STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County
The Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case No. 2012-212269

THE STATE,

Respondent,

v.

JON WYNN JARRARD, SR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly allowed the State to present its case as indicted, and the certified copy of Appellant's prior conviction was offered as evidence of a specific statutory element of the offense rather than propensity evidence.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In May 2010, an eight year old child (the Victim") in Horry County disclosed her grandfather, Appellant Jon Wynn Jarrard, Sr., molested her on multiple occasions in her bedroom. In November 18, 2010, the Horry County Grand Jury indicted Appellant on one count of first degree criminal sexual conduct with a minor under S.C. Code §16-3-655(A)(1) (Supp. 2013). In January 2011, the Grand Jury indicted Appellant on one count of lewd on a minor under S.C. §16-15-140 (2003).

Appellant had a prior conviction for lewd act on a minor, and he was on the sex offender registry. On April 2, 2011, the Grand Jury indicted Appellant on one count of first degree criminal sexual conduct with a minor pursuant to S.C. Code §16-3-655(A)(2) (Supp. 2013). Thereafter, the State *nolle prossed* the November 2010 criminal sexual conduct indictment, and proceeded on the January 2011 lewd act indictment and the April 2011 criminal sexual conduct indictment.

The case was scheduled for trial the week of June 11, 2012. On April 3, 2012, Appellant moved to prevent the State from proceeding on the April 2011 indictment, or in the alternative, to suppress evidence of his prior lewd act conviction and the required sex offender registration. Appellant argued the State's sole purpose for re-indicting him was retaliation for his decision to go to trial. The prosecutor responded the decision to re-indict was not in retaliation, but the case was simply her first opportunity to use §16-3-655(A)(2) because most of the defendants in her cases did not have prior convictions. The circuit court ruled the State could proceed on the April 2011 indictment, but did require the State to elect whether to proceed with the prior conviction prong or the sex offender registry prong, and the State indicated it would only present evidence of the

prior conviction. (April 3, 2012 Hearing Transcript [4/3 HT], pp. 1-17; Record on Appeal [R.], pp. 1-17).

The trial commenced on June 11, 2012, before the Honorable Larry B. Hyman, Circuit Court Judge. Prior to opening statements, the State confirmed it only intended to show Appellant's prior lewd act conviction by introducing a certified copy of the conviction, and did not intend to mention the sex offender registry. Upon Appellant's motion, the sentencing judge's handwritten notes regarding conditions of the sentence, and the actual number of years of Appellant's sentence, were redacted. (Trial Transcript [TT], pp. 35- 43; R., pp.24-32).

During opening statements, the State indicated it had to prove a sexual battery occurred on a minor under the age of sixteen by a person with a prior conviction for lewd act, and stated there would be evidence presented showing the Victim was under the age of sixteen and Appellant had a prior conviction for lewd act. Appellant's counsel also referenced the prior conviction as an element the State had to prove beyond a reasonable doubt, and stated he did not "think that's going to be too difficult to do." He then stressed the prior conviction had nothing to do with the current case. (TT, pp. 62-76; R., pp. 35-49).

Pamela Gause ("Gause") testified she babysat for the Victim and her younger sister in 2010-2011, and kept them about 150 times during that time. In May 2010, the Victim and Gause's six year old daughter were caught in the daughter's bed with their pants down and touching each other's genitalia. When Gause spoke to her daughter and the Victim about the incident, she asked the Victim if anyone had ever touched her that way, but the Victim did not respond immediately. The Victim eventually disclosed she had been molested, and told Gause who had molested her. Gause then contacted the

Victim's mother (Appellant's daughter), and told her to come from work right away. Gause had no further involvement in the matter. (TT, pp. 76-88; R., pp. 49-61).

The Victim's mother testified Gause called her at work one day and said there was a problem with the Victim. When the mother arrived at Gause's home, Gause told her about the Victim's disclosures. The next day, she took the Victim to the police and reported the molestation. (TT, pp. 102-108; R. pp. 62-68).

The mother also admitted she thereafter gave the solicitor's office affidavits and a video of the Victim purporting to recant the allegations, but testified at trial the Victim never recanted. She stated the affidavits were prepared by her mother, Appellant's wife and the Victim's grandmother, and she signed them because the situation was tearing her family apart and the grandmother (her mother) asked her to sign them. She further stated the grandmother coached the Victim to make the statements on the video. (TT, pp. 108-117, 121, 126-127; R., pp. 68-77, 81, 86-87).

The Victim testified Appellant touched her on her "privacy" with his hands. She stated the incidents occurred in her bedroom, she woke up when Appellant put his fingers "inside of it," and it felt "gross" and "uncomfortable." The Victim further testified she did not tell her mother about what happened because it would get her grandfather in trouble and she loved him. (TT, pp. 157-170; R., pp. 88-101).

The Victim stated her grandmother made her say on the video that she made the allegations up, and she "didn't feel right" about having to say it. (TT, pp. 170-171; R., pp. 101-102). She also testified her grandmother also told her to write a letter to her grandfather saying she was sorry she lied and got him in trouble. (TT, pp.184-185, 193-194; R., pp. 115-116,124-125).

Carol Rahter, M.D., was qualified as an expert in child sexual assault examinations. She testified she interviewed the Victim in June 2010 at the request of the Horry County Police Department, and performed a medical examination. The Victim told her about an incident of sexual assault when the Victim was seven years old, and said it occurred in Horry County. The physical examination did not reveal any abnormalities, which Dr. Rahter testified was normal given the Victim's age and the length of time since the assault occurred. (TT, pp. 208-225, 232-258; R., pp. 133-150, 157-183).

An investigator with the Horry County Police Department testified he did a background check on Appellant during the investigation of this case, and discovered Appellant had a prior conviction for lewd act on a minor. (TT, p. 201; R., p. 132). The State introduced, over Appellant's objection, a certified copy of Appellant's prior lewd act conviction. (TT, pp. 275-277, State's Exhibit 11; R., pp. 200-202, 269). The circuit court instructed the jury the prior conviction was admitted "for one purpose and one purpose only and that was to establish or go to establish, whether it establishes it or not entirely up to you, but to establish one of the elements of the offense [Appellant] is charged with," and admonished the jury to "consider it for no other purpose." (TT, pp. 291-292; R., pp. 210-211).

During closing argument, Appellant's counsel acknowledged the prior conviction was an element of the offense because "the legislature, in all their knowledge, upped the ante and said that we're going to make that an element of the crime." He also argued the jury would not do justice if it convicted Appellant of the current charge because of the prior conviction. (TT, pp. 300-301; R., pp. 214-215).

The solicitor referenced the prior conviction twice very briefly during closing argument. The first reference regarded why the legislature passed the law, and the second reference was strictly in connection with the evidence in the record as to each element of the offense. (TT, pp. 319, 322-323; R., pp. 233, 236-237).

Before going into the general jury charges, the circuit court again charged the jury regarding its use of the prior conviction.

> Ladies and gentlemen, let me remind you again that there is evidence of a prior conviction for committing a lewd act upon a minor presented in this trial. That evidence was presented for one and one purpose alone, to meet the requirements of the statute. The statute requires that the State prove to you beyond a reasonable doubt that the defendant has been previously convicted of one of a number of offenses, lewd act is one of those included offenses. You must not consider that evidence if you believe it for any other purposes. You may be inclined to say he committed that act so he must have committed this act; that would be inappropriate. You may say someone who did that is not believable, credibility, that is not appropriate. The only purpose for which you may consider that evidence is whether or not the State has proven to you beyond a reasonable doubt that he has a prior conviction of the offense.

(TT, p. 333; R. p. 247).

After approximately forty minutes of deliberations, the jury asked to rehear the Victim's testimony and the forensic interview. It also requested a definition of penetration. The testimony was read to the jury, and without objection, written transcripts of the forensic interview were provided to the jurors, and additional information regarding penetration was provided. (TT, pp. 347-354; R., pp. 254-261).

After another twenty minutes of deliberation, the jury convicted Appellant of both charges, and the circuit court sentenced him to concurrent prison terms of fifteen years. (TT, pp. 354-360; R., pp. 261-267). This appeal followed.

ARGUMENT

The circuit court properly allowed the State to present its case as indicted, and the certified copy of Appellant's prior conviction was offered as evidence of a specific statutory element of the offense rather than propensity evidence.

Appellant contends the circuit court erred in allowing the State to proceed under S.C. Code §16-3-655(A)(2) and introduce his 1997 lewd act conviction. He asserts the conviction's only relevance was to unduly prejudice the jury, and allowing its introduction constituted a denial of due process. While Appellant's lengthy discussion of due process accurately reflects the due process requirements, there are two fundamental flaws in his assertions relative to the application in the case.

As a threshold matter, Appellant ignores the well-established principle that the prosecutor has discretion to determine what charges to bring against a defendant.

> "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (*quoting* United States v. Goodwin, 457 U.S. 368, 380, n. 11, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

State v. Geer, 391 S.C. 179, 705 S.E.2d 441, 449 (Ct. App. 2010) (quotations and citations in original); *see also* United States v. Batchelder, 442 U.S. 114, 123-124 (1979) ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."); Strickland v. State, 276 S.C. 17, 274 S.E.2d 430, 432 (1981) (fact that prosecuting attorney may select which of several offenses to charge is not unconstitutional) (*citing* Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 [1975]).

"An accused person's protection lies in the fact that he may not be convicted unless upon a fair trial he is found guilty beyond a reasonable doubt of all of the elements of the offense of which he stands charged." Simmons, 215 S.E.2d at 884-885.

This discretion does not end when charges are filed. Rather, it continues through the pre-trial proceedings, including plea negotiations, discovery and motions, until the case is actually tried. United States v. Goodwin, 457 U.S. 368 (1982) footnotes omitted).

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.
>
> . . . .
>
> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.
>
> . . . . A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in Bordenkircher, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

Id. at 381-382 (1982) (footnotes omitted).

In this case, the solicitor initially charged Appellant under S.C. Code §16-3-655(A)(1), which provides that a person is guilty of first degree criminal sexual conduct with a minor if he commits a sexual battery on a victim less than eleven years of age. A conviction under that code section carries a mandatory minimum sentence of twenty-five

years in prison, no part of which can be suspended and no probation granted, or life in prison. S.C. Code §16-3-655(D)(1) (Supp. 2013).

Approximately four months later, and well over a year before the case was called for trial, the solicitor re-indicted Appellant under §16-3-655(A)(2), which provides that a person is guilty of first degree criminal sexual conduct with a minor if he commits a sexual battery on a victim less than sixteen years of age, and has previously been convicted of an offense listed in S.C. Code §23-3-430(C), or been included in the sex offender registry pursuant to S.C. Code §23-3-430(D). A conviction under this code section carries a mandatory minimum sentence prison sentence of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. S.C. Code §16-3-655(D)(2) (Supp. 2013). At trial, the solicitor elected to proceed only on the prior conviction prong, and never introduced evidence indicating Appellant was also included in the sex offender registry. (4/3 HT, pp. 16-17, TT, pp. 35-36; R., pp. 16-17, 24-25).

There is no dispute the Victim was under the age of thirteen at the time of the incident, and a charge under §655(A)(1) was appropriate. On its face, however, §655(A)(2) includes victims under thirteen years of age, and even though the charging decision was the solicitor's to make, she determined the sentencing parameters of §655(A)(2) were more fitting under the circumstances of the case. (State's Response to Defendant's Motion to Prevent State from Proceeding under 16-3-655(A)(2), p. 3, TT, p. 356; R., pp. 3, 263). The solicitor acted well within her discretion in determining what charges to bring in the case, Appellant had ample notice of the charges, and there was no due process violation in relation to the charges.

Appellant argues the sole reason the solicitor elected to proceed under §16-3-655(A)(2) was to circumvent the prohibition against propensity evidence. In advancing his position, however, Appellant glosses over the case law regarding evidence of prior convictions in first degree burglary cases, which is directly on point with the instant case regarding the admissibility of prior convictions when the conviction itself is an element of the offense.

While generally inadmissible, propensity evidence is not prohibited, and it is admissible if offered for a purpose other than to show the defendant is a bad person, or acted in conformity with his prior conviction.[1] State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 230 (2000). "[E]vidence of other crimes is admissible to establish a material fact or element of the crime charged." *Id.* The State is still required to prove all elements of the offense charged beyond a reasonable doubt, and "due process does not bar the admission of prior crimes simply because there is an accompanying prejudicial effect." *Id.*; *see also* State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618, 622 (Ct. App. 2002) (same).

Under S.C. Code §16-11-311(A) (Supp. 2013), a person commits first degree burglary if he enters a dwelling without consent and with the intent to commit a crime therein, and one or more delineated aggravating circumstances exists. The statutory aggravating circumstances include presence or use of a deadly weapon, or causing physical injury to a non-participant in the crime, or the defendant has two or more prior convictions for burglary and/or housebreaking, or the entering or remaining occurs in the

[1] "Propensity" is defined as a "natural inclination" or "bent." Webster's II New Riverside Dictionary, 549 (Rev. Ed. 1996). Thus, if the evidence at issue is not offered to show the defendant acted in conformity with his prior conduct, it is not "propensity" evidence by definition.

nighttime. The legislature chose to include the "two or more" prior convictions element of first degree burglary as a deterrent to repeat offenders. Benton, 526 S.E.2d at 230.

If the defendant has two or more prior convictions, he cannot require the State to stipulate to the convictions, or to one of the other delineated aggravating circumstances, in lieu of presenting evidence regarding the prior convictions. Benton, 526 S.E.2d at 230 (State cannot be required to accept defendant's stipulation to the existence of his prior convictions) (*citing* State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 [Ct. App. 1997]); Cheatham, 561 S.E.2d at 622 (State not required to accept defendant's stipulation that burglary occurred in the nighttime in lieu of presenting evidence of defendant's prior convictions). Allowing the State to present the prior convictions evidence does not dilute its burden of proof in violation of due process. Benton, 526 S.E.2d at 230; Cheatham, 561 S.E.2d at 622. When prior convictions are offered to prove an element of the charged offense, the evidence's probative value is not outweighed by its prejudicial effect as a matter of law. Benton, 526 S.E.2d at 230 (*citing* Rule 403, SCRE).

Appellant contends the Supreme Court's holding in State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), somehow changed the Benton analysis. On the contrary, the Court reiterated the Benton holding, specifically regarding the interplay between Rule 403 and the first degree burglary statute, and the conclusion that admission of the two prior convictions in a first degree burglary case was more probative than prejudicial. *Id.* at 748.

The issue in James, however, was admission of seven prior convictions, **five more** than required by the statute to prove first degree burglary. The Court noted that under the rule of Old Chief v. United States, 519 U.S. 172 (1997), "the probative value of the convictions entered **beyond the two required by the statute** decreases because of

the already sufficient evidence submitted to prove that element." *Id.* at 750 (emphasis supplied). Acknowledging "there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial," the Court found the "very great potential for prejudice" outweighed the probative value of "all seven prior convictions." *Id.* In short, the probative value of the number of prior convictions required under the applicable statute outweighs the prejudicial effect, but admission of any prior convictions beyond that number requires a Rule 403 probative/prejudice analysis.

In this case, the State only introduced the one prior conviction required by §16-3-655(A)(2), and as a matter of law, the probative value of that evidence outweighed its prejudicial effect. The circuit court twice properly instructed the jury regarding the limited purpose of the evidence, and admonished the jury not to use it for any other purpose.[2] Therefore, Appellant's conviction should be affirmed.

[2]Appellant's contention the manner in which the conviction was disclosed was highly prejudicial because of the way the document was redacted is meritless. Appellant specifically requested that the entire "Other Conditions" section and the actual sentence be redacted, and did not object to the way the redactions were done. (TT, pp. 38-43, 276-277; R., pp. 27-32, 201-202). Thus, he cannot now argue the redactions themselves made the document more prejudicial.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's conviction should be affirmed.

Respectfully submitted,

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June 23, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 23rd day of June, 2014.

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