STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2015-UP-266 (S.C. Ct. App. filed 5/27/2015)

13-GS-24-101

THE STATE,

RESPONDENT,

V.

GARY EUGENE LOTT,

PETITIONER

APPELLATE CASE NO. 2013-000494

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 20, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the trial judge did not err in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for lewd act on a minor was highly prejudicial when Petitioner was also charged with lewd act in the present case?

2. Did the Court of Appeals err in finding the trial judge did not err in refusing to declare a mistrial when the prosecutor asked an investigator on direct examination if he ever gave the defendant a chance to give his side of the story when the defendant exercised his Fifth Amendment right to remain silent?

STATEMENT OF THE CASE

In January of 2013, the Greenwood County Grand Jury indicted Lott for criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor third degree, indictments #2013-GS-24-101, 305. On February 28, 2013, Lott proceeded to jury trial before the Honorable Eugene C. Griffith, Jr. Lance Sheek and Mike Medlock represented Lott at trial. David M. Stumbo and Elizabeth White prosecuted the case. The jury returned a verdict of not guilty of criminal sexual conduct with a minor first degree but guilty of lewd act on a minor.[1] Judge Griffith sentenced Lott to 15 years. A timely notice of intent to appeal was served on March 5, 2013, and the direct appeal perfected. On May 27, 2015, the South Carolina Court of Appeals, in an unpublished opinion, affirmed the sentence and conviction. State v. Lott, Op. No. 2015-UP-266 (S.C.Ct.App. Filed May 27, 2105). A timely notice of intent to appeal was filed and then denied on August 20, 2015. This petition for writ of certiorari follows.

[1] The criminal sexual conduct with a minor third degree was amended, without objection, to an indictment for lewd act on a minor.

STATEMENT OF FACTS

The jury found Appellant guilty of committing a lewd act on a minor. Appellant was initially indicted for criminal sexual conduct with a minor first and third degree. The State, without objection, altered the indictment for criminal sexual conduct with a minor third degree, changing it to an indictment for lewd act on a minor. (R. pp. 6-8). The jury found Appellant not guilty of criminal sexual conduct first degree.

Appellant was a friend of the minor's mother and step-father. (R. p. 122, line 18 – p. 123, lines 1-7). The step-father testified that Appellant spent the night at their home on three or four occasions. (R. p. 123, lines 15-17). At trial the minor testified that she fell asleep on the couch in the living room, woke up between 2:00 AM and 2:30 AM and felt somebody's hands down her pants. (R. p. 72, lines 22-24; p. 76, lines 5-8). According to the minor, she opened her eyes and saw the Appellant. (R. p. 74, lines 23 – p. 75, lines 1-2). The minor also testified at trial that Appellant rubbed her leg a couple of weeks earlier. (R. p. 73, lines 3- 12).

The minor testified that when she felt the hand in her pants she moved over and then went into the kitchen. (R. p. 74, lines 19-22). The minor said that her step-dad, Jamie, woke up and went into the kitchen and she went into the kitchen with him. (R. p. 72, line 25 - p. 73, lines 1-2; p. 75, lines 14-19). The step-dad told her to go back to bed. The minor testified that she told the step-dad about the incident the next day. (R. p. 75, line 23 – p. 76, lines 1-22).

At trial the step-dad testified, "I woke up and I went to the kitchen. You know, I couldn't go back to sleep, so I started doing the dishes. [Minor] walked in there. She looked like she was half asleep. I told her to go back to bed. She just went back and did." (R. p. 127, line 24 – p. 128, lines 1-4).

Investigator Jeff Scott with the Greenwood County Sheriff's Department testified that he referred the eleven year old minor to the Child's Place for a forensic interview. (R. p. 149, lines 4-18; p. 151, lines 10-20). A videotape of the forensic interview was introduced in evidence without objection. (R. p. 155, lines 2-25). An anatomical drawing used in the interview was also introduced in evidence without objection. (R. p. 156, line 8 – p. 188, lines 1-8).

Appellant testified at trial and denied touching the minor. (R. p. 212, lines 5-12). Appellant testified that as a result of a conversation he had with the minor and then with the minor's mother, minor was no longer allowed to play with the next door neighbor. (R. p. 212, line 13 – p. 213, lines 1-11). Appellant testified that about a week before the minor made the accusation against Appellant the minor was upset with Appellant and told him, "Gary, I don't like you no more because you told mama that I – you know, what Chase did, and I can't play with him anymore." (R. p. 213, lines 12-16). The minor confirmed that her mother told her she could no longer play with Chase and she was upset about that because she had nobody else to play with. (R. p. 119, lines 7-16).

The jury found Appellant not guilty of criminal sexual conduct with a minor first degree but guilty of lewd act on a minor. The State charged Appellant with criminal sexual conduct with a minor first degree based on a 1996 conviction for lewd act on a minor. A sentencing sheet from the prior conviction was, over objection, admitted, in evidence. (R. p. 167, line 15 – p. 168, lines 1-23).

ARGUMENTS

1. The Court of Appeals erred in finding that the trial judge did not err in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for lewd act on a minor was highly prejudicial when Petitioner was also charged with lewd act in the present case

The State indicted Petitioner for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-655(A)(2) because the minor was less than sixteen and Petitioner had a 1996 conviction for lewd act on a minor. The State also indicted Petitioner for criminal sexual conduct with a minor third degree that was changed to lewd act on a minor prior to trial. (R. pp. 6-8). Petitioner moved to limit the introduction in evidence of the 1996 guilty plea to lewd act on a minor by offering to stipulate that Appellant has been convicted of an offense listed in S.C. Code §23-3-430. (R. pp. 21-25).

Relying on Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), Petitioner argued that the prejudicial effect of allowing the jury to learn that Petitioner had a prior conviction for lewd act on a minor outweighed the probative value. (R. p. 22, line 12 – p. 23, lines 1-19). Petitioner distinguished the burglary line of cases as the burglary statute specifically allowed for prior convictions for housebreaking or burglary but the criminal sexual conduct statute allowed prior convictions for any number of offenses listed in S.C. Code §23-3-430, like the prior felonies in Old Chief. (R. p. 23, line 20 – p. 24, 25, lines 1-21).

The judge ruled that the State did not have to accept the stipulation as the prior conviction was a statutory element of criminal sexual conduct with a minor first offense. (R. p. 29, line 22 – p. 30, 31, lines 1-11). The trial judge referenced the burglary statute and stated, "It

seems like the same issue to me. If it's an element, the State has got the right to prove it. You can offer to stipulate it but they don't have to accept it. Since there is only one conviction, there is not that number out there that they could try to use them all." (R. p. 30, line 22 – p. 31, lines 1-3). The judge then seemed to rule that the State could either use the prior conviction **or** the fact that Petitioner had to register as a sex offender for the prior conviction to meet the element[2]. The judge stated, "Consistent with my understanding of the case law, I think the State could go either way. They can use either one that they want. They can use the conviction or they can use that he had to register because of the conviction, however, they want to do it." (R. p. 31, lines 3-9). While there was a discussion about what the State could use to prove the prior conviction, there was no objection to the judge's ruling that the State could either use the prior conviction **or** the fact that Petitioner had to register as a sex offender for the prior conviction to meet the element. (R. pp. 31 – 35). The judge made no further findings pursuant to Rule 403, SCRE.

During trial the investigator incorrectly testified that Petitioner had a prior conviction for criminal sexual conduct[3]. (R. p. 168, lines 18-21). The investigator then corrected himself and testified that the prior conviction was for lewd act. (R. p. 168, line 23). The judge provided a curative explanation. The State then questioned the investigator further about the prior conviction

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[2] Counsel states that Petitioner was ordered to register as a sex offender although his plea to lewd act would have required him to register as a sex offender without an order. (R. p. 21, line 19 – p. 22, lines 1-11). S.C. Code §23-3-430 (D) provides, Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.

[3] It appears that a mistrial motion was made off the record and then later withdrawn. (R. p. 168, line 24 – p. 169, lines 1-2; p. 184, lines 3-7).

and asked, "What was another condition of the court upon that conviction? That is written on State's Exhibit #3?" (R. p. 171, lines 16-18). The investigator responded, "To register as a sex offender." (R. p. 171, line19). State's #3, a sentencing sheet from the 1996 lewd act conviction, was then admitted subject to the prior objection. (R. p. 171, line 20 – p. 172, lines 1-8). The jury heard that Petitioner had a prior conviction for lewd act on a minor **and** that Petitioner was required to register as a sex offender.

At the close of the State's case Petitioner moved for a mistrial based on the judge's failure to require the State to accept the stipulation in regard to the prior conviction. (R. p. 196, lines 25 – p. 197, lines 1-4). The judge denied the motion for a mistrial. (R. p. 198, lines 8-15). The judge erred. The judge's limiting instruction to the jury did not cure the error. (R. p. 292, lines 7-17). During deliberations the jury asked for a definition of what the lewd act was in 1996. (R. p. 302, lines 13-25).

The South Carolina Court of Appeals affirmed and wrote:

> The trial court did not err in refusing to require the State to stipulate Lott had "a prior conviction of a crime under section 23-3-430." See S.C. Code Ann. § 16-3-655(A)(2) (Supp. 2014) (providing a prior conviction of committing a lewd act on a minor is an element of first-degree criminal sexual conduct with a minor); State v. Benton, 338 S.C. 151, 154-155, 526 S.E.2d 228, 230 (2000) (holding "evidence of other crimes is admissible to establish a material fact or element of the crime").

State v. Lott, Op. No. 2015-UP-266 (S.C.Ct.App.Filed May 27, 2105). The Court of Appeals' reliance on State v. Benton is misplaced. The burglary statute at issue in Benton and in State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), 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. The name and nature of the prior conviction is not a material fact or element of the crime.

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. Benton, 338 S.C. 151, 155-56, 526 S.E.2d 228, 230 (2000) this Court wrote:

> Even in Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), upon which appellant relies, evidence of the defendant's prior felony conviction, an element of the weapons charge for which he was on trial, was admissible. Because the name and nature of the prior conviction were irrelevant (they were not elements of the current charge), their probative value was outweighed by their prejudicial effect. For purposes of an element of first degree burglary under § 16–11–311(A)(2), we conclude the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect. Rule 403, SCRE. (footnote omitted).

In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), this Court wrote:

> In Old Chief, the defendant was charged with three crimes: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) violation of 18 U.S.C. § 922(g)(1) (possession of a firearm by anyone with a prior felony conviction). Id. 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 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. The Court found that the defendant's admission that he committed a qualifying crime to be sufficient for purposes of proving a violation of 18 U.S.C. § 922(g)(1) under these circumstances. Id. (footnote omitted).

Both the Benton and the James cases involved the South Carolina burglary first degree statute, S.C. Code §16-11-311. In order to prove burglary first degree in James, the State

introduced certified copies of seven prior convictions for burglary. In reversing the conviction in James the Court wrote, "We believe the probative value of all seven prior convictions was outweighed by the very great potential for prejudice to James, and crossed the line established in Old Chief, regardless of the judge's limiting instructions to the contrary."

355 S.C. at 35, 583 S.E.2d at 750.

In the present case the State introduced a sentencing sheet from one prior 1996 conviction for lewd act which indicated that Petitioner was required to register as a sex offender. Although there was only one prior conviction, the statute at issue, S.C. Code §16-3-655(A)(2), provides for enhancement based on a prior conviction for any of the offenses listed in S.C. Code §23-3-430(C). The burglary statute, on the other hand, provides for enhancement based only on a prior conviction for burglary or housebreaking. As argued by Appellant at trial, the challenge in the present case is analogous to the challenge in Old Chief to 18 U.S.C. § 922(g)(1), which is triggered by a prior conviction for many different crimes.

In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), this 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 fist 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.

As in Old Chief, evidence of the name and nature of the 1996 conviction for lewd act was unnecessary to prove the crimes charged, and was highly prejudicial as Appellant was charged with lewd act in addition to criminal sexual conduct with a minor first degree and ultimately convicted of 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). The trial judge erred in not conducting a proper balancing test pursuant to Rule 403, SCRE. In this case, the probative value of the name and nature of the 1996 lewd act conviction is substantially outweighed by the danger of unfair prejudice in the jury hearing that appellant had been convicted of the same crime for which he was on trial.

The danger of unfair prejudice could have been reduced through a bifurcated proceeding. After the judge refused to require the State to accept the stipulation, Appellant moved to bifurcate the proceedings to allow the State to prove the prior conviction after the jury made a determination as to guilt on the other elements of the offense. (R. p. 42, line 17 – p. 43, lines 1-4).

The State objected. The judge denied the motion stating, "Consistent with my prior ruling, I am not going to bifurcate this because I think that is an element that the State is under a burden of proof by reasonable doubt. So I am not going to do that. I understand your Motion, it's very interesting, but I am not going to grant it." (R. p. 43, line 22 – p. 44, lines 1-3). The judge's prior ruling was in violation of Old Chief. The bifurcated proceeding would have cured the error. The Court of Appeals erred in finding that the trial judge did not err in refusing to require the State to accept the stipulation that Petitioner had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Petitioner had a prior conviction for lewd act on a minor was highly prejudicial when Petitioner was also charged with lewd act in the present case

2. The Court of Appeals erred in finding that the trial judge did not err in refusing to declare a mistrial when the prosecutor asked an investigator on direct examination if he ever gave the defendant a chance to give his side of the story when the defendant exercised his Fifth Amendment right to remain silent.

During the direct examination of the investigating officer the Solicitor asked, "Now, after you were able to hear this disclosure, after watching and observing the interview, did you ever give Mr. Lott [Petitioner] a chance to give his side of the story?" (R. p. 159, lines 15-19). Petitioner objected and moved for a mistrial based on the State's comment on Petitioner exercising his Fifth Amendment right to remain silent. (R. p. 159, line 21 – p. 160 – 165). Petitioner did not give a statement to police. The State argued that the question was not a comment on the Petitioner's right to remain silent. (R. pp. 161-165). The judge ruled stating, "All right, I tell you what. I'm going to sustain the objection. I am going to allow you to withdraw your question and ask the open- ended questions of 'did you investigate your case fully and interview all parties.' Leave it at that. I think that is the cleanest way to do it." (R. p. 165, line 22 – p. 166, lines 1-3). There was no further objection at that time.[4] At the close of the State's case Petitioner renewed the motion for a mistrial based on the State's comment on Petitioner exercising his right to remain silent. The judge erred in refusing to declare a mistrial.

In McFadden v. State, 342 S.C. 637, 640-641, 539 S.E.2d 391, 393 (2000), this Court wrote, "The State may not comment on a defendant's exercise of a constitutional right. Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); Johnson v. State, 325 S.C. 182,

[4] The failure to further object may need to be addressed in post conviction relief if Petitioner does not prevail on direct appeal.

480 S.E.2d 733 (1997); see also Doyle v. Ohio, [426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)] supra (right to remain silent); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (Fifth and Fourteenth Amendments forbids comment by the prosecution on the accused's silence)." The prosecutor's question constituted a Doyle violation.

The South Carolina Court of Appeals found that because the judge sustained the objection, the trial court committed no error and there was no abuse of discretion in the refusal to grant a mistrial. The Court of Appeals wrote:

> Because the trial court sustained Lott's objection to the State's question concerning whether Lott gave "his side of the story," the trial court committed no error. Once the trial court sustained the objection, the issue became whether the trial court should grant a mistrial because of the solicitor's improper question.1 We find the trial court acted within its discretion in denying Lott's motion for a mistrial. See State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999) ("The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. A mistrial should not be granted unless absolutely necessary. Instead, the trial [court] should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (internal citations omitted)).

State v. Lott, Op. No. 2015-UP-266 (S.C.Ct.App.Filed May 27, 2105).

In State v. McIntosh, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004), this Court wrote:

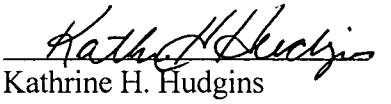
> When a Doyle violation occurs, the conviction still may be upheld when a review of the entire record establishes beyond a reasonable doubt the error was harmless. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 366 (1996). "An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced." State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986).

In the present case, the error was not harmless. While there was only a single reference to Appellant's exercise of his right to remain silent, the State's evidence was not overwhelming. The case was based solely on the testimony of the minor and the jury found Appellant not guilty of criminal sexual conduct with a minor first degree. The Court of Appeals erred in finding that the trial judge did not err in refusing to declare a mistrial when the prosecutor asked an investigator on direct examination if he ever gave the defendant a chance to give his side of the story when the defendant exercised his Fifth Amendment right to remain silent.

CONCLUSION

Based on the above two arguments this Court should grant the petition for writ of certiorari and order further briefing on the issues.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of September, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2015-UP-266 (S.C. Ct. App. filed 5/27/2015)
13-GS-24-101

THE STATE,

RESPONDENT,

V.

GARY EUGENE LOTT,

PETITIONER

APPELLATE CASE NO. 2013-000494

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, and the S.C. Court of Appeals this 21st day of September, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of September, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 29, 2021