STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable William P. Keesley, Circuit Court Judge

Opinion No. 2019-UP-166

THE STATE,

RESPONDENT,

V.

BRYAN JEFFREY ELLIS,

PETITIONER.

APPELLATE CASE NO. 2017-001558

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Bryan Jeffrey Ellis petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that the improperly redacted statement which implied Petitioner sexually abused a second child was prior bad act evidence that should have been excluded under Rule 404(b), SCRE and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) because it was inadmissible bad character evidence that did not meet a *Lyle* exception. While this Court's opinion addressed the undue prejudice prong of Rule 403, SCRE, it did not address the Rule 404, SCRE argument that was raised by trial counsel and by appellate counsel. Although Petitioner was never charged with sexual misconduct against

another child, the trial court denied defense counsel's motion to completely redact a question and answer in Petitioner's written statement to police in which the name of another child was obviously deleted. The insufficient manner in which the question and answer were redacted gave the impression that police officers believed Petitioner may have molested a second child. Counsel also respectfully submits the Court overlooked the relatively small probative value of the evidence when compared to the nature of the unfair prejudice. Finally, counsel respectfully submits the Court overlooked the prejudice to Petitioner from the admission of this evidence since the appearance that an accused has sexually preyed upon multiple children is extremely prejudicial, particularly here where the solicitor exploited the erroneous admission of the evidence in closing argument by calling him a sex offender who must be stopped. Counsel respectfully seeks rehearing on the points discussed above.

The state indicted Petitioner for criminal sexual conduct with a minor in the first and third degree, alleging that Petitioner fondled and engaged in oral sex with his seven-year-old stepdaughter (Child). R. 501 – 502; R. 504 – 505. Child disclosed the alleged abuse to her mother, Petitioner's wife, who confronted Petitioner and called 911. R. 243, l. 18 – 244, l. 8; R. 248, ll. 15-20.

Petitioner was interrogated about the allegation by Detective Rawl of the Lexington County Sheriff's Department. R. 48, ll. 3-6; R. 53, ll. 15-19. The interrogation was reduced to a written statement, in which Petitioner admitted to touching the child's vagina, engaging in fellatio with her, and giving her a vibrating device. R. 487 – 493. Petitioner wrote that he performed these acts with the child because she had a tendency to self-stimulate, and he believed he was teaching her about masturbation while pleasuring himself. R. 488 – 490. Child testified that Petitioner touched her private part with his hand, put his mouth on her private part, put his

private part in her mouth, and gave her a vibrating thing. R. 175, l. 2 – 176, l. 18; R. 181, ll. 4-25.

Petitioner testified at trial and admitted to improper behavior—giving Child a vibrating device—but that behavior did not amount to criminal sexual conduct with a minor. Petitioner said he falsely confessed because he felt threatened by Rawl during the interrogation and that Rawl pushed him into "saying what he wanted me to say." R. 400, ll. 15-19; R. 402, ll. 20-24. Petitioner explained that he made up the portions of the statement in which he admitted to sexual acts and touching of Child in response to Rawl's interrogation. R. 402, l. 5 – 403, l. 25. Petitioner testified that he did not have sexual contact or oral sex with Child. R. 386, ll. 4-6; R. 403, ll. 23-25.

Petitioner admitted in his testimony that he had conversations with Child about masturbation and gave her a vibrating device. R. 385 ll. 6-21. Petitioner said he was informed by his wife that the child had begun masturbating and he had conversations with Child to let her know "it's okay to play with yourself," but to "be a little more discreet about it." R. 385, ll. 6-13. Petitioner acknowledged that he gave Child a "vibrating bean" to use for self-stimulation, but denied sexual contact or touching. R. 385, l. 19 – 386, l. 6.

Petitioner's written statement to Rawl also included questions about whether Petitioner had discussed masturbation with his minor step-son (Brother One) or minor son (Brother Two). R. 492 – 493. Petitioner was not charged with any sexual offenses against Brother One or Brother Two.

Defense counsel moved the court redact this portion of the statement, arguing Rule 401, Rule 403, and Rule 404, SCRE. R. 126, l. 5 – 128, l. 10. Defense counsel moved to redact all of page six and the first two questions and answers on page seven of Petitioner's statement. R. 127,

l. 13 – 130, l. 12. Defense counsel moved to redact "[d]iscussions with [Brother One] about masturbation." R. 127, l. 16. Counsel argued: "**that's a bad act. It's not relevant. The prejudice outweighs the probative value. He's on trial for alleged acts against [Child].**" R. 128, ll. 8-10 (emphasis added). Defense counsel said: "the first two questions and answers on the top of page 7 are a continuation of that line of questioning." R. 130, ll. 10-12. The contested question and answer read:

> Q: Did your wife know that you had these conversations with [Brother One] and [Child]?
>
> A: No, I never thought to tell her I talked to them about it.

R. 493.

The state argued the inclusion of Brother One's name was incidental, and the statement was relevant because Petitioner admitted talking to Child about masturbation without notifying his wife, and because Petitioner said he discussed masturbation with Brother One but didn't act on any of those instructions to Brother One. R. 130, l. 18 – 131, l. 6; R. 127, l. 24 – 128, l. 6.

Defense counsel argued the state had "five and a half other pages of the same topic they can work with" that did not reference a second child. R. 131, ll. 8-11. Counsel argued that "the prejudice is injecting potential sexual conduct even the inference of it," and "the prejudice outweighs the probative value." R. 131, ll. 11-14.

The court allowed the statement's admission with the name of Brother One obliterated; the defense objected to this form of redaction pursuant to *State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010). R. 132, l. 13 – 134, l. 14. The court noted counsel's objection but allowed the question and answer to be redacted and admitted as follows:

> Q: Did your wife know that you had these conversations with [Child]?
>
> A: No. I never thought to tell her

R. 500. Counsel renewed his objections, including Rule 404(b), to the redactions after they were made, objected again when the statement was testified to by Rawl, and again when it was introduced into evidence. R. 221, ll. 22-24; R. 311, ll. 24-25; R. 321, ll. 7-8.

Prior to the statement's admission, Petitioner's wife testified she had no knowledge that anything of a sexual nature had occurred between Child and Petitioner. R. 242, ll. 5-11. Several other portions of Petitioner's statement introduced in evidence contained admissions that Petitioner believed he was teaching Child about masturbation, without referring to Brother One. R. 497 – 498.

The solicitor argued to the jury that Petitioner was a sex offender who must be stopped and labeled Petitioner as a "sex offender" seven times in her closing arguments. R. 436, l. 17 – 437, l. 19; R. 441, ll. 12-13; R. 456, l. 4. The solicitor declared: "This is a sex offender and there's no other way around it. Let this be the last time that he hurts a child in this way. Let this be the last time that he steals the innocence of a child." R. 446, ll. 15-20. The defense objected to this argument as improperly "appealing to passion and prejudice," and the court instructed members of the jury not to base their verdict on passion, prejudice, or bias. R. 446, l. 19 – 452, l. 1.

Nevertheless, the solicitor continued: "I submit to you this must be the last time. The correct verdict in this case—" R. 447, ll. 5-6. Defense counsel again objected, and the court again instructed the jury to base its verdict on the evidence. R. 447, ll. 5-11. The solicitor reacted by telling the jury: "you must return a verdict that speaks the truth," and then called Petitioner a "manipulative sex offender" in her reply closing. R. 447, l. 14-15; R. 456, l. 4.

Rule 404(a), SCRE prohibits the admission of character evidence generally, subject to certain exceptions. Rule 404(b), SCRE allows that while evidence of other bad acts is not

admissible to prove the person acted in conformity with their character, it may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Here, the introduction of the improperly redacted portion of the statement was impermissible bad character evidence that conveyed the impression that Petitioner was a sex offender who acted in accordance with his character and sexually assaulted the minor in the case at hand. The question and answer regarding the other child was improper under Rule 404(a) since it did not meet one of the 404(b) exceptions.

Defense counsel further objected to the introduction of this portion of the statement pursuant to Rule 403 when he argued "the prejudice outweighs the probative value." Rule 403, SCRE provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Probative value means the measure of the importance of the tendency to prove or disprove the outcome of a case. *State v. Gray*, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014).

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Even if prior bad act testimony is relevant, the trial court must apply Rule 403 and exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Perry*, 420 S.C. 643, 654, 803 S.E.2d 899, 905 (Ct. App. 2017).

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). A "trial court may properly redact dissimilar particulars of sexual conduct to avoid unfair prejudice to the defendant." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

Counsel objected to the manner of redaction as violating the principles laid out in *State v. Johnson,* 390 S.C. 600, 703 S.E.2d 217 (2010). In *Johnson*, the South Carolina Supreme Court addressed a redaction which allowed the jury to see that reference to another person had been blacked out with ink. *Id.* at 605, 703 S.E.2d at 219. There, the redactions were in a non-testifying codefendant's confession, with the name of the person who helped him commit the crimes obliterated. *Id.* The detective in the case testified this confession in part led to Johnson's arrest. *Id.* The Court found the redaction combined with the detective's testimony that the codefendant's confession caused him to arrest Johnson was constitutional error and resulted in prejudice. *Id.* at 607, 703 S.E.2d at 220.

Although *Johnson* involved a *Bruton*[1] issue, the redaction here was of similar form. Brother One's name was removed in a way that made it clear reference to another person had been censored. The court's refusal to fully redact the question and answer allowed gratuitous uncharged sexual misconduct before the jury. Taken in context, the redaction effectively told the jury Petitioner was "conversing" with more than one child about masturbation. Implying there was another victim of sexual abuse via the whited-out spaces before Child's name and after

[1] *Bruton v. U.S.*, 391 U.S. 123 (1968).

Petitioner's answer unfairly prejudiced Petitioner by injecting the inference a second child may have been sexually abused by Petitioner.

The evidence was not important to prove the outcome of the case; it had minimal probative value as the state introduced other evidence Petitioner admitted talking to Child about masturbation without his wife's awareness. Prior to the statement's admission, his wife testified to the jury she did not know anything of a sexual nature had occurred between Child and Petitioner. Several other portions of Petitioner's statement introduced in evidence contained admissions that Petitioner believed he was teaching Child about masturbation, without containing an unfairly prejudicial reference to another child.

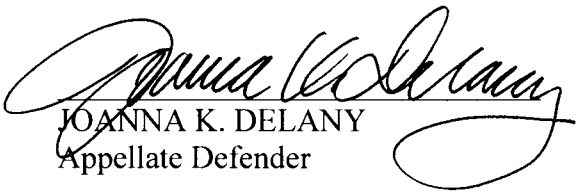
The solicitor fully exploited the erroneous admission of this evidence in closing argument by repeatedly calling Petitioner a sex offender. A solicitor's closing argument must not be calculated to arouse the jurors' passions or prejudices. *State v. Day*, 341 S.C. 410, 535 S.E.2d 431 (2000); *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). Petitioner submits the judge's instructions that the jury base its verdict on the evidence rather than passion, prejudice or bias were insufficient to dispel the solicitor's infection of the trial with the idea that Petitioner had sexually abused multiple children—sex crimes against children are the most abhorrent and reviled type of crimes that exist in our society, save the (possible) exception of terrorism.

The trial court erred by failing to order the question and answer involving Brother One be entirely redacted, as any probative value was outweighed by unfair prejudice. Petitioner was unfairly prejudiced because the statement implied to the jury that there was a second victim of sexual abuse, although Petitioner was not charged with any sexual offenses against other children. The insufficiently redacted statement was improper prior bad act evidence: it conveyed

to the jury that Petitioner had the bad character of a sex offender and so he acted in conformity with that character and committed the crimes for which he was being tried. The extreme nature of this prejudice cannot be overstated. The solicitor exploited the faulty redaction by repeatedly calling Petitioner a sex offender in closing argument.

Based on the above arguments, counsel for Petitioner respectfully seeks rehearing.

Respectfully Submitted,



JOANNA K. DELANY
Appellate Defender

This 23rd day of May, 2019.

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THE STATE,

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PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Bryan Jeffrey Ellis, #373122, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of May, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of May, 2019.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 26, 2028