

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TALMADGE LEROY ROWELL

APPELLANT

APPELLATE CASE NO. 2013-002398

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether, in a sex abuse case, the trial court erred in joining indictments involving two alleged victims for trial where the joinder prejudiced appellant? _____

STATEMENT OF THE CASE

On October 27, 2011, a Horry County grand jury indicted appellant for two counts of second degree criminal sexual conduct with a minor and two counts-of-lewd act on a minor involving two alleged victims. R. 192. On November 4 - 6, 2013, appellant was tried before the Honorable Edward B. Cottingham and a jury. R. 1. Martin D. Spratlin represented the State. R. 1. Thomas Floyd represented appellant. R. 1. The jury convicted appellant on all of the charges. R. 173, l. 21 – 174, l. 11. Judge Cottingham sentenced appellant to concurrent terms of fifteen years' imprisonment. R. 183, ll. 20 – 24. After timely filing and service of the notice of appeal, this appeal follows.

ARGUMENT

In a sex abuse case, the trial court erred in joining indictments involving two alleged victims for trial where the joinder prejudiced appellant.

Relevant Facts

Minor 1 and Minor 2 were appellant's stepdaughters. R. 83, l. 21 – 85, l. 12. R. 103, l. 20 – 104, l. 25. The State charged appellant with one count of lewd act and one act of second degree criminal sexual conduct with a minor for each complainant. R. 188 (indictments). Minor 1 claimed appellant began molesting her when she was twelve years old. R. 86, ll. 7 – 9. She testified regarding several alleged instances of abuse.

Minor 1 claimed that appellant first touched her vagina while she was taking a bath. R. 86, l. 10 – 88, l. 19. She claimed the second incident occurred in a deer stand when appellant pulled down her pants and rubbed her vagina. R. 88, l. 20 – 92, l. 8. Another incident occurred in appellant's bedroom when appellant supposedly performed oral sex on her. R. 92, l. 12 – 94, l. 9. In two other instances, appellant also allegedly placed his mouth on Minor 1's breasts and, in the other, touched her vagina. R. 94, l. 15 – 99, l. 12. Minor 1 did not claim that appellant digitally penetrated her.

Minor 2 claimed the abuse began when she was approximately ten years old. R. 106, ll. 12 – 16, Minor 2 alleged that appellant kissed her inappropriately. R. 106, ll. 14 – 16. She also alleged that when she would wash dishes, appellant would approach her from behind, stick his hands down the front of her pants, and rub her vagina. R. 107, l. 8 – 109, l. 9. Minor 2 claimed appellant digitally penetrated her. R. 108, l. 17 – 109, l. 2.

The State's other two witnesses were complainants' mother ("Mother") and Detective Todd Cox ("Cox") with the Horry County Police Department. Mother testified

she worked and left the complainants home with appellant. R. 76, l. 20 – 77, l. 3. She also testified that the complainants told her about the abuse and she reported it to the police. R. 79, ll. 1 – 22. Detective Cox testified that he took a statement from appellant shortly after he was arrested. R. 115, l. 13 – 124, l. 6. A recording of appellant's statement was entered into evidence and played for the jury. R. 124, ll. 10 – 24. R. 128, ll. 18 – 19 State's Exhibit 3. During the interrogation by Detective Cox, appellant admitted to some of the abuse allegations but not to all of them. State's Exhibit 3.

The State asked the court to join all four indictments for trial. R. 5, l. 5 – 6, l. 6. The solicitor argued joinder was appropriate because the incidents arose from the same course of conduct, they occurred at around the same time, and both complainants were appellant's stepdaughters who lived with him during the time of the allegations. R. 5, l. 19 – 6, l. 6. The solicitor argued that the facts and circumstances were very similar to State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013) and that case controlled. R. 5, l. 19 – 6, l. 6. Appellant objected to joinder. R. 6, ll. 9 – 21. Defense counsel agreed that the facts and circumstances were, in the trial judge's words, "straight within" McGaha, but argued that the prejudicial effect of trying the cases together was too great. R. 6, ll. 9 – 21. Judge Cottingham ruled the cases would be tried together. R. 6, l. 13 – 7, l. 3.

Discussion

The trial judge erred in joining these cases. "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights

would not be prejudiced.” State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996); see also State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005); State v. Grace, 350 S.C. 19, 23, 564 S.E.2d 331, 333 (Ct. App. 2002); State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996) Only “interconnected” offenses are of “the same general nature.” State v. Harry, 321 S.C. 273, 278, 468 S.E.2d 76, 79 (Ct. App. 1996). However, offenses 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).¹

Considering the question of joinder, this case did not involve a single crime spree. Each complainant testified about several discrete incidents. Minor 1 alleged abuse occurred in the bath and in a deer stand and also involved oral sex, but no digital penetration. Minor 2 alleged the abuse all took place in the home and alleged digital penetration, but no oral sex. These incidents required different proof. Therefore, consolidating the indictments was error State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009), State v. Wallace, 384 S.C. 428, 683, S.E.2d 275 (2009). In McGaha, the

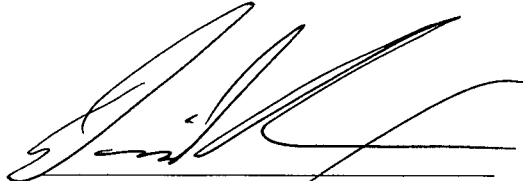
¹ Cf. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (finding it proper to try together all crimes arising from a single uninterrupted crime spree).

case cited by the solicitor and relied on by the trial judge, this Court found that the evidence of the abuse of one child would be admissible in the other child's trial under Rule 404(b). The trial judge here made no such determination. Appellant was unfairly prejudiced when each of the complainants' testimony bolstered the others' claims.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Edward B. Cottingham, Circuit Court Judge

THE STATE,

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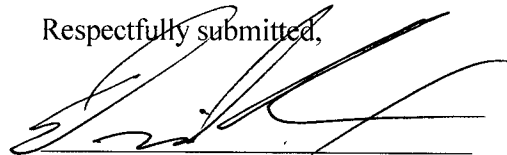
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Talmadge Rowell states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Edward B. Cottingham, which was held on November 5, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Talmadge Rowell.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of August, 2014.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) State's Exhibit 1;
- (4) Court's Exhibit 1;
- (5) State's Exhibit 3 (Audio CD- to be transported).

I certify that this designation contains no matter which is irrelevant to this appeal.

August 8th, 2014



David Alexander
Appellate Defender

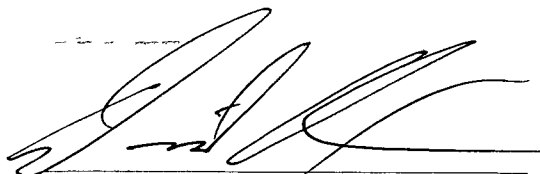
South Carolina Commission on Indigent Defense
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 8th, 2014

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

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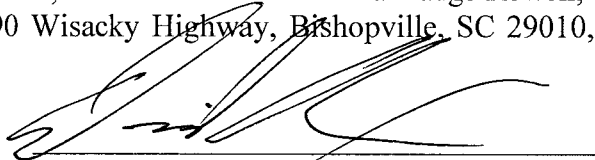
V.

TALMADGE ROWELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and on Mr. Talmadge Rowell, #357729 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 8th day of August, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of August, 2014.

Grant Mendenhall (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.