IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Appellate Case No. 2018-001745

The Honorable Letitia H. Verdin, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

William Lee Carpenter.....Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

Relevant Facts.....1

I. The trial court judge erred in allowing the State to introduce evidence of Carpenter's sexual preferences because they were irrelevant and unduly prejudicial and improperly interjected Carpenter's character as an issue in the case.....15

II. The trial court judge erred in allowing the State to introduce a picture on Carpenter's phone of Owens covered in feces since this photograph was irrelevant to the charges against him, and unduly prejudicial and improperly interjected Carpenter's character as an issue in this case 18

III. The trial court judge erred in allowing the State to introduce evidence of computer searches conducted on Carpenter's computer related to his sexual preferences when those searches were irrelevant to the charges against him, and unduly prejudicial, and interjected Carpenter's character as an issue in this case.....19

IV. The trial court judge violated the defendant's right to a public trial when she removed a family member from the courtroom while the child witness was testifying without making the required findings...20

CONCLUSION.....22

TABLE OF AUTHORITES

Federal Cases

People v. Bargarozy, 132 A.D. 2d 225, 522 N.Y.S. 848 (1987) 17

Presley v. Georgia, 558 U.S. 209 (2013)..... 21,22

Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1 (1986).....22

Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 478 U.S. 501 (1984) (Press-Enterprise I).....22

Waller v. Georgia, 467 U.S. 39 (1984).....21

State Cases

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 16

State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)..... 18

State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009) 18

State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923).....16

State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) 17

State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990) 16

State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983)..... 16

State v. Tizard, 897 S.W. 2d 732 (Tenn. Crim. App. 1994).....18

State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010).....16

Other Authorities

South Carolina Rules of Evidence, Rule 403 .....18, 19

South Carolina Rules of Evidence, Rule 404(b)..... 2, 4, 5, 16, 18, 19

STATEMENT OF THE CASE

William Lee Carpenter was indicted by the Greenville County grand jury for two counts of criminal sexual conduct first degree, two counts of exposing another to HIV, and two counts of criminal sexual conduct third degree. He was tried before the Honorable Letitia H. Verdin and a jury between September 10- 13, 2018. He was convicted and sentenced to 30 years for both counts of criminal sexual conduct in the first degree, 10 years for each count of exposing another to HIV, and 15 years for both counts of criminal sexual conduct in the third degree. The sentences were ordered to run concurrently. Carpenter was represented by Joshua Kendrick and Christopher Leonard. The State was represented by Christy Sustakovitch and Candace Clark.

This appeal timely follows.

Relevant Facts

William Lee Carpenter was convicted of the sexual abuse of two of the four grandchildren who were living with him, his girlfriend, and his son and daughter-in-law during a two-year period. ROA 96. Complicating the trial of this case is that Carpenter has unusual sexual preferences that, though legal, the State exploited in its attempt to prove Carpenter guilty of the crimes against his grandchildren, even though these sexual preferences were irrelevant and highly prejudicial. As Carpenter ultimately explained to the jury during his testimony, he is a "submissive" sexual partner who also is a coprophilic, or someone who receives sexual arousal from feces.

Evidence relating to this aspect of Carpenter's character was admitted into evidence, over objections, and constitutes the issues raised on this appeal.

Pre-Trial Motions and Pre-Trial Hearing

On August 18, 2016, defense counsel filed various motions to exclude irrelevant and highly prejudicial evidence sought to be admitted by the State. ROA 587-592. Relevant to the claims here, counsel filed a motion to exclude any and all references to any of Carpenter's sexual predilections that do not involve illegal activity. Counsel also filed a motion *in limine* related to any photographs pertaining to Carpenter's sexual preferences. A pre-trial hearing was held on September 6, 2018 regarding the admission of this evidence. Generally, defense counsel sought to keep out any references to Carpenter's interest in coprophilia, but the hearing focused on two sets of evidence—photographs, including one of Carpenter's girlfriend covered in excrement, and computer searches related to Carpenter's sexual fetishes.

The Photograph

In response to counsel's motion to exclude admission of the photograph, the State argued the admission of this evidence was necessary to prove intent under *South Caroline Rules of Evidence*, Rule 404(b), Supp ROA 16, 27, and to "educate" the jury. Supp ROA 23-24. As the solicitor explained, the State would be unable to win its case without the evidence. Supp ROA 21. The State also argued it wanted to introduce the picture to show the time this activity was occurring in the household to rebut an anticipated defense argument that Carpenter was often at work, or there

were too many people in the house for this kind of activity to have been occurring. Supp ROA 22. The State argued:

> Honestly, in all the years I've prosecuted, I've never come across one. I can find no case law related to coprophilia and how a court would deal with it. It's just not a regular sex act that you can draw the commonsense intent. And what I would say is: It is outside of the common knowledge of a jury that anybody would be sexually aroused by rubbing feces on a child's back. I just believe that.
>
> The basis of the CSC third charge is that that happened. And as we mentioned, the enema in the rectum. Your Honor, unlike those commonly understood sex acts, this type of physical contact where you're incorporating feces is outside the common knowledge that a Greenville County juror would have to understand that that act, in and of itself, would ever bring [gratification], which is one of the elements of CSC third. . .
>
> It almost sounds fantastical. If you have no knowledge of this, you know, until you have one look at a picture like that, it's hard to describe.

Supp ROA 16, l. 10- 18, l. 4.

The State made a conscious decision not to use an expert to explain this subject matter to a jury since "a picture is worth a thousand words . . ." Supp ROA 34, l. 3.[1]

The Computer Searches

The State also wanted to introduce Carpenter's computer searches into "urine" and "piss" into evidence to prove intent. The State argued:

> So the state is not offering to prove that he [is] some kind of deviant person, or character evidence at all, Your Honor. The issue here is that the intent behind this defendant's actions, when he put feces on their back, is not apparent. It's not like those cases where you—you know—excuse the words, I guess, garden-variety vaginal sex or anal sex or oral sex. The intent behind that is apparent, so the state doesn't have

[1] This photograph is so inflammatory, in fact, that the trial court sealed it at some point, and undersigned counsel had to request this Court, on June 20, 2019, order the Greenville County Clerk of Court's Office to allow counsel to access it.

> to really prove that. And that's what the cases are saying. They're saying you don't need to prove intent in that scenario. But this one is just a different animal. It's a different case.

Supp ROA 15, l. 21- 16, l. 9.

When the judge asked specifically why the internet searches were relevant, the State responded:

> Well, and there's a large amount of Internet searches related to urine and enemas. And when you go back to this very specific form of sexual activity, the children—Brendan is saying that they inserted—he calls it a "douche" in his rectum. And he tries to describe it. He says it's like shots are.
>
> But I think the fact that there are no many searches for enemas does educate the jury related to this unique form of sexual activity. I think, you know, a lot of people are not into drinking urine. A lot of people are not into—most people . . . And I'm just being honest in trying to think through it. When you have over 500 hits related to that and these children are going to say that they had to drink urine, I think it just goes to prove a totality of the circumstances.

Supp ROA 19, ll. 2-22.

Again, the State argued it wanted to give the jury "the full picture" because coprophilia is outside the normal knowledge of the jury. Supp ROA 24, l. 1.

Defense Counsel Objections and the Court's Ruling

Defense counsel argued all of this testimony was inadmissible. He argued it was not admissible under SCRE, Rule 404(b). Supp ROA 26-28. He also argued it was irrelevant. Supp ROA 32. The trial judge found it admissible because the State has the burden of showing some sexual gratification from the touching, and that the jury "might not understand" that the touching was sexual without this evidence. Supp ROA 28, ll. 21-22. The State reiterated its two grounds for admitting this evidence

were 1) because it has the burden of proving the elements of CSC third degree, and 2) to prove intent under SCRE, Rule 404(b). Supp ROA 29. The trial court judge found the probative value of the photograph illustrating Carpenter's girlfriend covered in excrement outweighed its prejudicial value. Supp ROA 37. Per her ruling from the bench, she conducted both a SCRE, Rule 404 analysis and a SCRE, Rule 403 analysis. Supp ROA 38.

Before the start of the trial, the parties renewed objections to this testimony and clarified the scope of what evidence would be admitted. ROA 24-28.

The Trial

The State offered the following evidence at trial: James Parris, an officer with the Traveler's Rest Police Department, testified that he received a report of a possible sexual assault on June 4, 2016. ROA 107-08. The children's mother, Dalina Moore and two children came to the police department around 8:00pm that evening. ROA 108. At that point, only her daughter was the complainant. ROA 108. Ms. Moore was very distraught, and the officer wrote her statement for her. ROA 109. He did not talk to the child. ROA 110. Officer Parris then forwarded the case to Tim Kelly, who became the lead investigator on the case. ROA 111. Ms. Moore and her children left the police station around 9:30pm. ROA 115.

Tim Kelly, the Captain of the Traveler's Rest Police Department also testified. ROA 117. At the time of these events, he was an investigator. ROA 117. On June 6, 2016 he was forwarded Parris's initial report. He then contacted the Julie Valentine Center and set up forensic interviews with the two children. ROA 118. Kelly

attended the interviews. ROA 119. According to Kelly, the female child disclosed sexual abuse that occurred at her grandfather's house. Kelly determined the child was at that house from Spring of 2014 to Spring of 2016. ROA 120. At the time of the interview, the female child was 9 years old. Her brother was 10. She alleged the abuse occurred around Thanksgiving but was not specific as to whether it was 2014 or 2015. ROA 120. The male child, during this interview, did not disclose any abuse. ROA 120.

During the investigation, Kelly obtained a search warrant. ROA 121. He testified they were trying to find evidence related to the allegations of sexual assault. ROA 122. Kelly testified that while executing the search warrant, he located Carpenter's cell phone. Kelly said Carpenter told him-- about what would be found on the cell phone-- that "he had a varied sex life." Defense counsel immediately objected. ROA 130. Then, according to Kelly, Carpenter showed him pictures on the cell phone of his girlfriend (and co-defendant), nude in the bathtub with feces on her. ROA 131. The Solicitor entered this picture into evidence at the trial. ROA 131.

Kelly testified that Carpenter told him that his phone and computers were password protected and that he left his bedroom locked when he was not there. ROA 136. Carpenter was arrested on June 19, 2016. ROA 136.

November 2, 2016, nearly four and a half months after the initial complaint to the police, Dalina Moore called Kelly and told him that her son disclosed sexual assaults committed against him. ROA 136. Additional interviews were conducted,

and Carpenter was charged with additional crimes. ROA 136. Kelly recommended the children have medical examinations. ROA 137.

On cross-examination law enforcement admitted that Carpenter was highly cooperative. Carpenter told law enforcement about an additional computer tablet he had in the trunk of his car, and a computer he had his place of business. ROA 140-41. Law enforcement never interviewed any of Carpenter's family members, or his neighbors, or any of his associates. ROA 142.

Kelly testified on cross-examination that he later became aware of some of the male child's serious psychological conditions. He had some cursory knowledge of his history but did not know the details. ROA 152.

The parties stipulated that Carpenter is HIV+ and was on notice of that status at the time of these alleged events. ROA 156.

Investigator Jim Perry of the Greenville County Sheriff's Office also testified. ROA 156. He is currently an investigator in the computer crimes investigation unit. ROA 157. He retrieved photographs from Carpenter's cell phone. ROA 160. The State moved State's Exhibit #14 into evidence, again over defense counsel objection and published it to the jury. ROA 161. It was the picture of Carpenter's co-defendant and girlfriend, Regina Owens nude in the bathtub and covered in feces. The picture's date was June 28, 2015. ROA 162.

Investigator Perry also testified to searches that Carpenter conducted on his computer. ROA 164. There was a single search hit for "urine." ROA 164. There were multiple search hits for "piss." ROA 165. He got multiple hits for "enema." ROA 165.

Perry testified the sites visited by Carpenter were for sexual stimulation. ROA 165. There was no testimony that Carpenter used his computers or cell phones to search for anything relating to child pornography or sexual interest in children.

Dalina Moore, the children's mother, also testified. ROA 185. She is common law married to William Carpenter, III, the son of the defendant. She and her husband have four children, ages 14, 11, 12, and 8 years old. ROA 186. She testified that she and her family moved in with her husband's father, Carpenter, in Spring of 2014. ROA 188. They were all living in the same house during this time frame. Shortly after she moved in, Carpenter's girlfriend, Regina Owens, also moved into the house. ROA 189. Moore testified that her son—the one who is the subject of indictments in this case—has ADHD. It apparently caused him to be held back in kindergarten. ROA 190. Also, he struggles with communication skills. ROA 191. The family moved in with Carpenter when her husband was laid off from work and needed support to help them get on their feet financially. ROA 192.

Moore testified that Regina Owens had a drug problem. She used crack cocaine, marijuana, and pills. ROA 195. During the day, both Moore and Owens would be present at the house while the children attended school, and the men went to work. ROA 195. The two of them would watch television, clean up the house, and talk. ROA 196. Moore admitted that sometimes when she was at the house with Owens, they would drink and do drugs together—she testified they would get "wasted." ROA 196, l. 16. According to Moore, Carpenter would obtain the drugs for Owens. ROA 197. Moore testified that typically Carpenter would leave for work early

in the morning, and would get home late in the evening, sometimes after 9:00pm. ROA 198. Carpenter and Owens would be left alone with the children if they had to go to the grocery store, if they had an occasional date, or if Moore had a doctor's appointment and her husband had to take her to it. ROA 198.

Moore admitted she was not a very good parent. ROA 199. She and Ms. Owens also had a sexual relationship. ROA 200. They had sexual relations at the home, and also at other places. ROA 200. Moore testified she was "most likely" drunk or high when they had sex. ROA 201. DSS has been involved with the family. ROA 201. Moore and her family moved from Carpenter's home sometime in March 2016. ROA 202. There were times the children would stay at home with Carpenter and Owens while they searched for a house to rent in Pickens. ROA 203.

Around June 2016, Moore testified she became aware that her daughter claimed she had been abused. ROA 204. Her son told her that he had witnessed something while they were living at Carpenter's house. Based on what her son told her, they went to the Traveler's Rest Police Department. ROA 204.

Moore's daughter, according to Moore's testimony, told her she had been the victim of a sexual assault in Carpenter's bedroom around Thanksgiving. ROA 205. She did not know which year around Thanksgiving these events allegedly occurred. ROA 205. Several months after the daughter's disclosure, her son made his alleged disclosure. ROA 208. She took him to the doctor because she was concerned about his health. He was experiencing hallucinations and hearing voices. He would urinate in the corners of their home. ROA 209. He had nightmares and anger issues. ROA

209. At one point, he was given Risperdal for his hallucinations, but Moore quickly took him off that medication. ROA 219. He was also prescribed Zoloft and Prozac at various times. ROA 229.

Moore testified that she was aware that Carpenter and Owens had an unusual sex life because Owens told her. ROA 211. Owens showed Moore a video that related to this unusual sex life. ROA 212.

DSS was involved with the family. At the beginning of November 2016, they came to the house and spoke to the children. ROA 235. Moore called Investigator Kelly the day after they spoke to DSS. ROA 235.

Moore's daughter, the alleged victim, testified. ROA 243. At the time of her testimony, she was 11 years old. ROA 243. She testified that she recalled Carpenter touching her twice in ways that she did not like. ROA 248. On both occasions, she claimed that Regina Owens held her down. ROA 250. She also claimed that Carpenter put "his poop" on her and her brother's backs. ROA 250. Then they had to scrub each other with a rag. ROA 251.

Dr. Mary Fran Croswell, a child abuse pediatrician with the Greenville Health System, testified for the State. ROA 255. She examined both children in this case. ROA 259. She examined the female child on June 15, 2016 after a referral from the Traveler's Rest Police Department. ROA 259. Dr. Croswell testified that the child's father told her that she was "acting out, not listening, not doing what she was asked" and that those behaviors first alerted the parents that something was wrong. She was also having nightmares. ROA 270. The child's medical examination came back

normal with a small issue attributed to a form of irritation. ROA 271-72. She tested negative for any sexually transmitted diseases. ROA 273.

Dr. Croswell examined the young male on November 21, 2016 after a referral by the Traveler's Rests Police Department. ROA 274. During this interview, he disclosed that he was sexually abused in the anal area. ROA 276. She performed her physical, and his results were normal. ROA 276. He also tested negative for HIV. ROA 277.

The male child testified before the jury after Dr. Crosswell. ROA 290. At the time of his testimony, he was nearly 13 years old. ROA 290. He testified he was touched inappropriately in his grandfather's bathroom. ROA 295. He claimed that his grandfather put a syringe in his butt. ROA 295. He did not know if anyone else was in the room when this happened. ROA 296. After that, poop came out of his butt and it was rubbed all over his back. ROA 297. He then claimed his grandfather anally penetrated him. ROA 297. The male child also claimed that his grandfather made him drink his own urine. ROA 297.

Amber Hiott, a licensed professional counselor from the Julie Valentine Center, testified. ROA 307. She conducts forensic interviews in cases where there is a question of sexual assault. ROA 308. She first conducted her interviews of the children on June 14, 2016. ROA 310. She conducted a second interview on November 10, 2016. ROA 310. During the June 14, 2016 interviews, the female child disclosed sexual abuse; the male child did not. ROA 313. On November 10, 2016, she

interviewed both children again. ROA 314. During this last interview, the male child disclosed alleged sexual abuse. All four forensic interviews were published to the jury.

Shauna Galloway-Williams, Executive Director of the Julie Valentine Center, testified for the State. ROA 351. She explained that it is not uncommon for children to delay in disclosing child abuse. ROA 358.

The defendant's son, William Carpenter, also testified. ROA 374. He testified, contrary to Dr. Croswell's testimony, that his daughter has not had any behavioral or emotional problems, and that she does "wonderful" in school. ROA 375. His son has ADHD and does not like school. ROA 375. His son began to hallucinate when they moved to Pickens, South Carolina after leaving Carpenter's house. ROA 375. He confirmed that both his wife and Ms. Owens were using drugs while they lived there with the children. ROA 380. He also confirmed that the children were left alone with Carpenter and Owens on very limited occasions; like when they went grocery shopping, or when they were searching for a new place to live. ROA 381. Carpenter admitted on cross-examination that he is also a drug user. ROA 387. He denied that he colluded with his children to raise these allegations against his father.

Mr. Carpenter testified on his own behalf at trial. ROA 400. At the time of trial, he was 57 years old. He denied that he was guilty of these crimes. ROA 401. He has owned his own company in Greenville, South Carolina for 24 years. ROA 402. As he explained to the jury, he worked long hours, especially during hail season when he was responsible for fixing the dents out of cars. ROA 403-04. Carpenter explained that he often provided financial support for the family, even when they were living in

Charleston. ROA 405. Carpenter testified that he received an inheritance when his mother passed. ROA 407.

Moore and the children moved in with him in February or March of 2014. ROA 408. Regina Owens moved in shortly afterwards. The house is a little over 2300 square feet. ROA 409. When the family moved in, it was "just sound and noise everywhere, kids everywhere." ROA 420, ll. 10-11. The house has a lot of wood floors, and everything echoes. ROA 420. Carpenter testified he was at the house most Sundays, but other than that, it was a rare occasion. ROA 421. During the week, he would get home from work around 8:00 and 9:30pm. ROA 421. Carpenter denied that he used crack cocaine, meth, or pills. Instead, he said he liked to have a joint or two in the evenings when he got home, and after the kids were in bed. ROA 424.

Carpenter testified he did not take off for long vacations over Thanksgiving. He would take the day off but would go back to work on Friday and Saturday. ROA 426. For Thanksgiving, they would have Carpenter's sister and brother-in-law come over. They would cook and have a big meal in the middle of the day. There was a large crowd at the house. ROA 426.

Moore and Carpenter's son prepared to move out in early 2016. They wanted their own home and were tired of being clumped in the house in one group. ROA 427. He gave his son a talk about being financially responsible. He thought their money problems were largely of their own doing; he wanted his son to be self-sufficient. ROA 428. It appeared there were money issues. Carpenter testified that his son and daughter-in-law informed Carpenter they found a trailer down the road from him,

but they needed help making the down payment because they had not received their tax refund. He told them he could not assist them with the down payment. He felt they were using the children to guilt him into making the down payment since the children were really excited and had already picked out their bedrooms. ROA 429-430.

Two or three months after they moved out, Carpenter went to visit his son, daughter-in-law and grandchildren at their new house in Pickens. Carpenter had sent a van to help them and told Moore, "Hey, I'm paying for part of this; it's part of William's inheritance; and I need you to make payments on the other part." ROA 431, ll. 1-3. He asked Moore why she never said thank you, and she said, "Well, I thought that was part of William's inheritance." ROA 431, ll. 7-8. Carpenter then told her there was not any inheritance coming for him, but that the inheritance came to him and his sister. ROA 431. According to Carpenter, her whole demeanor changed. She had a "tougher" and different attitude than she had five minutes before that remark. ROA 431, l. 18. Around 20 days later, the police came to Carpenter's house. ROA 431-32.

When law enforcement executed its search warrant, Carpenter freely cooperated. He even told them about a computer laptop that was at his business. He wanted them to know that he had not done anything wrong. There was also a tablet in the van that he voluntarily turned over, even though law enforcement did not have a warrant to search vehicles. ROA 432-33.

Next, Carpenter testified to his unusual sex life. ROA 433. He also testified that he has had "ED" for 15 to 18 years and that he has not had a functional erection in over six years. ROA 436. Again, Carpenter denied that he sexually abused his two grandchildren. ROA 440. On cross-examination, he testified that he never "sat alone at the house with those kids." ROA 443, l. 25- 444, l. 1.

On cross-examination, the State, once again put up Exhibit #14 to ask Carpenter questions about it. The Solicitor started asking him questions about his being aroused by it, completely unrelated to anything relating to claims of sexual abuse against his grandchildren. ROA 445. The judge asked the State to make the photograph unavailable to the jury as they approached the bench for a sidebar. ROA 446. Again, the State asked Carpenter about Regina Owens' sexual satisfaction reflected in the photograph, a topic completely unrelated to the allegations of abuse. ROA 446. Then, she wanted to know "what is it about urine that you enjoy?" ROA 447. She then asked a series of questions about Carpenter's sexual activity with consenting adults, again completely unrelated to the allegations of abuse against the children. ROA 448. The Solicitor then asked Carpenter about his enjoyment of enemas and feces. ROA 449. She asked how he would use enemas on other consenting adults. ROA 449.

After closing arguments and the jury charge, the jury began their deliberations at 12:13pm. They reached a verdict at 3:20pm. ROA 577. Carpenter was found guilty on all charges. ROA 578. The court sentenced Carpenter to 30 years for criminal sexual conduct with a minor first degree, 10 years for exposing another to HIV, and

15 years for criminal sexual conduct with a minor third degree. All sentences were ordered to run concurrently. ROA 585.

I. The trial court judge erred in allowing the State to introduce evidence of Carpenter's sexual preferences because they were irrelevant, unduly prejudicial and improperly interjected Carpenter's character as an issue in the case.

The State's admission of evidence of Carpenter's sexual proclivities, including his sexual arousal at the sight of feces, inserted rank character propensity evidence into the trial and rendered it fundamentally unfair. It has long been established in this state that evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983); *State v. Lyle*, 125 S.C. 406, 118 S.E.803 (1923). This rule is grounded on the policy that character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime for which he is charged." *State v. Peake*, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990).

The introduction of this crude evidence invited the jury to base its verdict on its revulsion towards Carpenter's sexual acts and not the evidence in the case. The State's case consisted of the delayed disclosures of young children, being raised in a chaotic and neglectful environment. Their disclosures were interspersed between claims of clear fantasy as reflected in the videotaped forensic interviews. Beyond those disclosures, there was no evidence that tended to prove that Carpenter was guilty of these crimes. The introduction of Carpenter's sexual fetishes was

inadmissible under SCRE, Rule 404(b) and was unduly prejudicial. *See State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991) (even relevant and otherwise admissible evidence may be excluded for undue prejudice).

Repeatedly, the State argued for the admission of this evidence as necessary to prove "intent." Like the defendant in *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), a case defense counsel cited in his pre-trial motion, Carpenter's defense in this case was that he did not do it, "making it highly questionable whether the element of intent was a material issue in the case." *Id.* at 12, 722. As the South Carolina Supreme Court held in *Nelson*, "In the trial of sex offenses, extrinsic evidence of intent is admissible only in those cases where there is no challenge to the occurrence of the physical contact itself, but the intent of the actor is at issue because the nature of the contact is subject to varying interpretations" *Nelson*, 331 S.C. 1, 11 (quoting *People v. Bagarozy*, 132 A.D. 2d 225, 235, 522 N.Y.S. 848, 854 (1987)). *See also State v. Tizard*, 897 S.W.2d 732, 744 (Tenn. Crim. App. 1994) (evidence of sexually explicit videotapes and booklet, found in defendant's home, not probative of intent: "[T]o the extent that the ultimate inference sought to be drawn by the state, *i.e.*, the defendant's intent to commit a sexual battery upon the victim, must be derived from initial inferences about the defendant's character traits circumstantially drawn from the questioned evidence, such evidence's probative value on the ultimate inference is greatly attenuated"). Here, Carpenter testified on his own behalf and adamantly denied he inappropriately touched his grandchildren. This evidence relating to coprophilia was inadmissible to show "intent" and its admission rendered Carpenter's

trial fundamentally unfair. It was additionally unduly prejudicial. Respectfully, Carpenter asks this Court to grant him a new trial.

II. The trial court judge erred in allowing the State to introduce a picture on Carpenter's phone of Owens covered in feces since this photograph was irrelevant to the charges against him, unduly prejudicial and improperly interjected Carpenter's character as an issue in this case.

SCRE, Rule 403 states that "[a]lthough 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 delay, waste of time, or needless presentation of cumulative evidence." "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are…not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). Photographs pose a danger of unfair prejudice when they have "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998).

The photograph of Carpenter's girlfriend covered in feces lacked any connection with the alleged acts of abuse against the children. Carpenter's sexual proclivities as it relates to feces did not tend to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would

have been without the photograph. Instead, it improperly signaled to the jury that Carpenter had strange sexual fetishes, leading a jury to make the improper inference that he, therefore, is capable of pedophilia, too in violation of SCRE, Rule 404(b). The act portrayed in the photograph was consensual conduct by two adults and did not tend to prove that Carpenter abuses children. It was improper, and the court erred in allowing it to be admitted into evidence.

The State's decision to highlight this evidence contributed to its prejudicial effect in this case. During its cross examination of Carpenter, as discussed earlier, the State kept the photograph on a projector as it grilled Carpenter about acts he has engaged in with consenting adults. The State's cross-examination of Carpenter using this photograph belies its claims that it needed to introduce the photograph to "educate" the jury or to meet its burden of "proving intent." Respectfully, this Court should grant Carpenter a new trial.

III. The trial court judge erred in allowing the State to introduce evidence of computer searches conducted on Carpenter's computer related to his sexual preferences when those searches were irrelevant to the charges against him, unduly prejudicial, and interjected Carpenter's character as an issue in this case.

For the same reasons that the admission of evidence of Carpenter's sexual proclivities and the photograph of Regina Owens covered in feces was improper, so too was the admission of computer searches that related to Carpenter's sexual fetishes but did not tend to prove that Carpenter abused his grandchildren. This evidence was irrelevant pursuant to SCRE, Rule 403 and improperly placed Carpenter's character into evidence in violation of SCRE, Rule 404(b). Again, this

evidence improperly signaled to the jury that Carpenter had strange sexual fetishes, leading the jury to make the improper inference that he was therefore capable of pedophilia. The trial court judge erred in allowing this evidence to be admitted, and this Court should grant Carpenter a new trial.

IV. The trial court judge violated the defendant's right to a public trial when she removed a family member from the courtroom while a child witness was testifying without making the required findings.

Prior to the testimony of one of the child witnesses, the following exchange occurred:

> MS. SUSTAKOVITCH: It's been made aware to me that the defendant's brother-in-law is in the courtroom now. He's not listed on the witness list, so I know he's not going to be a witness at trial. Apparently, that—seeing him has bothered the child witness that's going to be testifying second. Is there a way that he could be asked to step out, at least just during her testimony? That would be the only time that I would ask that.
>
> THE COURT: All right. Yes, sir.
>
> MR. KENDRICK: I don't know of any—I mean, I don't know what they're talking about. But I don't know of anything that would allow that, Your Honor. I mean, this is—
>
> THE COURT: Well, I think a trial judge has the responsibility of—and has the discretion to make the courtroom, you know, more—or easier for a child witness to testify. I know that there have been things where witnesses have testified from other courtrooms and done it closed-circuit and things of that nature. If—I'll say, during that particular witness, I'd ask the brother-in-law to step outside. And then he can certainly be here for the remainder of the trial. I think that's too much of an imposition on anyone.
>
> MR. KENDRICK: Can I put my reasoning on the record?
>
> THE COURT: Absolutely.

> MR. KENDRICK: It's our position that a courthouse is open to a constitutional trial and that any closing of the courtroom would be a structural defect.
>
> THE COURT: Uh-huh.
>
> MR. KENDRICK: So we would object to a witness being able to—allowed to control who is in and out of the courtroom, outside of any particular sequestration order. That being said, we understand your ruling.
>
> THE COURT: All right. Very well. And as I said, I think there's certainly a great deal of precedent in the state for making a courtroom somewhat more conducive. There have even been situations where the defendant has been out of the view of the witness, either by something physical or by being put in another courtroom or things like that. I think this is a minor imposition, so we'll do that. All right.

ROA 181-182.

The law on this issue is clear—there is a presumption that a trial shall be open to all members of the public. The right to an open trial may give way in certain instances to other rights or interests such as a defendant's right to a fair trial, or the government's interest in inhibiting disclosure of sensitive information. The United States Supreme Court, in *Waller v. Georgia*, 467 U.S. 39 (1984) set out the standards courts must apply before excluding the public from any stage of a criminal trial:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

The trial judge's obligations on this point are beyond dispute: "The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from

the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Presley v. Georgia*, 558 U.S. 209 (2013) (quoting *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 505 (1984) (*Press-Enterprise I*)).

The trial court judge simply failed to undertake what the United States Supreme Court demands. The trial court judge had to identify the specific interests implicated, the threat to those interests, which must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Presley* at 215-216 (quoting *Press-Enterprise I* at 510). And see *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside,* 478 U.S. 1, 15 (1986) ("The First Amendment right to access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial"]). The trial court erred by improperly closing with courtroom without making the necessary findings to do so. This Court should grant Carpenter a new trial.

CONCLUSION

This Court should reverse Carpenter's convictions and remand for a new trial.

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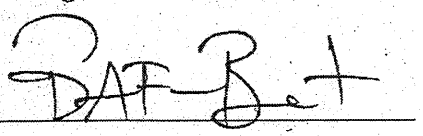
BY: 

March 18, 2020.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Appellate Case No. 2018-001745

The Honorable Letitia H. Verdin, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

William Lee Carpenter.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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