at 365. Specifically, defense counsel argued that Appellant's charges do not arise out of a single chain of circumstances because the charges involve "*different victims, different times, and . . . different witnesses.*" R. 15, ll. 7 – 53, l. 14 (emphasis added). Notably, although Minor Child 1 maintained that the sexual abuse occurred on July 7, 2008, "*there was eight months where those incidents could have occurred*" to Minor Child 2 based on his testimony that he was eight years old when the alleged abuse occurred. R. 62, ll. 14-20; R. 285, ll. 21-22; R. 312, l. 10 – 313, l. 18 (emphasis added). *See Middleton*, 288 S.C. at 23, 339 S.E.2d at 693 (finding the charges "did not arise out of a single chain of circumstances, and required different evidence for proof").

Furthermore, same as in *Smith*, 322 S.C. at 110, 470 S.E.2d at 365-66, the State erroneously maintained that the charges would have been admissible in a subsequent trial to show a common plan or scheme even if the charges were severed. R. 19, l. 6 – 21, l. 3. *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), clear and convincing evidence of other relevant crimes is admissible to prove: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other; or (5) identity. *See* Rule 404(b), SCRE. Here, the State would not have been able to show a common plan or scheme in a subsequent trial because the connection between the prior bad act and the crime must be more than just a general similarity (sexual abuse: compare touching the outside of a female's vagina with male anal penetration). *See State v. Stokes,* 279 S.C. 191, 304 S.E.2d 814 (1983) (noting the connection between the prior bad act and the crime must be more than just a general similarity); *see also State v. Rivers,* 273 S.C. 75,

254 S.E.2d 299 (1979).

The Court is also to balance the probative value of the evidence against its prejudicial effect. *See State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993); *see also* Rule 403, SCRE. Defense counsel argued to the trial court, "[Appellant] is prejudiced where you're trying two sexual charges against separate victims." R. 17, ll. 17-18. As such, Appellant is prejudiced because the jury could infer Appellant's propensity for child sexual abuse by allowing the State to bolster its case by stacking the charges together. The prejudicial effect of consolidating Appellant's sexual abuse charges is obviously higher when: (1) there is no physical evidence to support Minor Child 1 and Minor Child 2's allegations; (2) Minor Child 2's rectal examination "was normal" and showed no signs of penetration; and (3) Minor Child 2 did not claim that he was sexually abused until after he had learned of his sister's sexual abuse allegation. R. 226, l. 8 – 228, l. 2.

Furthermore, the State admitted that it had a weak case against Appellant when it also improperly argued that the charges should he consolidated as res gestae of the case:

> [I]f the jury can't hear about how [Minor Child 2] disclosed, they're missing a big chunk. *That's all the evidence the State has in this case is each of the children's disclos[ures]. 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). Therefore, even if the evidence was admissible under Rule 404(b), SCRE, its prejudicial effect would substantially outweigh any probative value under Rule 403, SCRE.

Accordingly, Appellant's sexual abuse charges should not have been tried together as they fail to meet the requirements for consolidation of charges, and Appellant

was prejudiced by the trial court's denial of his motion to sever the charges. *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693 (finding "[i]t is evident the charges against appellant did not arise out of the same transaction") (citing *State v. Whitener*, 238, S.C. 244, 89 S.E.2d 701 (1955)); *see also Smith*, 322 S.C. at 110, 470 S.E.2d at 366 ("Further, under these facts, we hold the prejudicial effect of the ABHAN conviction outweighs its probative value. We find the ABHAN conviction would not be admissible under *Lyle* in a subsequent trial on the homicide.").

II. The trial court erred in admitting alleged prior bad act evidence where the connection between the prior bad act and the crime was nothing more than just a general similarity and the probative value of the evidence was outweighed by its prejudicial effect.

In addition to the Rule 404(b), SCRE, analysis discussed above, this Court "address[ed] the applicability of the motive and intent exceptions of *Lyle* and Rule 404(b), SCRE, in the context of sex crimes" in *State v. Fonseca*, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009), *aff'd*, 393 S.C. 229, 711 S.E.2d 906 (2011). The *Fonseca* Court found that "introduction of the prior bad act under the motive exception provided in *Lyle* and Rule 404 was error" because the defendant's "motive was not made a material issue at trial." *Id.* at 648, 681 S.E.2d at 5. As to the intent exception, the *Fonseca* Court found:

> [B]ecause intent is an element of most crimes, if we hold this evidence admissible, prior sexual acts would be admissible to prove the required intent in all prosecutions of subsequent sex crimes. Such is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404.

Id. at 649, 681 S.E.2d at 5. The *Fonseca* Court also addressed the common plan or scheme exception under Rule 404(b), SCRE, and found that the charges were not sufficiently similar in acts and remoteness in time. *Id.* at 649-50, 681 S.E.2d at 5-6.

In this case, Appellant's motive or intent to commit the crimes charged was not made a material issue at trial. *Id.* (finding "[w]ithout motive or intent being a material issue, it is error to admit prior bad acts as evidence of the same in a sexual crime"). As for the common plan or scheme exception, "[t]he State provide[d] no compelling argument of any similarities between the two occurrences, or any argument to overcome the fact that the incidents are remote in time."[5] *Id.* (internal footnote omitted). Specifically, defense counsel argued, "I don't see how you make the quantum leap from allegations of touching to allegations of anal intercourse." R. 5, ll. 20-22.

The State also cited *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009), and maintained that the alleged crimes were similar and "establish[ed] a pattern of escalating abuse[.]" R. 7, ll. 22-25. However, this case is distinguishable from *Clasby* for three reasons. First, the "alleged sexual misconduct [in *Clasby*] was directed at the *same* victim." *Id.* at 156, 682 S.E.2d at 896. Second, the alleged incidents in the present case do not establish a pattern of sexual abuse. *Id.* Finally, there is not "a close degree of similarity" between the crimes charges (i.e., compare touching the outside of a female's vagina with male anal penetration). *See State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003).

The facts of this case mirror the facts presented in *Tutton*, 354 S.C. 319, 580 S.E.2d 186, where this Court found, "[T]he *similarities in this case are insufficient* to support the inference that Tutton employed a common plan or scheme to commit the assaults alleged in this case." The similarities are as follows: (1) the allegations of sexual abuse involved *two*

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[5] In *Fonseca*, "[t]he State aver[ed] that the fact the fact the fact that both of the incidents occurred in Appellant's marital home while his wife was in the other room, demonstrates that the Appellant had a common scheme or plan to attack the victim while his wife was not present or was in the other room." *Id.* at 650, 681 S.E.2d at 6.

siblings; (2) the alleged sexual abuse did *not* occur at the same time; (3) the allegation of a threat was only made by *one* sibling; and (4) the charged offenses were *not* of the same type. *Id.* at 332-33, 580 S.E.2d at 193 (emphasis added). Notably, in *Tutton*, all of the alleged victims were adolescent females. *Id.* at 323, 580 S.E.2d at 188.

The probative value of the prior bad act evidence *did not* substantially outweigh the danger of unfair prejudice to Appellant, particularly were: there is no physical evidence to support Minor Child 1 and Minor Child 2's allegations; Minor Child 2's rectal examination "was normal" and showed no signs of penetration; and Minor Child 2 did not claim that he was sexually abused until after he had learned of his sister's sexual abuse allegation. R. 226, l. 8 – 228, l. 2; *See State v. Fletcher,* 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (explaining "why certain prior bad act testimony is inadmissible, i.e., ..." when "the only function of [the] testimony ... was to demonstrate ... bad character" which was "used by the jury to infer that the defendant did in fact commit the crime"). The potential effect of the prejudice is further highlighted and enhanced by the jury's request to during deliberations to "have a copy of [Minor Child 1's] testimony[.]" R. 355, l. 20 – 357, l. 18.

Accordingly, the trial court erred in admitting alleged prior bad act evidence to show where the connection between the prior bad act and the crime was nothing more than just a general similarity and the probative value of the evidence was outweighed by its prejudicial effect. R. 292, l. 15 – 338, l. 11; *Accord Fonseca*, 383 S.C. 640, 681 S.E.2d 1, *aff'd*, 393 S.C. 229, 711 S.E.2d 906; *Stokes,* 279 S.C. 191, 304 S.E.2d 814 (1983) (noting the connection between the prior bad act and the crime must be more than just a general similarity).

III. The trial court erred in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial.

In *State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999), our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. *Id.* The Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* (quoting *State v. Mitchell,* 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998)).

Even if this Court finds that the two previous errors do not require reversal, the cumulative effect of those errors in light of the State's improper comments and arguments were so prejudicial as to deprive Appellant of a fair trial. *See Johnson,* 334 S.C. at 93, 512 S.E.2d at 803. Specifically, in addition to the defense counsel's sustained objections, there are three notable instances where the State prejudiced Appellant's right to a fair trial.

Hearsay - Rule 801(d)(1)(D), SCRE

"In South Carolina, a sexual assault victim's prior consistent statements limited to the time and place of the alleged incident are not hearsay if the victim testifies at trial and is subject to cross-examination." *State v. Jeffcoat*, 350 S.C. 392, 565 S.E.2d 321 (2002) (citing Rule 801(d)(1)(D), SCRE). "The rule expressly allows other witnesses to testify the victim complained of the assault, but only as to "time and place"; it specifically circumscribes such testimony by "excluding details or particulars." *Id.* (citing *State v. Schumpert,* 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993). However, "[a]mong the

details which must be excluded under the rule is the identity of the alleged perpetrator." *Id.*; *See Jolly v. State,* 314 S.C. 17, 443 S.E.2d 566 (1994).

Here, the State asked Tina Aiken, the mother of Minor Child 1 and Minor Child 2, "*Do you remember [Minor Child 1] telling you [Appellant] sexually abused her?*" defense counsel objected, arguing that the witness can only "testify as to place, time, opportunity and nothing else." R. 149, l. 22 – 150, l. 1 (emphasis added). The trial court replied, "All right. Okay. Ask your question again." R. 150, ll. 4-5. Therefore, the State's question was improper and extremely prejudicial under Rule 801(d)(1)(D) because it went beyond mere time and place. *See State v. Whisonant,* 335 S.C. 148,155, 515 S.E.2d 768, 771 (Ct. App. 1999) (finding testimony containing detail exceeding the parameters of the rule constitutes hearsay).

Improper Bolstering - Rule 608(a), SCRE

The South Carolina Supreme Court has held that it is improper for a forensic interviewer to comment on the veracity of a child's accusations of sexual abuse. *See State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (2012) (finding the trial court erred in admitting the forensic interviewer's testimony that "both interviews that I conduct with the [minor child], I found them to be compelling for sexual abuse"); *see also State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (finding error in admitting forensic interviewer's written statement that each child "provide[d] a compelling disclosure of abuse"); *accord State v. Dawkins,* 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); *State v. Dempsey,* 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in

which sexual abuse was alleged was improper vouching for child).

In this case, after the trial court qualified Shauna Galloway-Williams as an expert, she testified that she conducted a forensic interview with Minor Child 1 and Minor Child 2. R. 246, l. 23 – 263, ll. 9; R. 285, ll. 3-11. Outside the presence of the jury, the State asked the trial court, "Am I able to ask about whether her disclosure was compelling in her expert opinion?" R. 280, ll. 5-6. Defense counsel subsequently objected and argued:

> [N]ow [the State] wants to go on and get the opinion. And I think Your Honor said the magic word here, to say that [the forensic interviewer is] credible. *That is simply . . . witness vouching for the credibility of another witness, Your Honor, and that's improper.*

281, ll. 10-14 (emphasis added). The trial court denied the State's request to ask the forensic interviewer about her finding the Minor Child 2's disclosure compelling. R. 281, l. 15 – 282, l. 9.

Despite the trial court's ruling, the State asked the forensic interviewer, "When [Minor Child 2] made a disclosure . . . Do you have an opinion as to that disclosure?" R. 291, ll. 20-22. The forensic interview then testified:

> *Yes. I described [Minor Child 2's] disclosure as compelling disclosure because he was able to provide both those core and contextual details about what he was describing.* He able to say who, what, when, where, how. But he also gave a lot of pretty vivid description about what it felt like. *Probably one of the most compelling details that he shared was related to his body positioning*, how he was positioned when this incident occurred and how [Appellant] was when he performed this act, as well.

R. 291, l. 23 – 292, l. 6 (emphasis added).

Similar to *Jennings*, 394 S.C. 473, 716 S.E.2d 91, there was no physical evidence presented to prove Appellant sexually assaulted Minor Child 1 and Minor Child 2, and

the only evidence presented by the State was the minor's allegations of what occurred and other hearsay evidence. R. 62, l. 14 – 69, l. 25; R. 127, l. 21 – 129, l. 15; R. 149, l. 22 – 150, l. 1. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (noting "[t]here is no other way to interpret the lanugage used in the reports other than to mean the forensic interviewer believed the children were being truthful"); *see also State v. Ellis*, 245 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) (noting that "[a]n officer's improper opinion which goes to the heart of the case is not harmless"). Thus, the forensic interviewer's testimony that she found the disclosures compelling was improper and was extremely prejudicial to Appellant. *See McKerley*, 397 S.C. 461, 725 S.E.2d 139; *see also Jennings*, 394 S.C. at 483, 716 S.E.2d at 96 (Kittridge, J., concurring) (referring to the forensic interviewer's statement in the reports as "patently inadmissible evidence").

Improper Vouching by the State

In *State v. Shuler,* 344 S.C. 604, 545 S.E.2d 805, *cert. denied,* 534 U.S. 977, 122 S.Ct. 404 (2001), the South Carolina Supreme Court held that "a prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. . . ." (citations omitted). However, "[a] solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (noting "[i]t is inappropriate for the State to

assure the jury of witness' credibility, because the jury is charged with assessing the credibility of witnesses based on the evidence in the record").

In this case, the State improperly vouched for the credibility of Minor Child 1 and Minor Child 2 during closing arguments. *See Shuler,* 344 S.C. 604, 545 S.E.2d 805. Specifically, the State directly vouched for the credibility of Minor Child 2's testimony:

> Why lie? Why would a child want to lie about this? *There is no reason a child would want to lie about this*. . . . [T]here's certainly no reason for [Minor Child 2] to get up here yesterday and carry on a lie. . . . Why carry it on? *Because he's not lying.* He had nothing to gain out of this. Nothing.

R. 322, l. 11 – 323, l. 21. The State also vouched the credibility of both Minor Child 1 and Minor child 2's testimony together:

> I wouldn't have known how to and to carry it along for this amount of time and be this consistent about the core details of what happened. They've been consistent from day one. They're consistent now. . . . *It's the truth. It was the truth then. It's the truth now.* If they really wanted to make up a lie, wouldn't [Minor 1] have said he raped me? Wouldn't [Minor 2] have been saying that it happened, the penetration happened more than once? . . . You can convict if you believe these children. And setting [Appellant] free would be the same as saying what these children told me was a lie.

R. 324, l. 7 – 325, l. 24 (emphasis added). Therefore, the State improperly vouched for credibility of Minor Child 1 and Minor Child 2 without "support[ing] this vouching with anything within the record, such as corroboration by other witnesses or physical evidence." *Matthews*, 350 S.C. at 276, 565 S.E.2d at 768; *See Shuler,* 344 S.C. 604, 545 S.E.2d 805.

Accordingly, the trial court erred in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial. *See Johnson,* 334 S.C. at 93, 512 S.E.2d at 803.

CONCLUSION

For the foregoing reasons, Appellant Richard Beekman requests that this Court reverse his convictions and remand this case to the Pickens County Court of General Sessions for a new trial.

Respectfully submitted,

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of Jannuary, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

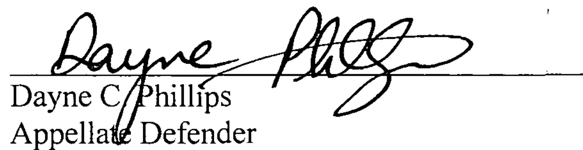
RICHARD BURTON BEEKMAN,

APPELLANT

Appellate Case No. 2011-196688

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of January, 2013.



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of January, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.