STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

LARRY JAMES TYLER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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SC Court of Appeals

APPELLATE CASE NO 2016-002364

BRIEF OF PETITIONER

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ISSUE PRESENTED

Was trial counsel ineffective in failing to move to sever the trial of Petitioner's charge for second-degree sexual exploitation of a minor from the trial of his remaining charges?

STATEMENT OF THE CASE

During the February 2013 term the Darlington County Grand Jury indicted Petitioner for sexual exploitation of a minor, in the second degree; criminal solicitation of a minor; disseminating harmful material to minors; and contributing to the delinquency of a minor. App. App. 273 - 284.

On February 25 – 27, 2013, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury in Darlington County. App. 1. Richard Jones represented Petitioner. Id. John Holt and Patti Parker represented the state. Id.

Petitioner was found guilty as charged. App. 186, l. 17 – 187, l. 21. Judge Burch sentenced Petitioner to eight years' imprisonment for disseminating harmful material to a minor; sexual exploitation of a minor, second degree; criminal solicitation of a minor; and three years' imprisonment for contributing to the delinquency of a minor. App. 194, ll. 3 – 13. All of the sentences were concurrent. Id.

The Court of Appeals affirmed Petitioner's convictions in State v. Tyler, 2015-UP-025 (January 14, 2015) rejecting his argument that the trial court should have directed verdicts in his favor. App. 284 – 285; App. 265.

On January 2, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 196 - 210. The state filed a return on May 15, 2015. App 211 – 214.

An evidentiary hearing was held on July 18, 2016 before the Honorable G. Thomas Cooper. App. 215. Lance S. Boozer represented Petitioner. Id. J. Rutledge Johnson represented the state. Id.

On November 4, 2016, the PCR judge filed an order denying Petitioner relief from his convictions and sentences. App. 264 – 272. He found that Petitioner failed to meet his burden of proving that trial counsel was ineffective because there was "no reasonable basis to make a motion

to sever the charges." App. 268. He also found that Petitioner could not show how he was prejudiced because the trial judge cured any potential bias of the jury that consolidation of the charges may have caused when he instructed the jury to, "reach separate verdicts on each and every charge." App. 271.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

STATEMENT OF THE FACTS

In 2011, Petitioner lived with his mother, Ernestine Witherspoon, in Darlington County. App. 274; App. 31, ll. 13 – 25. From July 1, 2011 to September 24, 2011, Doris Brown, the grandmother of the twelve-year-old female complaining witness (hereinafter "Minor") and her younger sister, Jasmine M., took the girls to the home where Petitioner lived with his mother, to visit. App. 44, ll. 8 – 18. During one visit, he gave Minor a cell phone with the "odd" photos and draft messages on it. App. 159, ll. 19 – 24; App. 163. ll. 1 – 19.

On their way home in the car, Minor's sister said there was a picture of a naked man on the phone. It was later found that the photographs on the phone depicted people in their underwear, not naked people. App. 51, ll. 2 – 56, ll. 7. Ms. Brown took the phone back to Petitioner. App. 43, ll. 21 – 46, ll. 13. Petitioner argued that when he gave the phone to Minor, he was unaware of the draft text messages or photos on it. App. 163, l. 20 – 164, l. 21. Trial counsel argued at trial that Petitioner's conduct towards Minor and her sister was no illegal, but "odd" and that the state was trying to criminalize Petitioner's odd behavior. App. 159, l. 19 – 160, l. 1.

Tyquan Brown was *an adult, male cousin* of Minor. App. 68, ll. 3 – 12. He visited Petitioner at his home and Petitioner gave Tyquan the cell phone in question. App. 68, l. 25 – 69, l. 14. In addition to the photographs of people in their underwear, Tyquan noticed some drafted text messages on the phone that had not been sent. App. 70, l 5 – 72, l. 15. Those messages purportedly consisted of Petitioner attempting to communicate with Minor. Id. Again, the state attempted to criminalize Petitioner's "odd" behavior. App. 159, l. 19 – 160, l. 1.

Tyquan called Minor's mother, told her what he found, and gave her the phone. App. 72, l. 12 – 73, l. 23. Petitioner argued at trial that the fact that he gave the cell phone still containing the

draft text messages to Tyquan supported Petitioner's defense that he did not give the phone to Minor as a means of communicating those draft messages to her. App. 163, l. 20 – 164, l. 21.

Georgita Brown, Minor's mother, saw the pictures and the draft messages on the phone. App. 80, l. 5 – 81, l. 12. She called the police, met Deputy Eric Hodges, and gave him the cell phone. App. 81, l. 16 – 83, l. 9.

Petitioner was arrested by Deputy Hodges for driving under a suspended license. App. 89, ll. 2 – 9. Hodges then told Petitioner, after advising him of his Miranda, 384 U.S. 436 (1966) rights, that he was working investigating the allegations by Minor. Id. Deputy Hodges obtained a search warrant for Petitioner's residence and his car. App. 90, ll. 17 – 21. Hodges found "pictures that were off the computer and off. . . some other phones." App. 90, ll. 22 – 24.

Deputy Russ Harrell searched Petitioner's computers, cell phones, and email accounts as well. App. 107, ll. 19 – 22. More photographs were found, one of which, on a Yahoo! email account, depicted an unrelated minor engaged in a sex act. Id. Petitioner was arrested and charged with criminal solicitation of a minor, sexual exploitation of a minor in the second degree, contributing to the delinquency of a minor, and disseminating harmful material to minors. App. 6, l. 16 – 7, l. 5.

A large number of legal photographs were found on Petitioner's computer. App. 90, ll. 22 – 24. Minor and her sister testified that Petitioner took photographs of them; however, *none* of the photos of Minor or her sister depicted any illegal activity. App. 52, ll. 17 – 25; App. 159, ll. 19 – 23; App. 163. ll. 1 – 19. The only photo that constituted illegal conduct was the anal sex photograph of the unrelated minor found on a Yahoo! email account. App. 107, ll. 19 – 22. That photo had no connection to Minor and there was no evidence presented that Petitioner was the one who took the photo of the unrelated minor.

The solicitation of a minor, disseminating harmful material, and contributing to delinquency charges against Petitioner arose from Petitioner's "odd" behavior towards Minor and her sister. App. 261, ll. 5 – 8. The sexual exploitation of a minor in the second-degree charge arose from a photograph of an unrelated minor found on a Yahoo! email account associated with Petitioner. Id.

Prior to trial, defense counsel moved to exclude the photograph of the unrelated minor from the forty-one photos allegedly seized from Petitioner's email account. App. 21, l. 7 – 22, l. 10. He argued that that photograph was "significantly different" from the others. Id.

The state responded that that photograph "showed sex" but the "young lady's face was not visible." The solicitor said: "I took that off and inserted the one from the Yahoo account which was visible." However, he reduced all of the photos to thumbnail size on a disk. App. 22, l. 11 – 23, l. 24.

Although that photograph was not evidence in the state's case against Petitioner regarding Minor, it was evidence of Petitioner's sexual exploitation charge. As a result of trial counsel's failure to move to sever Petitioner's cases, that photograph was admitted into evidence, and was used to color his "odd" conduct towards Minor and her sister as illegal conduct. App. 32, ll. 2 – 14.

Minor testified at Petitioner's trial that she and her sister went with their grandmother to visit the mother of Petitioner at her home where he lived. App. 52, ll. 3 – 16. Minor spoke to Petitioner's "odd" yet legal activity when she testified that Petitioner took photographs of her and her sister with his cell phone. App. 52, ll. 17 – 25. Minor identified the cell phone Petitioner gave her and said when they got in the car with their grandmother, they noticed pictures on the phone. App. 53, l. 23 – 55, l. 13. One photograph was a girl in a bikini and the other one was of Petitioner with blue underwear. App. 51, ll. 2 – 56, ll. 7. Minor did not read or see any of the text messages.

App. 59, ll. 1 – 60, ll. 8. There was no evidence presented at trial that Petitioner ever told Minor or her sister that there were draft messages stored on the phone for them to read.

Deputy Russ Harrell seized Petitioner's computer, hard drive, and several cell phones. App. 98, ll. 18 – 99, ll. 25. In his testimony at trial, Harrell went over the unsent drafted text messages concerning the minor that were drafted on one of the cell phones but not sent. App. 101, ll. 11 – 104, ll. 16.

Harrell then discussed photographs taken from Petitioner's desktop computer. Most of the images were of young girls under ten years of age in "unnatural positions." App. 107, ll. 16 – 18. One particularly harmful photo showed a young girl in a kneeling position and anal sex was being performed on her. App. 107, ll. 19 – 22.

The state's case was oriented toward convincing the jury that Petitioner was the type of person who would commit the alleged crimes. The state started in its opening statement by mentioning how Petitioner was indicted on "all sorts of charges," but accidently admitted that the photograph of the unrelated minor concerned, "*a whole 'nother set of charges*." App. 31, l. 4 – 34, l. 16. (emphasis added) The state then implored the jury to "consider the facts as a whole," in other words to use evidence from once set of charges to convict Petitioner on the other set. App. 37, ll. 5 – 21. Moreover, the state even cautioned the jury that the defense would urge the jury "to isolate things." Id.

In its closing, the state attempted to convince the jury that Petitioner's "odd" behavior was evidence of criminal activity. The solicitor told the jury that the messages drafted but never sent on the phone belied Petitioner's intent to sexually assault Minor because, according to the state, Petitioner was the *type* of person to do that. App. 149, l. 17 – 150, l. 17. The state argued that Petitioner was unlike "the average person in Darlington County." App. 151, ll. 7 – 14. The solicitor

even castigated Petitioner as an immoral *type* of person and that the, "common sense people from Darlington County," must convict Petitioner because of his "odd" conduct. App. 152, l. 12 – 153, l. 10.

Trial counsel was forced to try to mitigate the impact of the Yahoo! email account photograph of the unrelated minor engaged in anal sex during his closing statement. App. 165, l. 14 – 168, l. 1. Trial counsel's argument at closing was that Petitioner did not seek out the photographs sent to his email account because they were "SPAM" sent to him without his permission. Id.

While the judge later instructed the jury to convict of each conviction separately, the state's opening directly undermined that instruction and rendered it ineffectual for purposes of curing the prejudice to Petitioner of trial counsel's failure to move to sever his cases. App. 178, ll. 7 – 10; App. 271.

The jury returned verdicts of guilty as indicted. App. 186, l 17 – 187, l. 21. Judge Burch sentenced Petitioner to eight years' imprisonment for disseminating harmful material to a minor; sexual exploitation of a minor in the second degree; and criminal solicitation of a minor; and he sentenced Petitioner to three years' imprisonment for contributing to the delinquency of a minor. App. 194, ll. 3 – 13. All the sentences ran concurrent. Id.

At his PCR hearing, Petitioner alleged trial counsel provided ineffective assistance of counsel because he failed to make a motion to sever the sexual exploitation of a minor charge from his remaining charges. App. 231, ll. 21 – 239, ll. 20.

During the PCR hearing, trial counsel described the impact of the Yahoo! email photo as, "an awful picture." App. 253, ll. 12 – 14. During cross-examination, trial counsel admitted "perhaps" there was a reason to make a motion to sever and that, "perhaps one [charge] would lead the jury to believe the other [charges]." App. 259, ll. 14 – 21.

Trial counsel explained how the two sets of charges arose out of different facts, "[I]n my mind the exploitation [charge] dealt with the picture of the young lady involved in a sexual act. The disseminating [harmful material to a minor], the solicitation of a minor and contributing [to the delinquency of a minor] all dealt with [Minor]." App. 260, l. 18 – 261, l. 11.

On November 4, 2016, the PCR judge filed an order denying Petitioner relief. App. 264 – 272. He found that Petitioner failed to meet his burden of proving that trial counsel was ineffective because there was "no reasonable basis to make a motion to sever the charges." App. 268. He also found that Petitioner could not show how he was prejudiced because the trial judge cured any potential bias of the jury that consolidation of the charges may have caused when he instructed the jury to, "reach separate verdicts on each and every charge." App. 271.

ARGUMENT

Trial counsel was ineffective in failing to move to sever the trial of Petitioner's charge for second-degree sexual exploitation of a minor from the trial of his remaining charges.

Discussion

"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). Petitioner's sexual exploitation of a minor charge and his remaining charges were not "connected transactions closely related" in any manner. App. 260, l. 18 – 261, l. 11. Therefore, trial counsel's failure to move to sever Petitioner's cases prejudiced him because it allowed the state to present evidence from two unrelated sets of charges and biased the jury into convicting Petitioner by using evidence from one set of charges to convict him on the other set. App. 259, ll. 14 – 21.

When ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117 – 118, 386 S.E.2d at 625.

In State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986), Middleton was indicted separately for two counts of murder and criminal sexual conduct, and one count of attempted armed robbery, aggravated assault, and aggravated assault and battery. Id. The state argued for consolidation because the crimes were all part of a single crime spree and that the same knife was used for both sets of charges. Id. at 23, 399 S.E.2d at 693.

Our Supreme Court held that Middleton's charges failed to meet the requirements for consolidation because, "*the crimes did not arise out of a single chain of circumstances, and required different evidence for proof.*" Id. (emphasis added); see also State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (1985) (finding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial).[1]

In State v. McGaha, 404 S.C. 289, 744 S.E.2d 602 (Ct. App. 2013) this Court found that the trial court properly consolidated McGaha's trials. In that case this Court applied the test from State v. Harris, 351 S.C. 642, 652, 572 S.E.2d 267, 272 (2002) that stated a trial court may try consolidate trials together, "where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, **and** (4) no [substantive] right of the defendant has been prejudiced." Id.; McGaha, at 293-294, 744 S.E.2d at 604. (emphasis added) This test is conjunctive in nature and all elements must be present to consolidate separate trials.

McGaha was alleged to have committed criminal sexual conduct, in the first degree, and a lewd act upon a child, on two minor sisters. McGaha, at 291, 744 S.E.2d at 603. The Court found that the trial court properly held that McGaha's abuse of both minors stemmed from a

[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).

single chain of circumstances. Id. at 295, 744 S.E.2d at 605. The charges arose from a single chain of circumstances because,

> McGaha gained access to the children because the grandmother allowed him to live in their play room. McGaha used this access on multiple occasions to take each child from her bed to the play room, where he molested [them]. Dana was eight and Elaina was seven when the abuse ended. The time periods of the abuse overlapped almost precisely—McGaha abused Dana between March 2009 and August 2010 and Elaina between May 2009 and August 2010. Their similar ages and the similar duration of the abuse supports the trial court's emphasis on its finding that they "had the same relationship to" McGaha. *The molestation of each child during the same time period and in the same location, accomplished through the same access to them, established a sufficiently connected chain of circumstances to satisfy this element.*

State v. McGaha, 404 S.C. 289, 295, 744 S.E.2d 602, 605. (emphasis added)

In McGaha, this Court also found that the charges regarding both minors were proved by the same evidence. Id. The lower court held, "a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other." Id. at 297, 744 S.E.2d at 606.

To determine prejudice against McGaha created by consolidating his trials, the test was, "whether evidence of one or more charges would be admissible in a trial involving only the other charge." Id. at 298, 744 S.E.2d at 606. In McGaha, the state argued that evidence of McGaha's molestation of either child would be admissible in both cases under Rule 404(b), SCRE, as proof of a common plan or scheme. For the evidence to be admissible in separate trials for the purpose of showing a common scheme or plan, the state would have to establish a logical connection between the crimes by showing a "close degree of similarity." Id. at 298, 744 S.E.2d at 607.

Petitioner's case is unlike McGaha on each of the aforementioned points. Petitioner's two sets of charges were not "from a single chain of circumstances." App. 260, l. 18 – 261, l. 11. The

photograph discovered on the Yahoo! email account that depicted a minor engaged in a sex act was in no way related to the charges against Petitioner regarding Minor. App. 261, ll. 5 – 8.

Petitioner gained access to Minor and the Yahoo! email account photograph via different means. Family members brought the minor to where Petitioner resided, and the photograph was ostensibly sent to Petitioner from another email account. App. 44, ll. 6 – 18; App. 165, ll. 14 – 25. Moreover, unlike in McGaha, there is nothing in the record to show that the time periods of the two sets of charges overlapped.

Petitioner's charges are not of a similar nature such that they should not be tried together. See Wilkerson v. State, 728 N.E.2d 239 (Ind. App. 2000). The elements of the two sets of charges in Petitioner's case were different. See: S.C. Code Ann. §§ 16-15-0385(A)(B); 16-15-0342; 16-17-0490. See also: S.C. Code Ann. § 16-15-0405(A).

The first set of charges involved: disseminating harmful materials to minors, solicitation of a minor, and contributing to the delinquency of a minor. Disseminating harmful materials to minors requires a person, of any age, to knowingly present or allow a minor to view harmful material. Id. Solicitation of a minor requires a person eighteen years or older to knowingly communicate or attempt to communicate to a minor *with the intent of persuading the minor to perform a sexual activity.* Id. (emphasis added) Contributing to the delinquency of a minor requires only that a person over eighteen years old encourage a minor to engage in a list of enumerated activities, none of which regard sexual activity. Id.

The second set regarded the sexual exploitation of a minor charge. Sexual exploitation of a minor requires a person of any age to knowingly possesses, distributes, records, etc. material that contains a visual representation of a minor engaged in sexual activity. Id.

In addition to the elements of the charges being different, the evidence by which the state proved either set of charges in this case was different such that there was no proper exception by which the state could have admitted evidence from either set of charges as evidence for the other set if the trials were properly severed. App. 260, l. 18 – 261, l. 11. In State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), the South Carolina Supreme Court held that, "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." Id. at 406, 118 S.E. at 807. The Lyle Court stated that the five exceptions to the aforementioned rule were: motive; intent; absence of mistake or accident; a common scheme or plan so related that proof of one tends to establish the others; and identity of the person charged. Id. As will be discussed below, none of those exceptions applied in Petitioner's case.

Moreover, unlike in McGaha, Petitioner did not have a similar relationship with the complainants from both sets of charges. McGaha, at 295, 744 S.E.2d at 605; App. 260, l. 18 – 261, l. 11. Petitioner and Minor share a familial, albeit through adoption, relationship; whereas, there is no evidence Petitioner had any relation to, or had ever met, the unrelated minor in the Yahoo! email account photograph.

Petitioner's substantive rights were violated because trying the cases together created the risk that the jury would wrongfully convict Petitioner of one set of charges based on evidence presented for the other set of charges. That prejudice could have been avoided if trial counsel moved to sever Petitioner's trial because evidence from the either set of charges would not be admissible if the trials been handled individually. McGaha, at 298 – 299, 744 S.E.2d at 606 – 607.

While the decision in State v. Cross, __ S.C. __, 832 S.E.2d 281, 2019 WL 3311055 (2019), concerned bifurcation rather than severance of charges, our Supreme Court's analysis is instructive. The Court held that the trial court erred when it denied Cross' motion to bifurcate his trial for criminal sexual conduct with a minor and committing a lewd act on a minor. Id. at 1. Cross had a prior conviction from 1992 of criminal sexual conduct in the first degree. Id. at 2. Under S.C. Code Ann. 23-3-430(C) a person is guilty of criminal sexual conduct in the first degree if they engage in sexual battery with an individual less than sixteen years of age and the person has previously been convicted for "qualifying sex-related offenses." Id. Due to Cross' prior 1992 conviction, the state indicted Cross for criminal sexual conduct in the first degree. Id.

In a pretrial hearing, Cross moved for his trial to be bifurcated because he would be unfairly prejudiced if his 1992 conviction and his sex offender registry status were introduced to prove the prior conviction element of the criminal sexual conduct in the first degree charge under S.C. Code Ann. 23-3-430(C). Id. Cross requested that the lewd act charge and the sexual battery element of criminal sexual conduct in the first degree be presented to the jury first, and if the jury concluded Cross was guilty of the "sexual battery," then evidence of the prior 1992 conviction could be presented to the jury during the next stage of the trial. Id. Cross argued that the jury would be biased into believing Petitioner had a "predilection" to these types of offenses. Id.

The trial court ruled that Cross' 1992 conviction was more probative than prejudicial and that any prejudice can be addressed by "simply explaining to the jury that they're to draw no inference [from the prior conviction]." Id. Evidence of Cross' 1992 conviction was admitted to trial and he was convicted of both criminal sexual conduct in the first degree and committing a lewd act with a minor. Id. at 3.

Our Supreme Court held that the probative value of the prior 1992 conviction when the it was introduced was substantially outweighed by the danger of unfair prejudice, "that prejudice would have been totally eliminated had the trial been bifurcated." Id. at 8. Thus, the danger of the jury convicting Cross because of his prior conviction was so high, the trial court should have prohibited the jury from hearing about the prior conviction until after they came to a verdict on the present charges. Id.

The same prejudice that failing to move to bifurcate caused in Cross existed here when trial counsel failed to move to sever Petitioner's charges. The admission of Cross' prior convictions biased the jury into convicting him on his present charges. Id. Petitioner's sexual exploitation of a minor charge, which derived from an individual photograph of an unrelated minor, being tried alongside his other charges risked the jury convicting Petitioner of either set of charges with evidence from the other set. App. 186, l. 17 – 187, l. 21.

When confronted with a similar issue in State v. Rocha, 266 Neb. 256 (2013) the Supreme Court of Nebraska held that Rocha's trial counsel provided ineffective assistance of counsel when he failed to move to sever Rocha's sexual assault of a child charge from his other child abuse charges. Id. at 270. In Rocha, the complaining witnesses, J.S., J.C., A.R., and A.S., were his step children. Id. at 258 – 259. Rocha was alleged to have sexually assaulted J.S. a minor daughter, and to have committed child abuse on all four of the children. Id.

The Court explained the differences between the sexual assault charges versus the child abuse charges such that trial counsel should have moved to have the two sets of charges severed. Id. at 267 – 269. First, sexual assault charges and child abuse charges were not of a similar character because sexual assault, on its face, is sexual in nature whereas child abuse is not. Id. Second, the Court determined that because the sexual assault charge pertained to only one of the

children, the evidence to prove one set would not prove the other such that the two sets of charges were not "of the same or similar character." Id. Moreover, the Court held that the alleged sexual assault was not based on the same act or transaction as the child abuse charges, despite the alleged overlap in time and place.[2] Id.

The Court also found important that the evidence of child abuse did not require the presentation of the evidence of the sexual assaults, and vice versa. Id. Therefore, the charges were not part of the same act or transaction, nor were they of a similar nature such that they should not have been tried together. Id. Accordingly, Rocha was prejudiced by his trial counsel's failure to move for a severance. Id.

Similarly, in the present case there was no evidence presented that the two sets of charges were a part of the same transaction or act. Moreover, it was not necessary to introduce evidence from one set of charges to prove the other set. App. 260, l. 18 – 261, l. 11. The only commonality between the two sets of charges was that the search warrant issued to investigate the allegations by Minor against Petitioner uncovered the photograph of the unrelated minor engaged in a sex act. App. 34, ll. 6 – 16. Therefore, although both sets of charges regard sex, they were not of a similar nature such that they should not have been tried together.

In Wilkerson v. State, 728 N.E.2d 239 (Ind. App. 2000), the Indiana Court of Appeals held that Wilkerson was prejudiced by trial counsel's failure to move to sever his charges. Wilkerson, at 249. Wilkerson alleged that his trial counsel should have moved to sever the charges relating to the attack on minor T.S. and the charges relating to the attack on minor A.W. Id. at 245 - 246. The Court in Wilkerson recognized the inherent similarities between the two

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[2] The sexual assault charges and the child abuse charges stemmed from activity in the family home and they both allegedly took place over the same time. Id. at 267 – 268. However, when J.S. was assaulted, the other children were not present. Id. Moreover, there was no evidence presented that any of the other children had been sexually assaulted. Id.

charges. Both charges were sexual attacks on minors that occurred in Anderson, Indiana. Id. at 247. However, the Court held that the connection between the two crimes was limited because, "they occurred three weeks apart, at different times of day, at different locations, to different victims." Id. Furthermore, the Court explained that *mere repetition of similar crimes does not by itself warrant joinder.* Id. (emphasis added) Therefore, two crimes having a sexual component does not mean they are similar enough in nature to warrant consolidation of their cases. Id.

In State v. Sutherby, 165 Wash.2d 860 (2009) the Washington State Supreme Court, sitting en banc, held that Sutherby's trial counsel provided ineffective assistance of counsel when he failed to move to sever Sutherby's charges for possession of child pornography from charges for child rape and molestation. Id. at 887 – 888. Similar to the present case, as will be discussed below, there was no legitimate strategic or tactical reason for Sutherby's counsel's failure to move for a severance. Id. at 884. The Court held that because of the state's announced intent to use the pornography charges to show that Sutherby had a predisposition to molest children, counsel's failure constituted deficient performance. Id.

The Court explicated a four-part test to determine whether the failure to move to sever charges prejudiced a defendant as: "the strength of the State's evidence on each count; the clarity of the defenses as to each count; the court's instruction to the jury to consider each count separately; and the admissibility of evidence of the other charges even if not joined for trial." Id. at 884 – 885. (internal citations omitted)

When the Court applied that test in Sutherby, it determined that while the evidence on the child pornography was strong the evidence proving child rape and molestation was weaker. Id. at 885. The evidence for the child rape and molestation was the testimony of the minor and the medical evidence that "was consistent with abuse," but with medical professionals testifying that

the medical evidence "did not alone support the conclusion that sexual abuse occurred." Id. Therefore, the first prong weighed in favor of prejudice to Petitioner because the strength of the state's evidence did not provide undeniable proof of guilt on both charges.

The Court then held that Sutherby's defenses to the child rape and molestation charges were different from those for the possession of child pornography charges. Id. For the child pornography charges Sutherby stated he mistakenly downloaded it while trying to download adult pornography. Id. For the child rape and molestation charges Sutherby argued that he never sexually assaulted the minor and that she may have been confused because of an earlier incident the minor had with her "six-year-old uncle." Id. Therefore, for the second prong of the aforementioned test, Sutherby was prejudiced because there was distinctive "clarity" between his defenses to each set of charges such that he would not have put forth the same defenses at two separate trials, had they been properly severed.

For the third prong, while the trial court instructed the jury to decide each count separately, its instruction was insufficient because it did not give a limiting instruction directing the jury that "the evidence of one crime could not be used to decide the guilty for a separate crime." Id. at 885 – 886. In addition, the state, "consistently argued that the presence of the child pornography on Sutherby's computers" showed his motive to sexually assault the complaining minor witness. Id. Therefore, the court's instruction was inadequate to cure prejudice to Sutherby. Id.

Lastly, the Court held that had the possession of child pornography charge been severed it was "highly likely that evidence of Sutherby's possession of child pornography would have been excluded in a separate trial for child rape and molestation." Id. at 886. The Court

determined that the child pornography evidence, "would merely show Sutherby's predisposition toward molesting children and is subject to exclusion [under the rules of evidence]." Id.

Therefore, Sutherby was prejudiced by the failure to move to sever because, "[a] defendant must be tried for the offenses charged, and e*vidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity.* Id. at 887 (citing State v. Goebel, 36 Wash.2d 367, 368–69 (1950)). (emphasis added) (see also: Lyle, supra).

In this case there was no evidence that trial counsel's failure to move to sever was a reasonable trial tactic or strategy. App. 259, ll. 14 – 21; Sutherby, at 885. Moreover, the rest of his charges stem from the photographs and draft text messages stored on a cell phone. App. 260, l. 18 – 261, l. 11. As in Sutherby, in the present case the evidence of Petitioner's sexual exploitation of a minor charge was "evidence of unrelated conduct" for his remaining charges because they could not be proved by the same evidence. App. 260, l. 18 – 261, l. 11; Sutherby, at 887. App. 106, l. 1 – 107, l. 23. Accordingly, the risk of the jury convicting Petitioner by using evidence from one set of charges to convict him on the other set of charges was high. Therefore, had trial counsel moved to sever Petitioner's charges it would likely have been granted.

The trial court's instruction in Sutherby was insufficient to cure the prejudice of trial counsel's failure to sever. Sutherby, at 885 – 886. Here the trial court gave a similar jury instruction. to convict Petitioner of each charge separately. App. 178, ll. 7 – 10; App. 271. As in Sutherby the instruction in the present case was likewise in sufficient to cure the prejudice from trial counsel's failure to sever Petitioner's cases.

The trial court here, as in Sutherby, did not instruct the jury instruct the jury that "the evidence of one crime could not be used to decide guilt for a separate crime." Sutherby, at 885 –

886. The state's case here similarly relied on convincing the jury that Petitioner was the "type" of person to commit the crimes alleged.

Petitioner showed Strickland prejudice from trial counsel's failure to move to sever. The test used in McGaha and Sutherby to determine if the defendant was prejudiced by the consolidation of his trial was that: if evidence from one or more of the charges would be admissible in a trial involving only one of the charges, then there is no prejudice. McGaha, at 298, 744 S.E.2d at 606; Sutherby, at 886. Conversely, if the evidence would not be admissible in a trial involving only one of the charges, then Petitioner was prejudiced.

In McGaha, the lower court found, and the Court of Appeals affirmed, that if McGaha's trials were severed the evidence from one of McGaha's trials could have been used in the other because the evidence would be admissible under Rule 404(b), SCRE, as proof of a common scheme or plan. Id. at 298, 744 S.E.2d at 607.

Here, as in Sutherby and Rocha, none of the exceptions in Rule 404(b), SCRE, apply. Introduction of the evidence from either set of Petitioner's charges would not go to show a motive for committing the other charge, nor would it show a common scheme or plan. The evidence did not demonstrate, and the state never argued, that the photograph of the unrelated minor showed a motive for Petitioner to commit the acts alleged by Minor. Likewise, the evidence in the state's case regarding Minor did not show a motive for Petitioner's sexual exploitation charge. Additionally, Minor and her sister never alleged that Petitioner ever took photographs of them that would meet the elements of sexual exploitation such that there was no common scheme or plan between the two sets of charges.

Had trial counsel properly moved to sever Petitioner's trials, the remaining exceptions under Rule 404(b), SCRE, and under Lyle, supra, would not allow for admission of the evidence

from the other set of charges either. Admission would not prove the identity of anyone involved in either of Petitioner's cases because there was no question as to anyone's identity. Minor testified at trial, and the identity of the unrelated minor in the photograph is irrelevant to the state's case.

Admission would also not show absence of mistake or accident because Petitioner's defense was not that he made a mistake or had an accident. Lastly, admission would not show Petitioner's intent to commit the charges Minor alleged against him. Therefore, Petitioner was prejudiced by the failure to move to sever because the evidence from either charge would not be admissible if Petitioner's trials were held separately. Sutherby, at 886 – 887; Lyle, at 406, 118 S.E. 807.

As trial counsel explained in his closing argument, the evidence against Petitioner on the three charges regarding Minor showed, "odd" or "creepy" behavior, but nothing criminal. App. 159, ll. 19 – 24. The South Carolina Supreme Court held in State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) that, "[a] necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is." Nelson, at 15, 501 S.E.2d at 723 (quoting State v. Melcher, 140 N.H. 823, 831, 678 A.2d 146, 151 (1996)) (see also Cross, at 8.).

As in Nelson, the state here tried to use Petitioner's "odd" character as evidence of criminal wrong doing. Nelson, at 6 – 7, 501 S.E. 2d at 719. In Nelson, the lower court allowed the admission of an assortment of photo albums, stuffed animals, photos of young girls (that did not depict illegal activity), and video tapes of children's television programs from Nelson's bedroom into evidence. Nelson, at 4 – 5, 501 S.E. 2d at 717 – 718. The Court held that the evidence was "clearly inadmissible," as its only relevance was to show Nelson had the character of a pedophile. Nelson, at 6 – 7, 501 S.E. 2d at 719. The Court stated, "such evidence could only

invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted." Nelson, at 7, 501 S.E.2d at 719.

In the present case, Petitioner took numerous photographs of Minor, none of which were criminal in nature, and drafted, but never sent, text messages on his phone in which Petitioner professed affection for the minor. App. 52, ll. 17 – 25; App. 102, l. 6 – 103, l. 13. That conduct may have been "odd" or "creepy" but was not criminal. Nelson, supra. However, the introduction of the Yahoo! email photograph, that depicted an unrelated minor engaged in anal sex, colored that "odd" behavior as that of a sexual predator. App. 117, ll. 3 – 16. The state used the introduction of that photograph to obtain convictions on the charges regarding the "odd" or "creepy" behavior from Petitioner toward Minor.

Petitioner's "substantive rights" were prejudiced by trial counsel's failure to sever his trials because the Yahoo! email photograph presented for the sexual exploitation of a minor charge was the only evidence that depicted illegal activity. McGaha, at 298, 744 S.E.2d at 606 – 607; App. 117, ll. 3 – 16. That photograph influenced the jury into believing Petitioner had a character that had a propensity for child sex abuse; and thus, impermissibly convinced the jury that Petitioner's "odd" or "creepy" conduct towards Minor and her sister constituted criminal conduct. State v. Nelson, 331 S.C. at 15, 501 S.E.2d at 723.

Throughout the trial the particularly harmful photograph was referenced by both the state and the defense. In its opening statement the state referred to child pornography found on Petitioner's computer. App. 34, ll. 12 – 16. Defense counsel stated that the photographs, "have nothing whatsoever to do with [Minor]." App. 41, ll. 16 – 20. Trial counsel referred to the photo of the unrelated minor as, "one bad photo picture… one really bad picture," amongst the plethora of

innocuous photographs that were admitted in Petitioner's trial. App. 165, ll. 14 – 22. Trial counsel also tried to explain away the Yahoo! email account photograph by reminding the jury that the photograph was not found on Petitioner's computer, but that it was, "out there in outer space," because it was on an email. App. 165, ll. 22 – 25.

During the post-conviction relief hearing, trial counsel reiterated the harmful nature of the photograph in Petitioner's trial as, "[t]here was only one bad picture." App. 253, ll. 5 – 6. When pressed to be specific defense counsel opined that he was referring to the photograph of the unrelated minor engaged in a sex act and, "that was an awful picture." App. 253, ll. 12 – 14.

On direct examination during the post-conviction relief hearing trial counsel explained that he did move to not sever Petitioner's trial because "the exploitation, the pictures, except for one, we felt we could minimize." App. 254, ll. 11 – 13. He did not explain why he thought he could minimize the impact of the photograph or why he thought that was a reasonable tactic.

However, on cross-examination trial counsel reluctantly admitted, "perhaps" there would have been a reason to make a motion to sever. App. 259, l. 17 – 260, l. 1. Trial counsel testified that, as Petitioner argued, "perhaps [evidence from one set of charges] would lead the jury to believe the other." Id. Moreover, the post-conviction relief judge directly asked trial counsel how he could have separated the cases and trial counsel responded that there was a distinction between the two sets of charges, but in his mind, not a significant enough distinction to warrant separating Petitioner's trials. App. 260, l. 18 – 261, l. 11.

The state's theory for the set of charges related to Minor was that, although Petitioner did not send the text messages or photographs located on the cell phone, he gave the cell phone to Minor as an attempt to hand deliver the messages and photographs to her. App. 149, ll. 6 – 12. This theory was undermined by the fact that Petitioner gave that same exact phone to the minor's

twenty-one-year-old, male, cousin Tyquan Brown. App. 68, l. 25 – 69, l. 14. Petitioner giving the phone to Tyquan with the draft messages still on it buttressed Petitioner's argument that he was not intending to communicate the draft messages to Minor when he gave her the phone earlier and that he did not know the messages were on the phone. Therefore, the state's evidence regarding Minor's allegations was not strong. Sutherby, at 885.

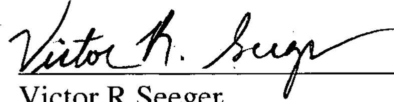
Without the Yahoo! email account photograph, the evidence against Petitioner amounted to innocuous photographs of Minor and her sister, as well as some draft text messages on Petitioner's cell phone where he expressed affection for Minor, but that were never sent, and that he likely never intended to send. Therefore, had trial counsel made a motion to sever in Petitioner's case, thereby keeping the evidence from both sets of charges separate, it was likely that the jury would believe that Petitioner was trying to simply give this cell phone away without regard to its contents nor the with intent to deliver its contents to anyone. However, once the photograph of the unrelated minor engaged in anal sex was shown to the jury, it was unreasonable for trial counsel to think that the jury would look at Petitioner's "odd" or "creepy" conduct toward the minor as anything other than an attempt to communicate to her harmful material and to solicit her into committing sex acts with him. App. 159, ll. 20 – 23. See also Nelson, supra.

Accordingly, trial counsel provided ineffective assistance when he failed to move to sever Petitioner's sexual exploitation of a minor in the second-degree charge from his remaining charges because they *do not* arise out a of a single chain of circumstances and *are not* provable by the same evidence. 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"). The two sets of charges were in no way related and the neither was the evidence to prove them. See

State v. Smith, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). Trial counsel's ineffective assistance of counsel prejudiced Petitioner because the failure to move to sever allowed Petitioner's two unrelated cases to be tried together, which biased the jury into convicting Petitioner of either set of charges while using "evidence of unrelated conduct," from the other set. Sutherby, at 887; 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").

CONCLUSION

By reason of the foregoing arguments, Petitioner's convictions should be reversed and his case remanded to the Darlington County Court of General Sessions for a new trial with the charges severed.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of October, 2019.