THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

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SC Court of Appeals

Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001408

The State,

Respondent,

v.

Rion McKissick Rutledge, Appellant.

FINAL BRIEF

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STATEMENT OF THE CASE

The Appellant, Rion Rutledge was indicted on 4 indictments of Sexual Exploitation of a Minor in the Third Degree: 2012-GS-46-3369 through 2012-GS-46-3372 and three indictments of Sexual Exploitation of a Minor in the Second Degree. A jury trial was conducted before the Honorable John C. Hayes, III on June 22 -24, 2015. The Appellant was found guilty of all seven charges and was sentenced to ten years on all charges with five years to serve, and then five years' probation. As a condition of probation the Appellant will be required to undergo mental health counseling with an emphasis on a sexual component. Additionally, the Appellant will be required to register on the Sexual Offender Registry. At the conclusion of the sentencing, counsel for the Appellant asked for the Appellant to be released on an appeal bond. The Court granted this request and set the appeal bond at Twenty Thousand ($20,000.00) Dollars, surety. This appeal arises out of the trial of the aforementioned charges. A Notice of Intent to Appeal was filed on June 26, 2015.

FACTS

On December 16, 2010, Investigator Lucinda McKellar of the South Carolina Attorney General's Office Internet Crime Against Children Task Force was conducting a routine online undercover proactive investigation. (R. p. 27, lines 18-19; T. p. 61, ll.18-19). In doing so, she entered specific search words which are common words associated with child pornography and began a search. (R. p. 27, lines 19-21; T. p. 61, ll. 19-21). Her search revealed a list of IP addresses that potentially had child pornography files located on their computer. (R. p. 28, lines 1-4; T. p. 62. ll. 1-4). She found an IP address located in South Carolina and proceeded to request information as to what company was assigned that IP address. (R. p. 28, lines 1-7; T. p. 62, ll. 1-7) The IP address was assigned to Comporium Communications.[1] (R. p. 38, lines 2-4; T. p. 72, ll. 2-4). The subscriber was Rion Rutledge, the Appellant. (R. p. 38, lines 9-11; T. p. 72, ll. 9-11) Additionally, Investigator McKellar continued her investigation and was able to download files from the IP address associated with Comporium Communications and the Appellant that were indicative of child pornography. (R. p. 35, lines 9-10; T. p. 69. ll. 9-10) These downloads were conducted at 11:50: 47, 11:53:52 and 11:50:48 on December 16, 2010. (R. p. 35. line 11, lines 15-16-p. 36, lines 13, 17; T. p. 69, l. 11, ll. 15-16, p. 70, l. 13, l.17) Investigator McKellar was able to obtain the Global Unique Identifier (GUID) of the computer which indicated the source of the downloaded material. (R. p. 35, lines 3-8; T. p. 69, ll. 3-8) A GUID of a computer is essentially similar to the VIN for a car. (R. p. 31, lines 22-23; T. p. 65, ll. 22-23) The GUID of a computer does not change although an IP address can change depending upon what the company had assigned or

[1] This information was made pursuant to a 2703(d) Order

where the computer was connecting to the internet. (R. p. 32, lines 5-11; T. p. 66, ll. 5-11). Investigator McKellar testified that anyone at the Appellant's location could connect to the internet through the IP address. (R. p. 43, lines 10-13; T. p. 77, ll. 10-13).

Investigator McKellar turned over her all her material to Investigator Bomar with the York County Sheriff's Office. After conducting his own "intel" he obtained a search warrant on March 2, 2011. (R. p. 61, lines 16-18; T. p. 95, ll. 16-18). As a result of the search warrant, several laptop computers, a desktop computer, a CD, a couple of DVD's and some memory cards were seized. (R. p. 68, lines 14-16; T. p. 102, ll. 14-16). A forensic examination was conducted on these electronic devices and three images were discovered on the laptop computer at that time. (R. p. 69, lines 2-7; T. p. 103, ll. 2-7). These three images are the basis of the indictment of Sexual Exploitation of the Minor in the Second Degree. Another image was found on the CD, and this image along with the same images that were found on the laptop, are the basis of the indictment of Sexual Exploitation of a Minor in the Third Degree. (R. p. 80, lines 11-14; T. p. 114, ll. 11-14)

Investigator Bomar testified that the first image that was found on the laptop computer was downloaded on February 16, 2010. (R. p. 119, lines 10-11; T. p. 156, ll. 10-11). The file was downloaded but never opened. (R. p. 119, lines 19-24; T. p. 156, ll. 19-24) The second image that was found on the laptop computer was downloaded on December 20, 2010. (R. p. 121, lines. 14-16; T. p. 159, ll. 14-16) This file was also downloaded but never opened. (R. p. 121, lines 23, 25; T. p. 159, ll. 23, 25). When a file is downloaded and has the exact same date and time, it means that it was downloaded but never opened. (R. p. 119, lines 22-24-p.121, line 25; T. p. 156, ll. 22-24, p. 159, l. 25) This image was downloaded after Investigator McKellar conducted her investigation.

The third image was downloaded on December 16, 2010 and downloaded but was also never opened. (R. p. 122, lines 1-12; T. p. 160, ll. 1-12) The forensic examination did not reveal what IP address was associated with any of these files. (R. p. 120, lines 3-14; T. p. 157, ll. 3- 14). Additionally, all of the files were actually no longer located on the computer and only through the forensic examination of the computer was a thumb cache or fragment of the images able to be obtained. (R. p. 125 lines 4-8; T. p. 164, ll. 4-8) As to the CD, it is unknown the actual date the CD was made. (R. p. 123, lines 22-24; T. p. 161, ll. 22-24) It is unknown whether this image was ever accessed on the CD. (R. p. 126, lines 8-13; T. p. 165, ll. 8-13) As to the images that were connected to his IP address, Investigator Bomar was unable to ascertain when these items came onto the computer. The images could have come on the same day McKellar conducted her investigation of two years prior. (R. p. 125, lines 15-19; T. p. 164, ll. 15-19) All that is known is that these images came onto the computer prior to December 16, 2010 (R. p. 125, lines 11-24; T. p. 164, ll.11-24).

The laptop computer that contained these images was obtained by the Appellant on March 11, 2004 through an auction along with numerous other laptops, printers and other electronic devices. (R. p. 137, lines 3-10; T. p. 194, ll. 3-10) The Appellant gave this computer to his brother in 2008 and his brother had possession of the laptop until February, 2011 when he returned it to him after a heated argument. (R. p. 138, lines 16-25-p. 144, lines 23-24-p. 145, lines 13-22; T. p. 195, ll. 16-25, p. 201, ll. 23-24, p. 202, ll. 13-22) The Appellant and his brother had a very volatile relationship. The Appellant's brother, who was deceased at the time of the trial, would frequently come to the Appellant's residence uninvited often times when the Appellant or his wife were not home. (R. p. 141, lines 14-25; T. p. 198, ll. 14-25) He would let himself into the garage, through an access door, and hang out in there, either alone or with a companion. (R. p. 142. lines 11-25; T. p. 199, ll. 11-25) Often times, the Appellant was unaware that his brother was at the house unless he left overturned beer cans or some other type of mess in the garage or neighbors reported that he had been there. (R. p. 142, lines 1-10; T. p. 199, ll. 1-10) At the onset of McKellar's investigation, the Appellant did not have possession of the laptop at issue. Additionally, McKellar downloaded these images through a file sharing program. In order to do so, the laptop had to be on and the file-sharing program had to be running. The Appellant was working at the time Investigator McKellar began her investigation and ultimately downloaded an explicit image. The CD which was found in the computer, after it was returned to Appellant, was removed by the Appellant by popping open the CD tray because the laptop did not have a power cord to turn it on. (R. p. 146, lines 1-14; T. p. 203, ll. 1-14) The Appellant threw the CD in the desk drawer and never looked at the contents of the CD. (R. p. 146, lines 1-14; T. p. 203, ll. 1-14)

ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION TO SEVER THE CHARGE OF SEXUAL EXPLOITATION ON A MINOR IN THE THIRD DEGREE FROM THE CHARGE OF SEXUAL EXPLOITATION OF A MINOR IN THE SECOND DEGREE.

In *State v. Tate*, 286 S.C. 462, 334 S.E.2d 289 (S.C. App. 1985) the Court examined whether trying a defendant at once for two identical but unrelated felonies violated the right to a fair trial. In *Tate*, the Defendant was indicted for forging a check where he brought a companion into a liquor store and falsely identified her as the payee of the check. Approximately three months later, the Defendant went into a different liquor store and falsely identified himself as the payee of another check. *Id.* 286 S.C. at 464, 334 S.E.2d at 290. Originally, the Defendant was charged under two indictments with one count of forgery, however before the trial one of the indictments was amended to include both counts. *Id.* 286 S.C. at 463, 334 S.E.2d at 289. The Defendant moved to sever the counts. *Id.* The Court denied his motion. The Appellate Court reversed the trial court and remanded for separate trials. *Id.* In doing so, the Court applied the factors set forth in *City of Greenville v. Chapman*, 210 S.C. 157, 41 S.E.2d 865, 867 (1947). The Supreme Court in *Chapman* held that misdemeanors can be joined in the same indictment and tried together where (1) they arise out of a single chain of circumstances (2) proven by the same evidence (3) are of the same general nature and (4) no real right of the defendant is jeopardized. In applying these factors, the Court in *Tate* found that the offenses were of the same nature, they were not misdemeanors, they did not arise out of a single change of circumstances and were not provable by the same evidence. *Tate* at 286 S.C. at 464, 41 S.E. 2d at 290. The Court further stated that joinder of the two counts were prejudicial because it was likely that the jury would infer criminal disposition based on evidence of one forgery and on that basis alone find the defendant guilty of another forgery. *Id.*

The issue of whether to join cases has a long rooted history that has been considered many times by federal courts, state courts and even the Court of England in 1897. In *Queen. v. King*, 1 Q.B. 214, 216 (1897) the Court stated " [i]t is hardly fair to put a man up on his trial on such an indictment for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given up on the others". In dealing with issues of joinder, Courts have applied a liberal rule on joinder of offenses. The justification for applying such rule appears to be the economy of a single trial. *Drew v. U.S.*, 331 F.2d 85, 88 118 U.S.App.D.C. 11 (D.C. Cir. 1964). However, despite the liberal rule applying to joinder, in determining whether offenses should be joined, the Court must weigh the prejudice to the Defendant by the joinder against the obvious important consideration of economy and expedition in judicial administration. *Id.* "A defendant may be prejudiced because (1) embarrassed or confounded in presenting separate defenses (2) jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find". "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one". *Id.* There is always a danger when several crimes are tried together that the jury may use the evidence cumulatively; that is, that although so much as would be admissible upon any of the one charges would not have persuaded them of the accused's guilt, the sum of it will convince them as to all. *United States. v. Lotsch*, 102 F.2d 35, 36 (2nd Cir.) cert denied., 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed 1500 (1939) When the accused's conduct on several separate occasions can properly be examined in detail, the objection disappears and the only consideration is whether the trial as a whole may not become too confusing to the jury. *Id.* emphasis added. If at any point in the trial, it appears that he Defendant is embarrassed in making his defense or that there is a possibility that the jury will or has become confused, then upon proper motion, the court should order a severance. *Id.* at 92. In *Lotsch* the court held that the three charges could be tried together. This was because the evidence was short and simple and there were no reasonable grounds to believe that a jury could not keep the evidence separate. *Id.*

In the case before this Court, prior to the start of the case, the Appellant moved to sever the indictments for Sexual Exploitation of a Minor Second Degree from Sexual Exploitation of a Minor Third Degree. (R. p. 6, line 25-p. 7 lines 1-4; T. p. 6, l. 25, p. 7, ll. 1-4). The basis for the indictments of Sexual Exploitation of a Minor Second Degree arises from a routine online undercover proactive investigation on December 16, 2010 by Investigator McKellar (hereinafter referred to as "McKellar"). (R. p. 27, lines 18-25; T. p. 61, ll. 18-25) During her investigation, she ran a special program limited to law enforcement which essentially conducts a search of files using distinct search words that are often associated with child pornography (R. p. 27 lines 19-25; T. p. 61, ll. 19-25.) Upon conducting this search, McKellar was alerted to material that had been downloaded in this State. McKellar began running a program a single source file-sharing network

program, where she began downloading content from one person. (R. p. 31, lines 4-11; T. p. 65, ll. 4-11). As she is doing this, the computer program takes screen capture of exactly what she is doing on her computer and it shows the information she is receiving and where it is coming from. (R. p. 30, lines 8-10; T. p. 64, ll. 8-10). Through this process she was able to ascertain the IP address that this material was being downloaded from. (R. p. 30, lines 21-22; T. p. 64. ll. 21-22). Her downloads were conducted on December 16, 2010 at 11:50:47, 11:53:32, 11:50:48 and 11:51:52 from a single source, meaning from one computer. (R. pp. 35-36; T. p. 69-70)
McKellar then was able to determine that the IP address was assigned to Comporium Communications. (R. p. 38, lines 2-4; T. p. 72, ll. 2-4). Comporium provided subscriber information and it was determined that the subscriber was Rion Rutledge located at 1108 Hummingbird. (R. p. 38, lines 9-11; T. p. 72, ll. 9-11) Once she realized it was in York County, she then turned this information over to York County Sheriff Office and Officer Bomar was assigned to further investigate the case. (R. p. 39, lines 2-24; T. p.73. ll. 2-24).

Based upon McKellar's file, Bomar conducted his own intel by taking pictures and examining the picture downloaded by McKellar to ensure they violated South Carolina law. (R. p. 61, lines 4-10; T. p. 95, ll. 4-10). Based upon his investigation, along with information provided by McKellar, Bomar obtained a search warrant for electronic equipment at the Hummingbird address which was executed on March 2, 2011. (R. p. 95 lines 11-13; T. p. 95, ll. 11-13). As a result of the search warrant several laptop computers, a desktop computer, a couple of DVD's a memory card and a CD was seized from the residence. (R. p. 68, lines 14-16; T. p. 102, ll. 14-16).

At this point, Bomar conducted a forensic examination on all the seized equipment. (R. p. 69, lines 2-7; T. p. 103, ll. 2-7). Examination of the laptop revealed fragments or thumb caches of files. (R. p. 164, lines 4-8; T. p. 164, ll. 4-8) Examination of a CD revealed a video of sexually explicit material.

During the trial of the Appellant's case, an extensive amount of technical evidence was presented by the State's expert witnesses who went into great detail about the forensic examination and McKellar's investigation. (R. p. 21, lines 14-25- pp. 56-88, -pp. 103-120, -pp. 126-128; T. p. 55, ll. 14-25, pp. 56-88, pp. 103-120, pp. 126-128) The evidence went into depth as to the identification of a computer, GUID, IP addresses, certain software programs used by law-enforcement, file sharing programs, single source downloads vs. multiple source downloads, fragmented files, and thumb caches. It can be presumed that this type of technical information is not readily understood by a lay person and can be very confusing. In fact, during the course of the trial, despite the trial court instructing the jury not to have any discussions or deliberations about the case until they were informed it was time to do so, the jurors sent several notes to the court. The first note to the Court asked "What is previous history on laptop that links Brother Rutledge to the laptop?" (R. p. 165 lines 5-6; T. p. 252, ll. 5-6) The Court responded with "that's for you to decide". (R. p. 165 lines 6-7; T. p. 252, ll. 6-7). The second note asked "We were to strike the, "letter" word document, but when we came back from lunch, Defense brought it up. What are we to strike?" (R. p. 165, lines 8-10; T. p. 252, ll. 8-10). Another note was handed up to the Court asking " what is the save date on the letter? (R. p. 189, lines 15-16; T. p. 280, ll. 15-16). The last note that was handed up stated " We are not deliberating the case we are trying to clarify confusing evidence." (R. p. 189, lines

18-19; T. p. 280, ll. 18-19). At that time each juror was called into the courtroom to be questioned as to whether their discussing the evidence, which is discussing the case, would affect their ability to be fair and impartial to the Appellant. (R. p. 189, lines 23-25-pp. 190-194, lines 1-6; T. p. 280, ll. 23-25, p. 281-285, ll. 1-6). It is obvious based upon the jurors questions that there was some confusion regarding the evidence. This confusion and the numerous notes of the jury is the exact issue the court in *Lotsch* was concerned about in allowing charges to be tried together. *Lotsch* at 92. When there is a possibility that the jury will or has become confused, the court should order severance. *Id.* This motion was made and denied by the trial court. Unlike *Lotsch*, where the evidence was short and simple, the evidence in the Appellant's case was very complex and confusing. Additionally, based upon the complexity of the evidence and the similarity of the evidence that was needed to prove the elements of the applicable statutes, it would be hard for a jury to keep the evidence separate and apply it to the correct crime as it all seems to run together.

The State argued that the charges needed to be tried together because of a res gestae argument. (R. p. 12, line 1; T. p. 12. l. 1). They argued that in order to get a full picture of the case it requires basically everything on that computer to be tied together with both charges. (R. p. 12, lines 2-6; T. p. 12. ll. 2-6). The theory of res gestae recognizes evidence of other bad acts may be integral part of the crime with which the defendant is charged or that the evidence is needed to aid the fact finder in understanding the context in which the crime occurred. *State v. McGee*, 408 S.C. 278, 758 S.E.2d 730 (S.C. App. 2014). Any evidence that is considered for admission under the res gestae theory also must satisfy the requirements of Rule 403, SCRE which requires evidence to be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

The motion to sever the third degree charges from the second degree charges was denied. In denying the motion, the trial court indicated that the full criteria of the factors set forth in *State v. Tate* citing *Greenville v. Chapman* does not require severance in this particular set of circumstances. (R. p. 12, lines 7-10; T. p. 12, ll. 7-10). In applying these factors, the Court stated that based upon what he had been told, without the benefit of hearing the evidence, the incidents do arise out of a single chain of circumstances. (R. p. 12, lines 11-13; T. p. 12, ll. 11-13). The circumstances in December are continuing and are tied together and as to the March charges, they are not proved by the same evidence but they are proved by evidence which is connected. (R. p. 12, lines 14-18; T. p. 12, ll. 14-18). The trial court went on to say that the charges are of the same general nature and no real right of the Appellant has been violated. (R. p. 12, lines 19-22; T. p. 12, ll. 19-22). The Court did express concern, though he would not call it second thoughts, but rather some hesitancy when there are multiple charges the jury can give more weight to the charges, despite being charged that they are not to do so. (R. p. 13, lines 1-8; T. p. 13, ll. 1-8). The trial court goes through and analyzes each of the factors set forth in *Tate* in denying the motion to sever. However, the trial court fails to thoroughly examine the prejudicial affect that joining the cases may have on the Appellant. In determining the prejudicial affect joining the charges may have on the Appellant, there are several factors the court should consider as set forth in *Drew v . U.S.*. Based upon the nature of the charges in the case before this Court, as being crimes against morality, a jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the

Defendant from which guilt of the other crime or crimes charged are found. The elements of Sexual Exploitation of a Minor Second Degree and Sexual Exploitation of a Minor Third Degree are very similar in nature. Both crimes require that the individual knows of the character or content of the material. The difference between the two crimes is essentially what is done with the material once the individual knows its content. If the individual merely possesses the material, he will be charged with Sexual Exploitation of a Minor in the Third Degree. However, if he knows the content or character of the material and distributes, transports exhibits, receives, sells, purchases, exchanges or solicits the material he would be guilty of Sexual Exploitation of a Minor in the Second Degree.[2] It is not illogical to believe that due to the close nature of these offenses a jury could use the evidence from either charge to infer criminal disposition of the part of the Appellant. Additionally, based upon the similarity of the elements of the statutes, a jury may cumulate the evidence of the other crimes charged and find guilt when if charged separately, it would not so find. In this case, the State presented evidence that the Appellant distributed, transported, exhibited, received, sold, purchased, exchanged or solicited material containing a visual representation of a minor engaged in sexual activity. If the jury finds, based upon that evidence, that the Appellant is guilty of this offense, they had to find that the Appellant knew the content or character of the material It is implied in §16-15-405 that the individual possessed the material or he could not have done the acts prohibited by this Statute. As a result, the Appellant would also have to be guilty of Sexual Exploitation of a Minor Third Degree §16-15-410 because this statute

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[2] This analysis only applies to subsection b of S.C. Code Ann. §16-15-405 as this is the section the appellant is charged under

requires element of knowledge and possession. However, if the cases were tried separately, this prejudice would be removed and the jury could not cumulate the evidence together or give more weight to the charges because there are multiple charges. This would seem to hold true in this case especially because out of the seven indictments three of the images are the basis for both indictments

The trial court failed to properly weigh the prejudice to the Appellant that was caused by the joinder of the claims with the need for judicial economy and administration. When the prejudice to an Appellant outweighs the need for judicial economy joinder of the cases should be denied. In this case, the Appellant suffered a great deal of prejudice by having the charges tried together. The evidence was very complex and the jury was confused as indicated by their notes. The nature of the charges is of such that a multiple of charges would be given more weight that the Appellant committed the crimes.

The trial court also erred in joining the cases due to the complex and confusing nature of the evidence. Unlike *Lotsch* where the three charges were properly tried together because the evidence was short and simple and there was no reasonable ground for thinking that the jury could not keep the evidence separate, the evidence in the case before this Court is complex and confusing as evidenced by the jury note stating that some of the evidence was confusing and they wanted clarification. Based upon the confusing nature of the evidence, it is also reasonable to believe that the jury could not keep the evidence separate, especially due to the fact that the same images were the basis of both charges.

Based upon the foregoing, the trial court erred in denying the Appellant's Motion to Sever the Charges and the Appellant's conviction should be reversed and the cases remanded for separate trials.

B. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AS NO EVIDENCE WAS PRESENTED THAT APPELLANT KNEW THE CHARACTER OR CONTENT OF THE MATERIAL AS REQUIRED BY S.C. CODE ANN. §16-15-410 (2011).

S.C. Code Ann. §16-15-410 states that an individual commits the offense of third degree sexual exploitation of a minor if knowing the character or content of the material, he possesses material that contains a visual representation of minor engaging in sexual activity. Emphasis added. The term" know" means "to have an knowledge, to possess information". *Black's Law Dictionary,* Sixth Edition. In looking to the plain meaning of this statute, it can be inferred that an individual that is charged with a violation of §16-15-410 must have an understanding or knowledge of the character or content of the material.

At the close of the State's case and also renewed at the conclusion of the case, Appellant moved for a directed verdict on the grounds that based upon the testimony presented, the State failed to prove that the Appellant had any knowledge of the character or content of the material that was discovered on the laptop computer or the CD that was found during the execution of the search warrant. (R. p. 134, lines 24-24-p. 135, lines 1-5-p. 181, lines 20-21; T. p. 174, ll. 24-25, p. 175, ll. 1-5, p. 270 ll. 20-21). The Trial Court denied both motions. The State's expert witness testified that the first file found on the laptop computer was downloaded on February 16, 2010 and was never opened or viewed on the computer. (Supp. R. p. 1, lines 5-25-pp. 118-120, lines 1-2; T. p. 154, ll. 5-25, pp. 155-157, ll. 1-2). The second file that was found on the laptop computer was downloaded on December 20, 2010 at approximately 10:20 a.m. and it was also never opened or viewed on that computer. (R. p. 121, lines 14-25; T. p. 159, ll. 14-25). The last file found on the laptop by the State's expert witness was downloaded on December 16, 2010 and also was not opened or viewed on that computer. (R. p. 122, lines 1-14; T. p. 160, ll. 1-14). The CD which contained sexual explicit material was found in the desk drawer in the Appellant's residence which is the basis of one of the indictments. The State failed to prove that the Appellant had actually been the individual that downloaded the files from the file sharing program. Evidence was presented that Appellant did not even have the laptop in his possession when these items were downloaded. Furthermore, he presented testimony and exhibits to corroborate his testimony that he was working on the day McKellar downloaded the material. All the State proved was that the laptop was used by someone to download the files and that the files were connected to the IP address at the time McKellar initiated her investigation. (R. p. 124, lines 24-25-p. 164 lines 1-24-p. 127, lines 9-18; T. p. 163, p. 24-25 p. 164, p. 164. ll. 1-24, p. 167 ll. 9-18) The fact that the files could be downloaded from the Appellant's IP address does not show that he was aware they were on his computer or that he knew of the content or character of the material. All it proves is that the files were located on this laptop. The actual files were no longer even on the laptop computer. (R. p. 125, lines 4-7; T. p. 164, ll. 4-7). Rather, the expert witness was required to use a software program used only by law enforcement to locate remnants of the file that once existed on this laptop. (R. p. 124, lines 18-22-p. 125 lines 1-24; T. p. 163, ll. 18-22, p. 164, ll. 1-24). There is no evidence as to how these files got onto the laptop or by whom. The expert witness testified he was unable to determine how the files got onto the laptop or where the laptop was physically located when the files were downloaded to the laptop. (R. pp. 127-130; T. p. 167-170). Nor could he ascertain when the files had actually been placed on the laptop computer. (R. p. 125 lines 4-24; T. p. 164, ll 4-24).

The statute at issue clearly requires that the Appellant knew the content or character of the material. There was no evidence presented that proved that the Defendant knew the content of the material or that he was the one who downloaded it or possessed it. The State argued that the laptop was found in the Appellant's office which is located in his home. (R. p. 135, lines 7-8; T. p. 175, ll. 7-8). This, in itself, is insufficient to show that the Appellant knew of the content or character of the material on the computer. A laptop, by its very nature, is moved from place to place and the mere fact that upon execution of the search warrant it was located in the Appellant's office in his house does not indicate that he was the person who downloaded these files from a file-sharing program. Additionally, the State argued that the GUID, which is an identifier of a certain computer, (R. p. 42 lines 15-23; T. p. 76, ll.15-23) was tied to a specific program with the initial downloads and the IP address for the specific downloads. (R. p. 135 lines 14-18; T. p. 175, ll. 14-18). This does not place the Appellant as the one who actually downloaded the material, especially due to the fact that testimony showed this laptop was not in his possession for an extended amount of time. In order for McKellar to initiate the downloads from the file sharing program, the computer only had to be on and the file sharing program running.

The Court denied the Appellant's motion indicating that "there is substantial circumstantial evidence sufficient for the case to go forward, and under the statutes". (R. p. 135 lines 19-22; T. p. 175, ll. 19-22). This was error because there was no evidence presented showing that the Appellant knew of the content or character of the files or what was contained on the CD. A directed verdict motion should be granted when the "evidence merely raises a suspicion that the accused is guilty" *State v. Cherry,* 348 S.C. 281, 285, 559 S.E.2d 297 (S.C.App. 2001).

At the conclusion of the case, the Appellant renewed his motion which was also denied. During the course of the trial, the Appellant testified that he obtained the laptop in question from an auction on March 11, 2004. (T. p. 193, ll. 24-25, p. 194, ll. 1-19). The Appellant further testified that he loaned the laptop to his brother for helping him out at the auction[3]. (R. p. 136 lines 17-25-p. 139 lines 1-4; T. p. 195, ll. 17-25, p. 196, ll. 1-4). Several witnesses corroborated that the Appellant loaned this computer to his brother. (R. p. 160 lines 12-25-p. 161 lines 18-21-p. 162 lines 12-22; T. p. 245, ll. 12-25, p. 247 ll. 18-21, p. 249, ll. 12-22). The Appellant further testified that after having a fight with his brother, his brother returned the laptop, along with other items he had taken or borrowed sometime after Valentine's Day, 2011. (R. p. 143 lines 19-25-pp. 144-145; T. p. 200. ll. 19-25 p. 201-202). The Appellant further testified that he was not able to use the computer because it was not returned with a power cord. (R. p. 145 lines 23-25; T. p. 202, ll. 23-25). Therefore, the Appellant did not have possession of this computer from March, 2004 through February, 2011. Additionally, there was extensive testimony that Appellant's brother would frequently show-up at Appellant's residence, regardless of whether the Appellant was aware he was coming, and hang out in the garage where the IP address was readily accessible. (R. p. 198, lines 23-25-pp. 142-143 lines 1-6-pp.152-155-p. 156, lines 14-25-p. 157-158 lines 1-20-p. 159, lines 12-14; T. p. 198, ll. 23-25, pp.

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[3] The appellant's brother, William Rutledge died prior to the trial in this matter

199-200 ll. 1-6, p. 225-228, p. 234, ll. 14-25, p. 235-236, ll. 1-20, p. 244, ll. 12-14). The State's expert witness testified that he could not tell when the files came in because he did not know, all he could testify to was that the files came in sometime prior to December 16, 2010. (R. p. 125, lines 20-24; T. p. 164, ll. 20-24). This was the time period Appellant's brother was in possession of the laptop and also had access to Appellant's garage and internet connection. Additionally, the Appellant was also presented evidence, both through testimony and written documentation, entered into evidence as exhibits, of his whereabouts at the time the McKellar was performing her investigation. (R. p. 147 lines 2-25-pp. 148-150 lines 1-8; T. p. 204, ll. 2-25, p. 205-207, ll. 1-8). This demonstrates that the Appellant could not have been downloading these items on the day the State alleges. Also, the Appellant testified that the CD that was seized was physically removed by him from the laptop after it was returned to him by his brother. (R. p. 146, lines 4-9; T. p. 203, ll. 4-9). He never looked at the CD or knew what was on it. It was tossed into his desk and forgotten about. The State did not present any evidence that the Appellant knew of the content of the files on his computer or CD nor that it was ever even played on the laptop computer or any other mounted device. (R. p. 126 lines 8-13; T. p. 165, ll. 8-13).

Based upon the foregoing, the trial court erred in denying Appellant's Motions for a Directed Verdict. An essential element of the crime Sexual Exploitation of a Minor Third Degree is the element of knowing and the State failed to prove this element beyond a reasonable doubt.

C. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AS NO EVIDENCE WAS PRESENTED THAT

APPELLANT KNEW THE CHARACTER OR CONTENT OF THE MATERIAL AS REQUIRED BY S.C. CODE ANN. §16-15-405 (2011).

S.C. Code §16-15-405 states that (A) an individual commits the offense of Second Degree Sexual Exploitation of a minor, if knowing the character or content of the material he (1) records, photographs, films, develops, duplicates, produces or creates digital electronic file material that contains visual representation of a minor engaged in sexual activity; or (2) distributes, transports, exhibits, receives, sells, purchases, exchanges or solicits material that contains visual representation of a minor engaged in sexual activity. As with S.C. Code Ann. §16-15-410, this statute requires the element of knowing the character or content of the material in order to be convicted of this offense.

At the close of the State's case and again at the conclusion of the trial, Appellant moved for a Directed Verdict on the grounds that the State failed to prove the essential element of knowing the character or content of the material. A directed verdict motion should be granted when the "evidence merely raises a suspicion that he accused is guilty" *State v. Cherry,* 348 S.C. 281, 285, 559 S.E.2d 297 (S.C.App. 2001).

The Appellant argued that there was no evidence to show that he had knowledge of the images. Furthermore, there was no evidence presented to show that he was the person who created the file, or even that he was the person who had access to the file or downloaded the file. (R. p. 134 lines 1-5; T. p. 174, ll. 1-5). This was a used computer, obtained at an auction and was eventually loaned out to Appellant's brother. (R. p. 137, llines 17-19-p. 138 line 18-p. 139 line 4; T. p. 194, ll. 17-19, p. 195, l. 18, p. 196, l. 4). Also, the State presented a great deal of evidence to show that McKellar downloaded the files in question from the Appellant's IP address which is connected to his physical address. (R. p. 134 lines 6-8; T. p. 174. ll. 6-8). However, they failed to set forth any evidence showing that the Appellant knew of the content or character of the files for which she downloaded as they were never even accessed or viewed. Additionally, the files that were downloaded from the laptop computer were only remnants of the actual file because the actual file no longer existed. (R. p. 125, lines 4-10; T. 164, ll. 4-10). Based upon the lack of evidence proving knowledge of the material or who the party was that downloaded the material, the State was unable to prove an essential element of the crime. It appears that the only reason Appellant was charged with these crimes is because the IP address was registered to his physical address, in his name and a laptop was found in an office that he uses but others have access to.

The trial court denied the Appellant's Motion for Directed Verdict both at the end of the State's case and at the conclusion of the trial. In denying the motion at the end of the State's case, the trial court stated that in looking at the statute they did not see where it says "knowing – about knowing the character or content of the material".(R. p. 134 lines12-14, line 16; T. p. 174, ll. 12-14, l. 16) Section 16-15-405 specifically requires an individual to know the character or content of the material. The trial judge erroneously indicated that such element was not necessary and thus his decision was based upon an improper interpretation of the law. As this is an essential element of this statute, it was imperative that the trial court consider this element when ruling on the Motion. The trial court indicated that based upon the statute and substantial circumstantial evidence the motion was denied. By relying on his improper interpretation of the statute this denial was erroneous.

Based upon the foregoing, the trial court erroneously denied the Appellant's

Motions for Directed Verdict and the Appellant's convictions should be overturned.

D. THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL WHEN NUMEROUS GROUNDS FOR A MISTRIAL AROSE DURING THE TRIAL AND THE FAILURE TO DECLARE A MISTRIAL RESULTED INA MANIFEST INJUSTICE.

The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes. *State v. Kirby*, 269 S.C. 25, 236 S.E.2d 33, 34 (S.C. 1977). The United States Supreme Court has "recognized the broad discretion reserved to a trial judge declaring a mistrial in the 'varying and often unique situations arising during the course of the criminal trial'." *Id.* 269 at 25, 236 S.E.2d at 35. "Where for various reasons deemed compelling by the trial judge, who is best situated to intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection…". *Illinois v. Somerville*, 410 U.S. 458, 93, S.Ct. 1066, 1069,35 L.Ed.2d 425 (1973). "The..test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being define as the public's interest in a fair trial designated to end in just judgment. *Id.*

The issue of a mistrial is somewhat unique in the case before this Court. During the course of the trial several incidents occurred that prompted the discussion of a mistrial. The first instance arose when Appellant brought up the issue to the court that the State intended to present other images or videos that are not subject to the indictment to the jury. (R. p. 13, lines 13-17; T. p. 13, ll. 13-17) The Appellant objected to this introduction of this evidence on the grounds of such introduction violated Rule 404, SCRE in that it was intended to show that the Appellant might have had other images and thus had a propensity to engage in this type of behavior. (R. p. 13, lines 16-17; T. p. 13, ll. 16-17). The State argued that all of images, even the images the Appellant was not charged with, are relevant to the case. (R. p. 14 lines 16-25-pp. 15-16 lines 1-10; T. p. 14, ll. 16-25, p. 15-16, ll. 1-10). The Court found that applying Rule 403, SCRE to the Rule 404, SCRE analysis, the prejudicial value of admitting the evidence outweighs the probative value. (R. p. 17, lines 7-11; T. p. 18, ll. 7-11). During the course of the State's case, the State presented testimony and showed evidence of at least a dozen to two dozen sexual-orientated videos, including those that mention minors, to the jury which violated the trial court's ruling regarding this evidence. (R. p. 101, lines 19-25-p. 102 lines 5-6; T. p. 135, ll. 19-25, p. 136. ll. 5-6). Appellant objected to this line of questioning and showing of the evidence and the Court found that this was the exact type of evidence that was ruled out. (R. p. 102 lines 3-10; T. p. 136, ll. 3-10). The State continued to argue that it was acceptable for these file names to be shown on the large screen because he was not talking about them, showing them and the Appellant was not charged with those. (R.p. 103-104 lines 1-16; T. p. 137-138, ll. 1-16) The trial judge indicated that there were two concerns he had with what the State was doing. (R. p. 104, line 17; T. p. 138, l. 17). First, the court ruled "that the [State] was not going to present to the jury anything regarding character evidence that is indications of prior bad acts as we usually refer to them". (R. p. 104 lines 17-20; T. p. 138, ll. 17-20). Secondly, the court took a break during court the prior day to allow the State to redact the exhibits in order to prevent anything like this happening. (R. p. 104 lines 20-22; T. p. 138, ll. 20-22) The trial court was concerned because these items had been published to the jury, despite his ruling that evidence of this type could not be presented, the jury was now aware that additional files showing sexually orientated material involving minors were located on the computer. (R. p. 105, lines 1-22; T. p. 139. ll. 1-22). The trial judge further stated that he would "have a hard time,… disassociating those type – that type of language with single shots that, obviously, are indications that they're films or images associated with them, that they are not number one, sexual in nature, and number two, involve teens". (R. p. 105, lines 14-21; T. p. 139. ll. 14-21). The Appellant felt that he had grounds for a mistrial but instead asked for some curative instructions. (R. p. 106, lines 6-11; T. p. 140, ll. 6-11). The trial judge decided that he would tell the jury that he had determined that the last things shown on the screen are not relevant, and they are not to consider them in their deliberation. (R. p. 106, lines 14-17; T. p. 140, ll. 14-17) It should be noted that these files were the basis of one of the notes the jurors sent to the court prior to deliberations. (R. p. 108, lines 9-17; T. p. 142, ll. 9-17). Additionally, another concern regarding this evidence was that it had been introduced as an exhibit, without objection, which would be with the jury during deliberations. (R. p. 107, lines 10-25; T. p. 141, ll. 10-25). However, the exhibit was introduced without objection without the Appellant having the opportunity to view it in its redacted form. (R. p. 107, lines16-18; T. p. 141, ll. 16-18). Lastly, the trial court struck a page from the record a computer pate which showed a dozen or two still pictures with wording beneath the each. The jury was told not to consider that page, but the court received a note from the jury that they were confused as to what information they were not to consider. (R. p. 165, lines 7-10; T. p. 252, ll. 7-10).

The second instance arose when the trial court received another note from the jury which raised concerns that the jurors had started discussing the case with each other prior to being told to do so. (R. p. 166, lines 10-18; T. p. 255, ll. 10-18). Madam forelady admitted that the jurors had started to discuss the case. Additionally, the trial court received a note indicating that they were not deliberating but they were trying to clarify confusing evidence. (R. p. 184, lines 16-22-p. 189, lines 17-19; T. p. 275, ll. 16-22, p. 280 ll.17-19). Despite the Appellant believing he would be entitled to a mistrial if he asked for one, Appellant, after extensive discussion with counsel, indicated that he was not desirous of seeking a mistrial. (R. p. 185, lines 17-25; T. p. 276, ll.17-25)

Based upon the above situations that occurred during the trial, the ends of substantial justice could not be obtained unless the trial was discontinued. The jurors had been shown a dozen to two dozen prejudicial pieces of evidence. (R. p. 101, lines 19-25-p 102, lines 5-6; T. p. 135, ll. 19-25, p. 136. ll. 5-6). The showing of this evidence raised a concern for the trial judge who indicated that he would have a hard time ignoring the dozen to two dozen files indicative of sexual activity by a minor especially due to the fact that the Appellant was charged with crimes relating to sexual activity by a minor. (R. p. 105, lines 14-21; T. p. 139. ll. 14-21). Furthermore, it was determined by the Court earlier in the trial, that this evidence was <u>not</u> to be admitted, but the State failed to comply with this ruling. The trial court has the inherent right to declare a mistrial without the appellant's consent and even over his objection. *Illinois v. Summerville*, supra. Under these unique circumstances, a mistrial was necessary in order to ensure that the Appellant received a fair trial that ended in a just judgment. A failure of the trial court to declare a mistrial is manifestly unjust.

E. THE APPELLANT WAS DEPRIVED OF A FAIR TRAIL DUE TO THE IMPROPER CLOSING ARGUMENT OF THE STATE.

A trial judge is vested in broad discretion in dealing with the range of propriety of closing arguments. *State v. Northcutt,* 372 S.C. 207, 641S.E.2d 873 (S.C. 2007) citing *State v Patterson,* 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1977). Ordinarily, his ruling will not be disturbed. *Id.* The appellant has the burden of showing any alleged error in argument deprived him of a fair trial or a fair determination of his guilt or innocence. *State v. Bell,* 302 S.C. 18, 393. S.E.2d 364 (1988) The Appellate Court must review the argument in context of the entire record. *State v. Northcutt*, 324 S.C. at 17, 482 S.E2d at 766.

Additionally, while a solicitor should prosecute vigorously, it is not his duty to convict but too see that justice is done. *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) In prosecuting a case, a prosecutors are bound to rules of fairness in their closing argument. *Id.* at 339. In the case before this Court, the State's closing argument deprived the Appellant of his right to a fair trial and a fair determination of his guilt or innocence.

As previously indicated, this case dealt with a great deal of technical computer evidence. During the State's case, the State introduced a Forensic Report which was testified to by Investigator Bomar and introduced into evidence. (R. p. 78, lines 20-21-p. 79, lines 1-16; T. p. 112, ll. 20-21, p. 113 ll. 1-16) The State went into great depth regarding the files that are the basis of the indictment and the fact that they were located on the laptop computer. However, due to the fact that the Exhibit had not been properly redacted according to the ruling of the trial court (R. p. 107, lines 16-18; T. p. 141, ll. 16-

18), the jury was not going to be allowed to take the document into the jury room because it contained other files indicative of pornography along with other browser history and files. (R. p. 167 lines 21-22; T. p. 256, ll. 21-22).

During the Appellant's case, the Appellant testified which was corroborated that he loaned this computer out to his brother. Additionally, the Appellant testified that he was not able to turn the computer on because it was dead and he did not have a power cord. (R. p. 146, lines 1-14; T. p. 203, ll. 1-14) Also, he testified and produced evidence that at the date and time Investigator McKellar downloaded the images he was not at home but rather he was working. (R. pp. 147-140; T. p. 204-207)

Upon the Appellant resting, the State indicated to the Court that he wanted to present reply evidence because "when the State presented the case there was no…indication that the laptop, where three of the video files were found and the CD were not in the possession of [the Appellant] in his house, and so the State did not present evidence at that time based upon that. …the State intends to go through the forensic report, which is already in evidence different pieces of the forensic report that show that …computer was in used during that time period". (R. p. 166 lines 22-25-p. 167, lines 1-9; T. p. 255, ll. 22-25, p. 256, ll. 1-9). The trial court noted that this report was already in evidence and now he wants a second opportunity to explain a piece of evidence that was already in evidence because he did not get into the issue of possession in its case in chief. (R. p. 167, lines 10-25-p. 168 lines 1-24; T. p. 256, ll. 10-25, p. 257, ll. 1-24). The trial court found that he would allow the State to make a proffer but he found that it was not appropriate reply testimony and he was not going to be allowed to present it. (R. p. 169, lines 8-10; T. p. 258, ll. 8-10)

Investigator Bomar testified, in camera, as to numerous files that were contained in the second forensic report he prepared. (R. p. 169, lines 20-23; T. p. 258, ll. 20-23) This testimony concerned Internet Explorer being accessed, Netflix being accessed, emails being sent and received, Facebook being opened, Microsoft word being used and several other programs. (R. pp. 169-178, lines 1-6; T. p. 258- 267, ll. 1-6). After listening to this testimony, the Court sustained the objection because the fact that a more detailed explanation of the forensic report seemed to be warranted because of the Defense's case does not reach the hurdle of allowing a reply. (R. p. 179, l. 14, ll. 22-25; T. p. 268, l. 14, ll. 22-25).

During the State's closing argument, the State, decided that despite the trial judge's ruling regarding the proffered testimony, despite not properly redacting the forensic report and despite them not offering any evidence to show that the laptop computer was not in the possession of the Appellant, they were going to draw the jurors attention to portions of the report that Investigator did not discuss. (R. p. 201, line 25-p.202-206, lines 1-13; T. p. 306, l. 25, p. 307-311, ll. 1-13). The State specifically drew the juror's attention to each and every one of the items that the Investigator Bomar testified to during his in camera testimony. Essentially, the State back-doored their way into getting the exact testimony they were prohibited to present to the jury because they failed to do so in their case-in-chief before the jury. The State exceeded the rules of fairness our laws require when presenting their closing argument and in doing so the Appellant was denied a fair trial. Additionally, this evidence, that the State failed to present in their case-in-chief, in effect denied the Appellant of a fair determination of his guilt or innocence.

CONCLUSION

Based upon the foregoing, the trial court erroneously denied Appellant's Motions for Directed Verdict and as a result he Appellant's convictions should be overturned. Additionally, based upon the foregoing, the trial court erred in joining the two cases and thus Appellant's conviction should be overturned and remanded to the lower court.

Respectfully submitted,

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August 4 , 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-001408

The State,

Respondent,

v.

Rion McKissick Rutledge, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief complies with Rule 211(b) SCACR.

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