STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Stephanie McDonald, Circuit Court Judge
Appellate Case No. 2013-001976

THE STATE,

Appellant,

vs.

MARCUS GREENE,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I.

The circuit court erred in granting Respondent's motion to bifurcate the elements of first-degree criminal sexual conduct with a minor.

STATEMENT OF THE CASE

In October of 2012, a Berkeley County Grand Jury indicted Respondent for third-degree criminal sexual conduct with a minor. In June of 2013, a Berkeley County Grand Jury indicted Respondent for assault with intent to commit first-degree criminal sexual conduct with a minor. Respondent moved to bifurcate the elements of first-degree criminal sexual conduct with a minor. The Honorable Stephanie McDonald held a pretrial hearing. David P. Schwacke and Cody Groeber represented Respondent during the hearing, and Assistant Solicitor Anne Williams represented the State. Judge McDonald granted Respondent's motion to bifurcate.

The State filed a timely notice of appeal. This brief follows.

ARGUMENT

I.

The circuit court erred in granting Respondent's motion to bifurcate the elements of first-degree criminal sexual conduct with a minor.

The circuit court erred in granting Respondent's motion to bifurcate the elements of first-degree criminal sexual conduct with a minor because of three reasons: First, bifurcation of the elements of a single charge and withholding essential information relating to the crime from the jury prevents the jury from discharging its deliberative and decisional functions. The jury cannot determine guilt or innocence without context and without hearing all the necessary and relevant information at one proceeding. Second, the circuit court's reliance on Rule 403, SCRE, was misplaced because evidence that Respondent had been ordered to be included on the sex offender registry pursuant to section 23-3-430(D) of the South Carolina Code was extremely probative considering it was an element of one of the crimes for which Respondent was on trial. Further, the trial judge could have eliminated any prejudice resulting from the admission of the evidence by issuing a limiting instruction to the jury. Finally, bifurcating elements of an offense creates many practical problems.

Accordingly, the circuit court's ruling should be reversed, and this case should be remanded for trial.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of

discretion occurs where the trial court's conclusions lack evidentiary support or controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Analysis

A. Right to a Unitary Trial

The circuit court erred in granting Respondent's motion to bifurcate the elements of first-degree criminal sexual conduct with a minor.

Section 16-3-655 of the South Carolina Code states that a person is guilty of first-degree criminal sexual conduct with a minor if he or she does the following:

> (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) **or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)**.

S.C. Code Ann. §16-3-655 (A)(2) (emphasis added).

Subsection (A)(2) of the first-degree criminal sexual conduct with a minor statute is analogous to the burglary in the first degree statute, wherein proof of two or more prior convictions for burglary and/or housebreaking is a necessary element of the State's case-in-chief. Compare S.C. Code Ann. §16-3-655 (A)(2) (making a prior conviction for certain offenses that require registration as a sex offender an element of first-degree criminal sexual conduct with a minor) with S.C. Code Ann. §16-11-311 (A)(2) (making two or more prior convictions for burglary and/or housebreaking an element of burglary in the first degree). Thus, the case law regarding burglary in the first degree is instructive in this case.

In State v. Benton, our Supreme Court held that the "probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its

prejudicial effect" despite the fact that the admission of such evidence would inform the jury that the defendant had previously been convicted of the exact same type of offense for which he was currently on trial. State v. Benton, 338 S.C. 151, 156, 526 S.E.2d 228, 230 (2000).[1] The Court noted that the proper way for a trial judge to eliminate any prejudice from the admission of the prior convictions was to not allow any details of the prior convictions into evidence and instruct the jury on the limited purpose for which the prior convictions could be considered. Id. at 156, 526 S.E.2d at 230-31.[2]

Further, in State v. Cheatham, this Court stated: "It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice." State v. Cheatham, 349 S.C. 101, 109, 561 S.E.2d 618, 623 (Ct. App. 2002).

Our appellate courts have made it clear that the appropriate remedy for eliminating any prejudice from the admission of prior burglary and/or housebreaking convictions is for the trial judge to instruct the jury to limit its consideration of the evidence to the particular purpose for which it is offered. See State v. Simmons, 352 S.C. 342, 356-57, 573 S.E.2d 856, 864 (Ct. App. 2002) (noting that the State cannot be forced to stipulate to the prior convictions element of burglary in the first degree; however, in order to eliminate prejudice to the defendant, the State may not introduce evidence of the details of the prior convictions, and the trial judge should instruct the jury that the prior

[1] In addition, the Court in Benton held that the prior convictions element of burglary in the first degree did not violate due process of law because the State had a valid state purpose in deterring repeat offenders and the statute was reasonably designed to accomplish that purpose. Id. at 154, 526 S.E.2d at 230.

[2] Notably, Rule 105, SCRE, addresses situations where evidence is admissible for one purpose but not admissible for another purpose. ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Thus, instead of bifurcating the elements of the offense, the trial judge should have followed Rule 105, SCRE, and given the jury an instruction regarding the limited admissibility of the evidence.

convictions should only be considered for the limited purpose of proving one of the elements of burglary in the first degree); Cheatham, 349 S.C. at 109-110, 561 S.E.2d at 623 (noting that the trial judge took every precaution to prevent the improper consideration of the defendant's prior convictions by charging the jury to limit its consideration of the prior convictions to whether the State proved one of the elements of burglary in the first degree); State v. Hamilton, 327 S.C. 440, 447-48, 486 S.E.2d 512, 516 (Ct. App. 1997) (holding that evidence of the defendant's prior burglary convictions was admissible to prove the prior offense element of burglary in the first degree and noting that the trial judge should instruct the jury to limit its consideration of the prior convictions only in determining whether the defendant was guilty of one of the aggravating factors which would support burglary in the first degree).

Additionally, in a well-reasoned opinion, the Supreme Court of Colorado held that the trial court erred in bifurcating the defendant's trial for possession of a weapon by a previous offender and noted the following:

> [When] . . . the issues sought to be tried separately are both elements of the same crime, the potential for disruption of the orderly trial of criminal cases is great.
>
> Many crimes contain one element which is more prejudicial than another. Were we to permit bifurcation in this case, every crime which contains two elements, one of which is prejudicial to the accused, could result in a bifurcated trial . . . A bifurcated trial of these and other crimes containing a prejudicial element would unduly interfere with the administration of the criminal justice system. **With good reason, 'two-part jury trials are rare in our jurisprudence.'**

People v. Fullerton, 525 P.2d 1166, 1168 (Colo. 1974) (emphasis added).

Moreover, other jurisdictions have concluded that it is error for the trial judge to bifurcate elements of an offense. See State v. Brown, 853 A.2d 260, 263, 266 (N.J. 2004)

(noting that the majority of other jurisdictions hold that a convicted defendant is not entitled to a bifurcated jury trial because the jury should be presented with evidence on each element of the offense during one undivided trial and pointing out that a contrary view "would change the nature of the charge by removing an element of the crime from the jury in the first trial phase, 'leaving the jury in a position only to make findings of fact on a particular element without knowing the true import of those findings.'") (citation omitted); Carter v. State, 824 A.2d 123, 134 (Md. 2003) ("Many courts have concluded that a trial judge does not possess authority to bifurcate a defendant's charge to prevent the jury from considering an element of that charge."); Essex v. Com., 442 S.E.2d 707, 710 (Va. Ct. App. 1994) ("Where a necessary element of the Commonwealth's case is that the accused is a convicted felon, evidence which tends to directly prove that fact cannot be excluded on the ground that its proof is prejudicial to the accused.").

In this case, the trial judge erred in granting Respondent's motion to bifurcate the elements of first-degree criminal sexual conduct with a minor for the following reasons:

First, the State should not be required to prove another element to the same jury at a separate trial to convict a defendant of a single crime. Bifurcation of the elements of a single charge and withholding essential information relating to the crime from the jury prevents the jury from discharging its deliberative and decisional functions because the jury cannot determine guilt or innocence without context and without hearing all the necessary and relevant information at one proceeding. The jury needs to hear evidence regarding each element of the first-degree criminal sexual conduct with a minor offense during one unitary trial.

Second, the circuit court's reliance on Rule 403, SCRE, in reaching her ruling was misplaced because evidence that Respondent had been ordered to be included on the sex

offender registry pursuant to section 23-3-430(D) of the South Carolina Code was extremely probative considering it was an element of one of the crimes for which Respondent was on trial. See Benton, 338 S.C. at 156, 526 S.E.2d at 230 (noting that a defendant's prior convictions for burglary and/or housebreaking is an element of burglary in the first degree; therefore, the "probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect."); see e.g., State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("'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 decision on an improper basis.'") (citations omitted).

Interestingly, the trial judge stated that she did not believe that the first-degree criminal sexual conduct with a minor statute was inconsistent with Rule 403, SCRE. However, she found that "under the facts of this case [she] need[ed] to sever that particular issue in [her] discretion under Rule 42(b) of the Rules of Civil Procedure which apply to the criminal rule." (Tr. p. 13.)[3] It is unclear why the trial judge believed that the facts of this case required her to bifurcate the elements of the crime considering the only evidence that the State sought to admit was the fact that Respondent had been ordered to be included in the sex offender registry, which would be identical to or substantially the same as the evidence admitted in every case where the State charged the defendant with first-degree criminal sexual conduct with a minor pursuant to section 16-3-655 (A)(2) of the South Carolina Code.

[3] However, "[b]ecause this was a criminal case, the Rules of Civil Procedure were not applicable." State v. Wren, 322 S.C. 103, 106, 470 S.E.2d 111, 112 (Ct. App. 1996).

Further, the proper way for the trial judge to eliminate any prejudice resulting from the admission of the evidence was to issue a limiting instruction to the jury. See e.g., Simmons, 352 S.C. at, 356-57, 573 S.E.2d at 864 (noting that in order to eliminate prejudice to the defendant, the State may not introduce evidence of the details of the prior convictions, and the trial judge should instruct the jury that the prior convictions should only be considered for the limited purpose of proving one of the elements of burglary in the first degree).

Finally, bifurcating elements of an offense creates many practical problems. For instance, many crimes contain one element which is more prejudicial than another. Thus, if this Court were to permit bifurcation in this case, every crime which contains two elements, one of which is more prejudicial to the accused, could result in a bifurcated trial. See Fullerton, 525 P.2d at 1168. Moreover, if the trial judge bifurcates the elements of the offense, problems regarding lesser-included offenses could arise. For example, in this case, second-degree criminal sexual conduct with a minor[4] could potentially be a lesser included offense of first-degree criminal sexual conduct with a minor. If the trial judge excludes the last element of first-degree criminal sexual conduct with a minor (i.e. "the actor has previously been . . . ordered to be included in the sex offender registry pursuant to Section 23-3-460 (D)) from the initial charge to the jury and also charges second-degree criminal sexual conduct with a minor, the jury might be more inclined to return a verdict for second-degree criminal sexual conduct with a minor because the age

[4] S.C. Code Ann. § 16-3-655 (B)(1) ("A person is guilty of criminal sexual conduct with a minor in the second degree if . . . the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age . . . .").

range is more specific. When the State, highlighted this problem to the trial judge, the trial judge stated that she could alleviate the problem by giving the jury a special interrogatory requiring the jury to find the exact age of the victim. However, this proposed solution by the trial judge increases the State's burden of proof because the State does not have to prove that the victim was a certain age at the time of the crime. Instead, the State has to prove that the victim was within a certain age range at the time of crime.

B. Immediately Appealable

To the extent, Respondent challenges the appealability of the trial court's order granting bifurcation, the order was immediately appealable under section 14-3-330 (2) of the South Carolina Code because the order involved a substantial right that could not be vindicated on appeal after trial.

Pursuant to section 14-3-330 of the South Carolina Code, "[t]he Supreme Court shall have appellate jurisdiction for correction of errors or law in law cases, and shall review upon appeal" the following:

> An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

S.C. Code Ann. § 14-3-330 (2).

Our Supreme Court has interpreted this provision as allowing immediate appeals in situations where a party's substantial right could not be vindicated on appeal after trial. See Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000).

Generally, if an appellate court can correct a trial court's error on appeal after trial, the trial court's ruling does not affect a substantial right. See id.

Notably, our Supreme Court has held on numerous occasions that a trial court's order depriving a party of a mode of trial to which the party is entitled to as a matter of right is immediately appealable. See Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) ("[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. §14-3-330(2) (1977) and must, therefore, be appealed immediately."); C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (noting that an order depriving a party of a mode of trial to which he or she is entitled to as a matter of right is immediately appealable). In fact, an order denying a party a mode of trial to which he is entitled is not only immediately appealable but **must** be appealed immediately. Lester, 327 S.C. at 266, 491 S.E.2d at 241.

Although our Supreme Court held in Senter v. Piggly Wiggly, 341 S.C. 74, 79, 533 S.E.2d 575, 578 (2000), that the trial judge's order denying bifurcation on the issues of liability and damages in a personal injury case was not immediately appealable, this case is easily distinguishable. The issue in Senter was whether or not to bifurcate the liability elements and the damages element of a personal injury case. Here, the trial judge bifurcated what is the equivalent of the liability elements of the crime by ordering bifurcation of the guilt phase of the trial.

Further, unlike parties in a civil case, the Double Jeopardy Clause restricts the State's ability to appeal a trial judge's order. See U.S. Const. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). The guarantee against double jeopardy offers three

separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

Accordingly, if this Court held that the trial judge's order granting bifurcation was not immediately appealable, the State would never be able to appeal the order because the Double Jeopardy Clause would prohibit an appeal if the jury acquitted the defendant,[5] and the State would have no right to appeal if the jury convicted the defendant. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 105-106 (2d ed. 2002) (identifying the limited situations in which the State has the right to appeal in a criminal case, which include the following: 1) an order quashing an indictment; 2) an order prohibiting the State from withdrawing a plea offer; 3) an order effecting the venire of jurors by which the defendant might be tried at any time; 4) a pretrial order granting suppression of evidence if the order significantly impairs the prosecution of the case; and 5) an order granting a defendant a new trial if the order was based on an error of law).

As such, unless immediately appealable, the issue of whether bifurcation of the guilt phase of a criminal trial is erroneous would always evade appellate review. C.f. Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (holding that

[5] See State v. Holliday, 255 S.C. 142, 145, 177 S.E.2d 541, 542 (1970) ("Based primarily upon the double jeopardy provisions of the Constitution . . . we have long recognized that the State has no right of appeal from a judgment of Acquittal in a criminal case . . . unless the verdict of acquittal was procured by the accused through fraud or collusion . . . .") (citations omitted); see also Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) ("When a successful **postacquittal appeal** by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a **postacquittal appeal** by the prosecution not only when it might result in a second trial, but also if reversal would translate into ''further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.''") (citations omitted and emphasis added).

appellate courts can address an issue that was otherwise moot if the issue was capable of repetition by would always evade appellate review).

In summary, a trial judge's order granting bifurcation is immediately appealable by the State.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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March 27, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Appellant proposes the following to be included in the Record on Appeal:

1) **Entire September 9, 2013 Transcript**
2) **Entire September 10, 2013 Transcript**

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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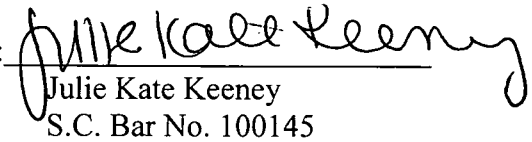
BY: 

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March 27, 2014

STATE OF SOUTH CAROLINA
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THE STATE,

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This day 27th of March, 2014.

Ellen R. DuBois

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ALAN WILSON
ATTORNEY GENERAL

March 27, 2014

Robert M. Dudek, Esquire
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RE: State v. Marcus Greene- Appellate Case No. 2013-001976

Dear Mr. Dudek:

I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Julie Kate Keeney

Julie Kate Keeney
Assistant Attorney General
S.C. Bar Number 100145

JKK/erd
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services