STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Apr 08 2020

S.C. SUPREME COURT

Appeal From Richland County
Hon. R. Knox McMahon, Circuit Court Judge
Appellate Case Tracking No. 2016-001975

The State, Respondent,

v.

Michael Scott Simmons, Appellant.

PETITION FOR REHEARING

On March 25, 2020, a majority of this Court reversed and remanded Appellant's convictions for six counts of sexual exploitation of a minor in the second degree. While the majority of the Court correctly found section 16-15-405 constitutional and upheld the validity of the State's search warrant, the majority also found evidence was improperly admitted because the trial court erred in finding defense counsel opened the door to its admission. However, the majority of the Court has overlooked the facts of this case, the admissibility of the evidence regardless of whether the door was opened, and the very logical, well-reasoned opinion of Chief Justice Beatty's dissent. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing; find the videos of child pornography and evidence identifying Appellant as the user of the external hard drive were properly admitted when counsel opened the door; find that even if defense counsel did not open the door, the evidence was otherwise

admissible, relevant, and highly probative to establish identity, which was a major issue raised by the defense; and affirm Appellant's six convictions and sentences.

ARGUMENT

This Court overlooked its standard of review in determining that the trial court abused its discretion in finding defense counsel opened the door and admitted evidence from the external hard drive. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008).

As the dissent notes, the State never addressed the external hard drive during its examination of VanHouten. However, the defense made a point of addressing all of the various items sent to VanHouten for examination, whether a full examination or a preview. As Chief Justice Beatty correctly noted: "Defense counsel's questions suggested to the jury that VanHouten's forensic examination failed to reveal any relevant evidence, when in reality, VanHouten did find evidence of child pornography on the external hard drive attached to the desktop found in Simmons's room." As the dissent properly concluded, consistent with this Court's case law which the majority overlooked: "The trial court was correct in allowing the State to clarify this false impression on redirect examination. . . . because there is evidence in the record to support the trial court's decision, I would hold the court did not abuse its discretion in finding defense counsel opened the door to VanHouten's testimony regarding the external hard

drive." The majority should adopt Chief Justice Beatty's opinion and find based on the applicable standard of review, the trial court did not abuse his discretion.

Even if the majority does not agree with Chief Justice Beatty and does not conclude based on the standard of review that evidence existed which supports the trial court's decision, this Court should find the evidence was otherwise admissible and not improperly admitted. The majority overlooked the fact the evidence became relevant and significantly probative to dispute Appellant's claim that the State failed to prove identity as the person who was distributing child pornography. At the beginning of trial, Appellant maintained the evidence of the eight child pornography videos and other evidence from the external hard drive was inadmissible under Rules 403 and 404, SCRE, because it was not relevant to the six underlying charges and because it was unduly prejudicial. However, by the time the State sought to admit the evidence it was highly relevant and probative because the desktop where it was alleged Appellant distributed child pornography was not the only location where it was found and eight videos of child pornography were in Appellant's possession on an external hard drive connected to the desktop and containing items specifically associated with Appellant and no one else.

Generally, evidence of prior bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Specifically, evidence of a subsequent or other bad act can be probative evidence to establish the identity of the perpetrator, especially when identity is at issue during trial. See e.g., State v. Stokes, 381 S.C. 390, 405, 673 S.E.2d 434, 441 (2009)

(finding other bad act evidence, which connected the defendant to a gun used in a burglary, "highly probative on the issue of the identity" when an identification could not be made by victims).

Appellant, beginning in opening statements, contested whether the State could prove the identity of the individual:

> [T]he state's going to tell you they looked at all the items. You'll see what the proof will show is they didn't, and that's concerning. There's no password protected. There's no Internet chats. **There's nothing, nothing to connect Michael Simmons to these six videos,** nothing that can reach beyond a reasonable doubt. **Nothing, nothing that can put him in front of a computer disseminating porn.**

(T.135-136; R.88-89) (emphasis added). As noted in the State's Final Brief of Respondent, as Appellant continued cross-examination of Detective Murphy, she repeatedly raised the issue of identity and questioned whether the State could prove who uploaded the videos. (R.156; 159-160). The same issue of identity continued to be raised, including asserting a third-party guilt argument regarding Kyle Dorion.

The State presented evidence contained on the external hard drive. The hard drive was found connected to Appellant's computer in Appellant's room and required password access. (R.53-54). The external hard drive contained eight videos of child pornography still in Appellant's possession. Most importantly, it also contained a photo of Appellant and a bill from Certified Recovery Service to Michael and Melanie Simmons, connecting him to the use of the external hard drive. (T.401-402; State's Exhibit 24; R.347-348). All of these files, including the child pornography had to be transferred to the external hard drive from the computer. The evidence was highly probative to identify Appellant as the person associated with child pornography because it is highly unlikely Dorion or anyone else would have downloaded child

pornography and then copied it onto Appellant's external hard drive where he had personal files such as photos and bills. This evidence, even if more prejudicial than probative at the beginning of trial, was significantly more probative and admissible under Rule 404(b) and Rule 403 as strong circumstantial evidence tying Appellant to the child pornography for which he was charged.

Because Appellant clearly placed the identity of the individual downloading and uploading the child pornography into issue, the external hard drive found in Appellant's room, connected to Appellant's computer, containing child pornography and other files directly tying it to Appellant became incredibly probative compared to how it was considered by the trial court prior to trial. The probative value to provide evidence to the jury tying Appellant to child pornography was extensive and was definitely not significantly outweighed by any prejudice caused by its introduction. As a result, the trial court did not err in admitted the external hard drive based on its extensive probative value and the fact it satisfied both Rule 403 and Rule 404. The majority should adopt Chief Justice Beatty's reasoning regarding whether defense counsel opened the door, but even if it chooses not to adopt the dissent, it should grant the Petition for Rehearing because it overlooked the fact that the evidence was probative, relevant, and properly admitted to provide the link between Appellant and the child pornography that Appellant's counsel continued to maintain was not present.

CONCLUSION

For all of the foregoing reasons, the State requests the Court grant the petition for rehearing; find defense counsel opened the door to the admission of the evidence; find even if counsel did not open the door, it was otherwise admissible under Rules 403 and 404(b) to establish Appellant's identity and connection to the child pornography after he placed identity squarely at issue; and affirm Appellant's convictions and sentences.

Respectfully submitted,

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Petition for Rehearing by electronic mail to the address listed in AIS and by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 8th day of April, 2020.

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