STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

GARY EUGENE LOTT,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in failing to require the State to stipulate that Appellant had a prior conviction for a crime listed in S.C. Code Section 23-3-430 where the prior conviction was an element of criminal sexual conduct with a minor in the first degree and the discretion of whether to accept the stipulation lay with the prosecution.

II.

The trial court did not err in refusing to declare a mistrial where Appellant objected before the witness gave a full answer and the prosecution subsequently rephrased the question in a manner that did not address Appellant's invocation of the right to remain silent.

STATEMENT OF THE CASE

Appellant Gary Lott was indicted for criminal sexual conduct with a minor in the first degree and criminal sexual conduct with a minor in the third degree. The State later amended the indictment for criminal sexual conduct with a minor in the third degree to an indictment for lewd act on a minor. A jury found Lott guilty of lewd act on a minor after trial on February 25-28, 2013, over which the Honorable Eugene C. Griffith, Jr., presided. On February 28, 2013, Judge Griffith sentenced Lott to fifteen years' imprisonment.

STATEMENT OF FACTS

Lott's arrest and conviction came about after Victim, an eleven-year-old girl, disclosed to her step-father, Jamie Baker, that Lott touched her inappropriately. Victim testified at trial she knew Lott through her mother and Baker. ROA. p. 71. Victim

testified that Lott sometimes came over to her mother and step-father's home to eat dinner. Lott would also take Victim for rides on his motorcycle. ROA. pp. 71-72. Lott stayed overnight at the Victim's step-parents' house so he could take Victim and her siblings to school the next morning. ROA. p. 78.

That evening, Victim was sleeping on the couch when she woke up and felt someone's hands down her pants. Victim opened her eyes and saw Lott touching her. Victim testified she could tell it was Lott because the person's hands touching her were shaking, and Lott's hands shake. Victim testified that once she felt Lott's hand down her pants, she moved away and then went into the kitchen. Baker was also awake and in the kitchen. Baker told Victim to go back to bed, so she returned to her bedroom. ROA. pp. 72-75. After school the next day, Victim told Baker about Lott's inappropriate touching and Baker called Victim's mother. Lott came over to the house. After talking to Baker, Lott came into the house and told Victim "Don't tell anybody" because it would ruin her mother's friendship with him. Lott tried to convince Victim that she was only dreaming the night before. Baker came in the house and told Lott to go back outside. ROA. pp. 76-77. Victim testified that on a previous occasion when Baker went to the hospital, Lott rubbed her leg. ROA. p. 73.

Baker testified that he and Lott had known each other for over ten years. Baker woke up at around 2:00 or 2:30 a.m. because of pain in his foot. Baker went to the kitchen to clean the dishes because he could not go back to sleep. Victim walked into the kitchen around 2:00 or 2:30, Baker told her to go back to bed and she complied. ROA. pp. 127-128. Baker testified that Lott has a physical condition that causes his hands to shake. ROA. p. 123. Baker described the circumstances behind Victim's disclosure,

made when she returned from school the next day:

> The bus dropped her off on the main road, I guess. I can see the bus from the porch. She kinda hopped off of it and – kinda angry-like. She walked up to me and asked if Gary was coming over. I told her that I didn't know. She said, "Well, he better not spend the night." That's when she broke down and started crying and told me what had happened.

ROA. p. 125, lines 2-10.

Baker confirmed that Lott stayed overnight several times before and that Lott helped Baker by taking the children to school after Baker was in the hospital because Baker took a lot of pain medication and slept a lot. ROA. pp. 123-124.

Investigator Jeff Scott of the Greenwood County Sheriff's Office testified that due to Victim's tender age, he did not actually get a statement from Victim. Instead, Investigator Scott set up a forensic interview with The Child's Place, which is a child advocacy center in Greenwood. ROA. p. 151. During the interview, Victim went into great detail about Lott's inappropriate touching. ROA. pp. 158-159. Investigator Scott was able to observe Victim's interview at The Child's Place. A videotape of the interview and an anatomical drawing from the interview were admitted into evidence without objection. ROA. pp. 155-156.

Lott also testified at trial. ROA. pp. 207-214. Lott testified he had a close friendship with Baker and Victim's mother. ROA. p. 207. Lott testified that the night of the incident, he slept in the living room where Victim and her brother were also sleeping. ROA. p. 209. Lott claimed he did not touch Victim at any point during the night and denied he ever touched Victim in an inappropriate way. ROA. p. 212; p. 214.

ARGUMENT

I.

The trial court did not err in failing to require the State to stipulate that Appellant had a prior conviction for a crime listed in S.C. Code Section 23-3-430 where the prior conviction was an element of criminal sexual conduct with a minor in the first degree and the discretion of whether to accept the stipulation lay with the prosecution.

The trial judge correctly noted that the State has a right to prove the prior conviction where it is an element of the crime. While the State may accept an offer to stipulate to a prior sexual offense made an element of first degree sexual misconduct with a minor, the State is not obligated to accept the offer.

Lott places great reliance on the case of Old Chief v. United States, 519 U.S. 172 (1997). South Carolina Courts have distinguished Old Chief in certain cases where the prior conviction was an element of an offense to be proved at trial. The South Carolina Supreme Court considered whether the prosecutor could refuse the defense's offer to stipulate to a prior offense in State v. Benton, 338 S.C. 151, 520 S.E. 2d 228 (2000). In Benton, the Court examined the defendant's attempt to force the State to stipulate that the defendant had two prior burglary convictions as an aggravating factor to prove burglary in the first degree.[1]

Citing State v. Johnson, 293 S.C. 321, 360 S.E. 2d 317 (1987), the Supreme Court noted that evidence of other crimes may be admissible to establish a material fact or element of the crime charged. The Supreme Court noted that in Old Chief, the name and

[1] For first degree burglary, the State is required to prove at least one of several enumerated aggravating factors, one of which is that the defendant has "a prior record of two or more convictions for burglary or housebreaking or combination of both." S.C. Code Ann. § 16-11-311(A)(2).

nature of the prior conviction were irrelevant, as they were not elements of the current charge. Benton, at 155, 520 S.E.2d at 230. This irrelevance led to the United States Supreme Court's conclusion that the probative value of the prior conviction was outweighed by its prejudicial effect. Id. The Court concluded that for purposes of an element of first degree burglary under §16-11-311(A)(2), the probative value of admitting the defendant's prior burglary charges was not outweighed by its prejudicial effect. Id. at 155-56, 520 S.E.2d at 230.

This Court also upheld the conviction where a defendant asserted the State should have been required to accept his offer to stipulate that he was convicted of a prior burglary offense under South Carolina Code Ann. § 16-11-311(A)(2). State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). This Court acknowledged the rule in Old Chief explaining, ". . . since Congress had made it plain that distinctions among generic felonies were irrelevant for purposes of the crime charged, the most the jury needed to know was that the admitted conviction fell within the class of crimes that Congress felt should bar a convict from possessing a gun." Id. at 445, 486 S.E.2d at 515. However, this Court found that, unlike Old Chief, a generic prior conviction was not involved. Id. at 446, 486 S.E.2d at 515. The Court went on to note that had the South Carolina General Assembly wished to use the prior convictions only as a sentence enhancer, rather than an element of the crime, then it would have done so. Id. at 447, 486 S.E.2d at 515. See also, State v. Cheatham, 349 S.C. 101, 109, 561 S.E.2d 618, 623 (Ct. App. 2002) ("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.").

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).

Subsection (A)(2) is analogous to the burglary 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 to this case. Both the prior convictions required under S.C. Code Ann. §16-3-655 (A)(2) and S.C. Code Ann. §16-11-311 (A)(2) are for a prior conviction with a level of specificity far beyond the level of generality of a prior felony conviction in Old Chief. As discussed earlier, the damning quality of the prior conviction in Old Chief was that it was generic. Any prior felony would qualify to meet that element, therefore the probative value was low, while the potential for prejudice was high. In the present case, however, S.C. Code Ann. §16-3-655 (A)(2) is particular about what offenses trigger the requirement for a convicted party to have to register as a sex offender. The specifically-enumerated list of offenses in the statute are all crimes involving sexual

misconduct and does not approach the level of generality like the prior felony conviction element from Old Chief. That the offenses all relate to prior convictions for criminalized sexual conduct makes the probative value of this evidence extremely high, therefore the admission of this evidence is a necessity. Furthermore, the South Carolina General Assembly clearly recognized the importance of the admission of the evidence of the specific prior conviction in codifying §16-3-655 (A)(2) in the manner they did.

Additionally, the suggested stipulation was grossly inadequate. The State should not be required to accept it. The proposed stipulation was that Lott "is required to register under 23-3-430(d) and has been convicted of a crime enumerated in 23-3-430(c)." ROA. p. 25, lines 16-19. As the prosecution noted, the stipulation would "leave holes in the jury's minds as to what – 'What in the world are they talking about? What kind of convictions qualify under this statute?'" ROA. p. 28, line 22 – p. 29, line 2. Citation and reference to a statute, without any indication as to the general subject matter of the statute, not only leaves the jury confused, but sends the clear message that something is being withheld from them. Jurors should not be treated in a fashion that frankly garners mistrust between them and the officers of the court. In their role of determining the truth, jurors should not be demeaned with a message that they cannot be trusted.

Further, the trial court did not err for failing to conduct a bifurcated proceeding, as no such requirement exists and a bifurcated proceeding is unnecessary to protect Lott's rights to a fair trial. Any potential for unfair prejudice was eliminated by the trial court's charge to the jury to limit its consideration of the prior offense only for the purpose of analyzing whether the pertinent element of the present offense was met. Our appellate

courts have made it clear that a similar instruction is the appropriate mechanism to remove the potential for unfair prejudice from the admission of prior burglary and/or housebreaking convictions. 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 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).

At trial, the prosecution referenced the prior conviction only in the context of establishing that Lott had a prior conviction, that the conviction was for lewd act on a minor, that he was required to register as a sex offender following that conviction, and that this prior conviction led to the State's charge of criminal sexual conduct with a minor-first degree. ROA. p. 168, line 17- ROA. p. 170, line 18. Therefore, the State did not introduce any details of the prior conviction other than what was necessary to support the State's charge of criminal sexual conduct with a minor-first degree.

At the conclusion of trial, the trial judge instructed the jury as follows: "You are to limit your consideration of this evidence of his prior conviction for the purpose of proving the elements of the offense charged herein." ROA. p. 292, lines 14-17. Later, in response to a question by the jury regarding the 1996 conviction, the trial judge instructed

the jury, "... you're not to consider that case or its definition under the law in regard to this. That is a conviction for the purpose of whether or not the State proved the element of having a prior conviction. It is limited to that purpose only." ROA. p. 302, lines 15-20. These instructions were more than sufficient to eliminate any potential prejudice to the defendant from the admission of his prior conviction. Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

Regardless of the trial court's decision not to require the State to accept the stipulation, evidence of Lott's prior criminal conviction would have become admissible anyway, as Lott opened the door to its admission. At trial, the following exchange took place between Lott and his counsel:

> Q: Have you ever touched her, period? Hugged her or anything else?
>
> A: Well, of course I've hugged the kid. You know, she was a loveable child. I mean, you know, getting off the motorcycle or whatever. But nothing in an inappropriate way. **You don't—you just don't do that.**

ROA. p. 213, line 24- p. 214, line 5 (emphasis added).

Lott's response that "you just don't do that" was an implicit assertion that he was innocent of the charges because he was not capable of such conduct. Lott's testimony intimating he was not capable of the criminal conduct alleged was sufficient to allow the prosecution to introduce evidence of Lott's prior conviction to rebut Lott's assertion. "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern,

399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012); see State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991). Seeing as the evidence of the prior conviction would have come in regardless of whether the state was forced to accept Lott's stipulation, Lott's argument that he suffered unfair prejudice as a result of the admission of his prior conviction is without merit.

Since the trial court did not err in declining to require the State to stipulate to the prior conviction, and Lott was not prejudiced by the admission of the prior conviction, the conviction and sentence should be affirmed.

II.

The trial court did not err in refusing to declare a mistrial where Appellant objected before the witness gave a full answer and the prosecution subsequently rephrased the question in a manner that did not address Appellant's invocation of the right to remain silent.

Lott argues that the trial court erred in denying his mistrial motion on the basis that the prosecution's question implicated Lott's invocation of the right to remain silent. However, after the trial court sustained Lott's objection, the prosecution rephrased the question without eliciting testimony on whether Lott asserted his right to remain silent.

Investigator Scott was examined as follows:

> Q: Now, after you were able to hear this disclosure, after watching and observing the interview, did you ever give Mr. Lott a chance to give his side of the story.
>
> A: Well, Mr. Lott came in when he was arrested and —

ROA. p. 159, lines 15-20. Lott objected and moved for a mistrial after the jury left the courtroom. The trial court sustained the objection; however, the trial court allowed the prosecution to rephrase the question in lieu of granting a mistrial. The trial judge did not abuse his discretion in deciding that there was no manifest necessity to declare a mistrial.

The prosecutor's question was harmless. Lott suffered no prejudice from the answer; no information detrimental to Lott was elicited by Investigator Scott in the partial answer. The prosecutor rephrased the question to: "Detective Scott, did you have an opportunity to talk to all parties involved with the case?" ROA. p. 166, lines 16-18. This was followed by the question "Do you feel like you gave it a full investigation? Talked to everybody that was involved in this case?" ROA. p. 166 lines 20-22. Lott did not object to the additional questions. Investigator Scott answered both questions in the affirmative

and did not reference Lott's silence in either answer. The rephrased questions and elicited testimony by the State did not reference Lotts' assertion of any constitutional rights.

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). "The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). "Among the factors to be considered in ordering a mistrial are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case." Patterson, at 226-27, 522 S.E.2d at 851. "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such

motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." Id.

In the instant case, the trial court did not err in allowing the prosecution to rephrase the question. Accordingly, the trial court did not err in allowing the prosecution to rephrase the question to avoid possible comment on Lott exercising his right to silence. Allowing the State to do so was the appropriate action in lieu of the severe action of a mistrial.

Further, even if Investigator Scott answered the question posed, no evidence in the record indicates Miranda warnings were ever provided. Reference to post-arrest silence is not implicated in the absence of Miranda warnings. Brown v. State, 375 S.C. 464, 475-76, 652 S.E.2d 765, 771 (Ct. App. 2007). Accordingly, no error occurred. The conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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September 24, 2014

STATE OF SOUTH CAROLINA

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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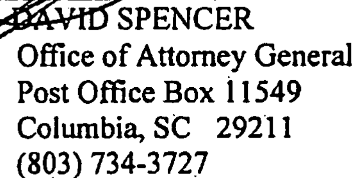

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September 24, 2014

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Kathrine H. Hudgins, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 24TH day of September, 2014.

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