

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GARY EUGENE LOTT,

APPELLANT

APPELLATE CASE NO. 2013-000494

Appeal from Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2015-UP-266

RECEIVED

JUN 10 2015

SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Gary Eugene Lott petitions the Court for rehearing. Counsel respectfully submits that this Court, by relying on State v. Benton, 338 S.C. 151, 526 S.E.2d 22 (2000) to support the holding that the trial judge did not err in refusing to require the State to stipulate that Petitioner had a prior conviction of a crime listed in S.C. Code §23-3-430, overlooked the fact that the burglary statute at issue in Benton provides that two or more prior convictions for **housebreaking** or **burglary** enhances a burglary to first degree. The criminal sexual conduct statute in the present case, however, provides that a prior conviction for any number

of offenses listed in S.C. Code §23-3-430(C) enhances a sexual battery to criminal sexual conduct with a minor first degree.

S.C. Code §16-3-655 provides:

(A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

(1) the actor engages in sexual battery with a victim who is less than eleven years of age; or

(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 §23-3-430(C) provides:

(C) For purposes of this article, a person who has been convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses shall be referred to as an offender:

- (1) criminal sexual conduct in the first degree (Section 16-3-652);
- (2) criminal sexual conduct in the second degree (Section 16-3-653);
- (3) criminal sexual conduct in the third degree (Section 16-3-654);
- (4) criminal sexual conduct with minors, first degree (Section 16-3-655(A));
- (5) criminal sexual conduct with minors, second degree (Section 16-3-655(B)). If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2) provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;
- (6) criminal sexual conduct with minors, third degree (Section 16-3-655(C));
- (7) engaging a child for sexual performance (Section 16-3-810);
- (8) producing, directing, or promoting sexual performance by a child (Section 16-3-820);
- (9) criminal sexual conduct: assaults with intent to commit (Section 16-3-656);
- (10) incest (Section 16-15-20);
- (11) buggery (Section 16-15-120);
- (12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470);
- (13) violations of Article 3, Chapter 15, Title 16 involving a minor;
- (14) a person, regardless of age, who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in this State, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in a comparable court in the United States, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in the United States federal courts of indecent exposure or of a similar offense in other

jurisdictions is required to register pursuant to the provisions of this article if the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender;

(15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

(16) kidnapping (Section 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent;

(17) trafficking in persons (Section 16-3-930) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

(18) criminal sexual conduct when the victim is a spouse (Section 16-3-658);

(19) sexual battery of a spouse (Section 16-3-615);

(20) sexual intercourse with a patient or trainee (Section 44-23-1150);

(21) criminal solicitation of a minor if the purpose or intent of the solicitation or attempted solicitation was to:

(a) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5);

(b) perform a sexual activity in the presence of the person solicited (Section 16-15-342);
or

(22) administering, distributing, dispensing, delivering, or aiding, abetting, attempting, or conspiring to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit a crime listed in Section 44-53-370(f), except petit larceny or grand larceny.

(23) any other offense specified by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA).

In contrast to the twenty three enhancement offenses listed in S.C. Code §23-3-430, the burglary statute lists two enhancement offenses and provides:

(A) A person is guilty of burglary in the first degree if the person enters a dwelling

without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

(a) is armed with a deadly weapon or explosive; or

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of *two or more* convictions for burglary or housebreaking or a combination of both.

S.C. Code §16-11-311(emphasis added).

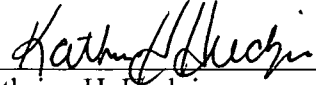
In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), the South Carolina Supreme Court distinguished the state burglary statute from the federal statute at issue in Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), and in footnote eight wrote, “Violation of 18 U.S.C. § 922(g)(1) is triggered by prior convictions for many different crimes. S.C.Code Ann. § 16–11–311(A)(2) requires proof of prior convictions for only two specific crimes: burglary and housebreaking.” The criminal sexual conduct with a minor first degree statute is triggered by prior convictions for twenty three different offenses, as opposed to the burglary first degree statute which is triggered by two specific crimes. The criminal sexual conduct with a minor first degree statute is analogous to the federal felon in possession of a firearm statute found in 18 U.S.C. § 922(g)(1). In Old Chief the prosecution relied on the defendant's prior indictment for “assault causing serious bodily injury” to establish a violation of 18 U.S.C. § 922(g)(1), and introduced the order of judgment and commitment for the defendant's prior assault conviction. Id. The United States Supreme Court found that, although *relevant* under Rule 402, FRE, the evidence of the name and nature of the crime was unnecessary to prove the gun charge, and was highly prejudicial to the defendant as it was similar to the current assault charges pending against the defendant. Id. Weighing the probative value of the name and nature of the crime against its prejudicial impact, the Court held that introducing these details was unduly prejudicial under Rule 403, FRE. Id.

Prior convictions are elements in both criminal sexual conduct with a minor first degree, S.C. Code §16-3-655 and felon in possession of a firearm, 18 U.S.C. § 922(g)(1). The name and nature of the prior conviction, however, are not elements of the offense. The fact that the prior conviction is an element does not end the analysis. See Old Chief. The trial court should determine if the probative value of the name and nature of the prior conviction is outweighed by any probative value pursuant to Rule 403, SCRE. In the present case the name and nature of the prior conviction for lewd act was not necessary to prove a sexual battery and was highly prejudicial as Petitioner was charged with criminal sexual conduct with a minor first degree and lewd act. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984); State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000)(When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced). Petitioner was further prejudiced by the fact that that, in addition to evidence about the prior conviction for lewd act, the jury learned, through the testimony of a detective, that Petitioner was required to register as a sex offender. (R. p. 171, lines 16-19). Any possible probative value of the name and nature of the prior lewd act conviction is substantially outweighed by the danger of unfair prejudice in the jury hearing that Petitioner had been convicted of the same crime for which he was on trial.

Additionally, in finding that the trial judge did not abuse his discretion in refusing to grant a mistrial when the State's questioning of an officer improperly commented on Petitioner's right to remain silent, counsel respectfully submits that this Court overlooked the fact that a Doyle violation requires reversal unless the violation is harmless. The violation in the present case was not harmless. The judge's refusal to grant a mistrial constituted an error of law. The judge abused his discretion in refusing to grant the mistrial.

Based on the above arguments, Petitioner respectfully requests rehearing.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 10th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED
JUN 10 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

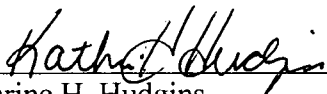
GARY EUGENE LOTT,

APPELLANT

APPELLATE CASE NO. 2013-000494

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Gary Eugene Lott #262345 at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 10th day of June, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 10th day
of June, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.