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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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AUG 12 2015
SC Court of Appeals

Appeal from Abbeville County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SCOTT CROSS,

APPELLANT

APPELLATE CASE NO. 2013-002596

FINAL BRIEF OF APPELLANT

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1.

Whether the court abused its discretion by refusing to bifurcate appellant's trial so that the jury could first determine his guilt or innocence of the underlying criminal sexual offense charge, and then determine if he had the requisite prior sex conviction under the statute, since this was a readily available mechanism to provide appellant a fair trial where the jury did not know he had already been convicted as a sex offender, and the state would not suffer any prejudice?

2.

Whether the court erred by finding that the probative value of allowing the jury to learn of appellant's prior sex offense outweighed its unduly prejudicial effect under Rule 403, SCRE, since the undue prejudice was easily avoidable in this case?

STATEMENT OF THE CASE

Appellant was indicted by the Abbeville County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree, and committing a lewd act upon the same minor. R. p. 433 – R. 438.

Appellant's case was called for trial on October 21, 2013 before the Honorable Frank R. Addy, Jr. and a jury. Josh Nasrollahi represented appellant. C. Yates Brown and Shannon Odom were the assistant solicitors. R. 1.

On October 23, 2013 the jury found appellant guilty on both counts. R. 420, ll. 1-8. Judge Addy sentenced appellant to twenty-five years imprisonment for criminal sexual conduct in the first degree, and fifteen years imprisonment for committing a lewd act on a minor. R. 428, l. 15 – 429, l. 5.

This appeals follows.

ARGUMENTS

1.

The court abused its discretion by refusing to bifurcate appellant's trial so that the jury could first determine his guilt or innocence of the underlying criminal sexual offense charge, and then determine if he had the requisite prior sex conviction under the statute, since this was a readily available mechanism to provide appellant a fair trial where the jury did not know he had already been convicted as a sex offender, and the state would not suffer any prejudice.

Introduction

Prior to trial, a lengthy in-camera hearing was held regarding impeachment evidence available because of the prior inconsistent statements of the alleged victim. The alleged victim was twenty-one years old at the time of trial, and she was thirteen years old in 2005 when the purported sexual abuse happened. R. 3, ll. 2-22. The alleged victim's allegation was that she was playing "hide and seek" with the adult appellant, and some other children, when he forced himself on her in an open field outside of her Abbeville County home. R. 4, l. 2 – 8, l. 19.

Relevant facts

Appellant moved to bifurcate the trial so that the jury could determine his guilt or innocence of the underlying sexual offense without learning of his prior conviction for criminal sexual conduct with a minor. The judge observed that: "I have not read [the facts of that conviction] to the jury yet and I may - - may simply let that go. But one of the elements in the indictment is that the Defendant is - - or has been convicted of CSC." R. 27, l. 14 – 28, l. 9.

The solicitor told the judge that appellant "pled guilty to criminal sexual conduct with a minor in 1992." The solicitor further said the certified indictment was a self-authenticating document that could prove the prior sexual offense under the statute. R. 27, l. 14 – 28, l. 9.

The judge noted that the defense objected to the state offering the prior offense into evidence while appellant's guilt on the underlying offense was at issue, and he noted the defense therefore moved to bifurcate the trial. R. 27, l. 14 – 28, l. 21.

Defense counsel stated he had moved to bifurcate the charge so that the underlying criminal sexual conduct offense was tried before the jury first. If appellant was convicted on the underlying charge then a short "second phase" before the jury would be held to determine whether appellant had indeed been convicted of a prior requisite sexual offense, or was on the sexual offender registry as required by the statute. Defense counsel noted the extreme prejudice of the jury learning appellant had a prior conviction for a sexual offense at the same time it was deliberating his guilt or innocence. It was "going to be propensity evidence as received by them." R. 28, l. 25 – 30, l. 15.

Defense counsel also requested that if the judge denied the motion to bifurcate, that he perform a Rule 403, SCRE analysis on the admissibility of underlying conviction. Counsel asked the judge to distinguish between Old Chief v. United States, 519 U.S. 172 (1997), where the Supreme Court prevented the risk of a conviction because the jury learned the defendant had been convicted in the past of a nearly identical crime, and the prejudice that occurs in first degree burglary cases because the "prior burglaries" element is proved at the same time as the underlying offense. R. 28, l. 22 – 32, l. 8.

Counsel also noted that the specific statute in this case referencing the prior conviction or sex offender registry status did not mandate that the state be allowed to put that conviction before the jury where other mechanisms were available to allow appellant to have a fair trial such as bifurcation of the trial, or a stipulation to the prior conviction. R. 28, l. 22 – 32, l. 8.

The solicitor essentially argued that the state did not have to stipulate to the offense, and that it had the right to prove appellant's prior sex conviction at the same time as the charge for which

appellant was on trial. R. 32, l. 9 – 35, l. 8. The solicitor also offered that he did not think the trial court had to conduct a Rule 403, SCRE analysis.

Defense counsel disagreed with that assertion. He argued if the judge was denying the bifurcation motion he still had to make a ruling that the probative value of the evidence of the prior conviction was not outweighed by its unduly prejudicial effect. The judge denied the bifurcation motion noting: "I don't see the need to bifurcate and I appreciate your position, however your objection is noted for the record." As to the Rule 403, SCRE objection, and the bifurcation motion, the judge stated he thought the jury was intelligent, and he essentially said that he thought it could follow a limiting instruction. R. 35, l. 5 – 37, l. 5.

The solicitor then said he planned to prove the element with "notice that he is given a certified conviction of criminal sexual conduct with a minor first degree as sufficient notice that he is on the sex offender registry." R. 38, ll. 9-12.

The judge later noted he had asked the solicitor to redact the indictment of the prior conviction from 1991 to remove the name of the minor child involved. R. 130, l. 25 – 131, l. 12.

When the solicitor moved the certified conviction from Anderson County of the prior criminal sexual conduct with a minor into evidence from March 9, 1992 defense counsel objected. R. 134, l. 1 – 135, l. 2. The judge then told the jury the only reason the prior criminal sexual conduct with a minor conviction evidence was being admitted was because it was "one of the elements of the underlying charge we are trying here today." R. 135, ll. 3-23.

The judge charged the jury that the state had to prove beyond a reasonable doubt that appellant engaged in a sexual battery with the alleged victim on or about December 29, 2005. The judge also instructed "a person is guilty of criminal sexual conduct with a minor in the first degree if the person engages in a sexual battery with a person who is less than sixteen years of age and the

actor **has been previously convicted or pled guilty to an offense listed in Section 23-3-430(c).** I instruct you that the crime of criminal sexual conduct with a minor in the first degree is a crime listed in Section 23-3-439(c)." R. 413, ll. 6-17.

Discussion

S.C. Code §16-3-655 provides: (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

> (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 state cited Spencer v. Texas, 385 U.S. 554 (1967), in support of its argument that it was not a Due Process violation, because of "collateral prejudice" for the state to introduce an indictment showing a conviction for a prior offense with a limiting instruction that such matters are not to be taken into account in assessing the defendant's guilt or innocence under the current indictment. The defense countered that the more current case of Old Chief v. United States, supra, was instructive to show that the court had the power to prevent this prejudice to the defendant through means that are readily available.

The trial in this case occurred on October 21-23, 2013. The attorneys discussed this Court's unpublished opinion in State v. Welch, 2011-UP-503 (decided November 10, 2011) in arguing the bifurcation and Rule 403, SCRE issue.[1]

Under the procedure set forth by the defense in this case the state would address its evidence about appellant allegedly molesting the minor. If the jury found appellant guilty of the underlying

[1] A very similar issue is pending before this Court in State v. Marcus Greene. Final Brief of Respondent filed January 6, 2015.

sexual offense with a minor, there would then be a short additional hearing where the state would be allowed to prove to the jury that respondent was on the Sex Offender Registry to cover that element of the offense. Regardless of how the determination of the element of the sex offender registry was made after appellant was found guilty of the indicted offense, the state would suffer absolutely no prejudice.

In State v. Jones, 234 Conn. 324, 662 A.2d 1199 (1995), the Supreme Court of Connecticut held that the trial court should have bifurcated that trial on a capital felony count so as to preclude admission of a prior murder conviction, and that the failure to do so required a new trial.

Similarly, the Utah Supreme Court determined, pursuant to its inherent supervisory power, that such a trial must be bifurcated. See State v. Florez, 777 P.2d 452 (Utah 1989). In State v. James, 767 P.2d 549 (Utah 1989), the Supreme Court of Utah also held that the appellate court had the inherent supervisory power over trial courts to adopt a bifurcated approach to an aggravated murder trial pursuant to Utah Code §76-5-202 (1)(h). The court held under that bifurcated approach the jury was not initially to be presented with evidence of the defendant's prior conviction. If the jury found the defendant guilty of an intentional and knowing killing, it would then be instructed on the prior conviction and deliberate on the existence or nonexistence of that prior conviction.

In Jackson v. State, 337 So.2d 1242 (Miss. 1976), the court held it had the inherent authority to bifurcate a death penalty trial into a guilt-finding phase and a sentence-determining phase.[2] In Hines v. State, 794 N.E.2d 469 (Ind. 2004), the Court held it was an abuse of discretion to deny the defendant's motion for a bifurcated trial, and the failure to bifurcate the

trial denied the defendant a fair and impartial trial where unlawful possession of a firearm by a serious violent felon was also a charge. See, also, Hines v. State, 801 N.E.2d 634 (Ind. 2004) (prosecutor should have accepted the defendant's proposed stipulation or the trial court should have bifurcated the trial); Monceaux v. State, 51 A.2d 474 (Del. 2012) (bifurcated trial did not violate *defendant's* due process rights).

In this case the trial judge abused his discretion by refusing to bifurcate the trail to protect appellant from the extreme prejudice of the jury knowing he had a prior criminal sexual conduct conviction while not prejudicing the state one iota. If appellant was convicted of the underlying offense, then the state could quickly prove the underlying conviction.

"[R]ules are made to secure justice, not defeat it." Gill v. State, 962 So.2d 552, 554 (Miss. 2007) *citing* Brewer v. Browning, 115 Miss. 358, 366, 76 So. 267 (1917). "[A]ll courts have the inherit power to correct and make judgments speak the truth." Turner v. State, 212 Miss. 590, 594, 55 So.2d 28 (1951).

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[2] Superseded by statute, recognized in Gray v. State, 351 So.2d 1342 (Miss. 1977).

2.

The court erred by finding that the probative value of allowing the jury to learn of appellant's prior sex offense outweighed its unduly prejudicial effect since a limiting instruction would not be effective, and particularly where bifurcating the trial was a readily available option that did not prejudice the state.

Relevant Facts

Defense counsel correctly argued that the judge should not allow the state to introduce the evidence of the 1992 indictment wherein he was convicted of criminal sexual conduct with a minor because the probative value of this evidence was substantially outweighed by its danger of unfair prejudice. R. 430 - 432. (1992 indictment). The judge denied the Rule 403, SCRE motion ruling the state had the right to place appellant's prior criminal sexual conduct conviction before the jury at the same time as he was being tried for the offense for which he was on trial.

Our Supreme Court has recognized the fundamental right to a fair trial. State v. Kennedy, 272 S.C. 231, 250 S.E.2d 338 (1978). The Due Process Clause of the Fourteenth Amendment to the United States Constitution similarly guarantees the defendant the fundamental right to a fair trial. Estelle v. Williams, 425 U.S. 501 (1976); Duncan v. Louisiana, 391 U.S. 145 (1968); Chambers v. Mississippi, 410 U.S. 284 (1973).

Rule 403, SCRE provides where evidence is relevant it still "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Unfair prejudice means a undue tendency to suggest a decision on an improper basis. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Appellant's remote 1992 conviction for criminal sexual conduct with a minor, without cavil, unduly prejudiced the jury in its determination of appellant's guilt or innocence on the underlying charge.

Obviously, evidence of the 1992 conviction was not admissible under Rule 404(b), SCRE to "prove the character of a person in order to show action in conformity therewith." Moreover, prior convictions that are strikingly similar to the one the defendant is on trial for only exacerbate the danger of unfair prejudice. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

The solicitor argued that the state had the right to place appellant's prior criminal sexual conduct with a minor conviction before the jury as if it were a prior burglary under the burglary statute. See State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (1998). Respectfully, the legislature does not have the power to legislate and waive a defendant's right to a fair trial. There were reasonable alternative methods, as argued in Issue 1 supra, to insure appellant had a fair trial while at the same time allowing the state to prove the element of the prior charge. The state sought to gratuitously prejudice appellant to the maximum degree. The judge erred by denying appellant's Rule 403, SCRE motion and allowing the state to introduce the evidence of the prior CSC with a minor conviction.

Finally, the error in this case is not harmless. The alleged victim repeatedly admitted she did not tell the truth to the police at different times. Appellant strongly denied he ever played "hide and seek" with these children and he denied raping or molesting the alleged victim. R. 374, l. 22 – 383, l. 22.

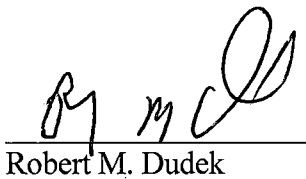
The alleged victim acknowledged she did not disclose the criminal sexual conduct offense when it allegedly occurred in the field outside her home. R. 76, ll. 18-22. She repeatedly claimed she did not "recall" or "remember" important events about accusations of the criminal sexual

conduct. R. 86, l. 12 – 88, l. 25. The alleged victim admitted she gave false statements that she had other times claimed were true against appellant's brother, Andy, "where she also accused him of having sex with her." R. 104, l. 4 – 107, l. 2. The alleged victim was in "self contained" classes and was only able to finish the ninth grade although she was twenty-one years old at the time of trial. R. 63, ll. 6-24. It is clear she came from a dysfunctional family, sexually and otherwise. The error was not harmless.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Abbeville County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

August 11, 2015

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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 Mark R. Farthing, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of August, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of August, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .