STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY EUGENE LOTT,

APPELLANT

APPELLATE CASE NO. 2013-000494

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

1. Did the judge err in refusing to require the State to accept the stipulation that Appellant 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 Appellant had a prior conviction for lewd act on a minor was highly prejudicial when Appellant was also charged with lewd act in the present case?

2. Did the judge 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. This appeal 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 judge erred in refusing to require the State to accept the stipulation that Appellant 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 Appellant had a prior conviction for lewd act on a minor was highly prejudicial when Appellant was also charged with lewd act in the present case

The State indicted Appellant 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 Appellant had a 1996 conviction for lewd act on a minor. The State also indicted Appellant 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). Appellant moved to limit the introduction in evidence of a 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), Appellant argued that the prejudicial effect of allowing the jury to learn that Appellant had a prior conviction for lewd act on a minor outweighed the probative value. (R. p. 22, line 12 – p. 23, lines 1-19). Appellant 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).

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).

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 Appellant 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,

[2] Counsel states that Appellant 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.

there was no objection to the judge's ruling that the State could either use the prior conviction **or** the fact that Appellant 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 Appellant 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 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 conviction, was then admitted subject to the prior objection. (R. p. 171, line 20 – p. 172, lines 1-8). The jury heard that Appellant had a prior conviction for lewd act on a minor **and** that Appellant was required to register as a sex offender.

At the close of the State's case Appellant 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).

In State v. James, 355 S.C. 25, 31, 583 S.E.2d 745, 748 (2003), the South Carolina Supreme 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).

The James case involved the South Carolina burglary first degree statute, S.C. Code §16-11-311, which 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. (emphasis added).

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[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).

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 Appellant 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. As noted by the Court in footnote eight of the James opinion, "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." 355 S.C. at 31, 583 S.E.2d at 748.

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. 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.

2. The judge erred 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 [Appellant] a chance to give his side of the story?" (R. p. 159, lines 15-19). Appellant objected and moved for a mistrial based on the State's comment on Appellant exercising his Fifth Amendment right to remain silent. (R. p. 159, line 21 – p. 160 – 165). Appellant did not give a statement to police. The State argued that the question was not a comment on the Appellant'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 appellant renewed the motion for a mistrial based on the State's comment on Appellant 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), the South Carolina Supreme 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, 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)."

. In State v. McIntosh, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004), the South Carolina Supreme 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

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

> 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.

CONCLUSION

Based on the arguments presented above, the sentence and conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of April, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 25, 2014

Kathrine H. Hudgins
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THE STATE,

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V.

GARY EUGENE LOTT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of September, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of September 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.

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September 25, 2014

Salley W. Elliott, Esquire
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Re: The State v. Gary Eugene Lott

Dear Salley:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/khh

Enclosure