

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal From Horry County
The Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case No. 2015-000334

THE STATE,

Respondent,

v.

JON WYNN JARRARD, SR.,

Petitioner.

BRIEF OF RESPONDENT

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ISSUE PRESENTED

The circuit court properly allowed the State to present its case as indicted, the redacted, certified copy of Petitioner's prior conviction was offered as evidence of a specific statutory element of the offense rather than propensity evidence, the jury was properly instructed about the conviction's only purpose, and the probative value of the conviction outweighed its prejudicial effect as a matter of law.

STATEMENT OF THE CASE

A Horry County jury convicted Petitioner on one count of first-degree criminal sexual conduct with a minor and one count of lewd act on a minor. In an unpublished opinion filed December 17, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions, and denied Petitioner's Petition for Rehearing by Order filed January 23, 2015. (Appendix, pp. 1-9). On March 5, 2015, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, which this Court granted by Order dated February 16, 2016.

STATEMENT OF FACTS

In May 2010, an eight year old child (“Victim”) in Horry County disclosed that her grandfather, Petitioner Jon Wynn Jarrard, Sr., molested her on multiple occasions in her bedroom. In November 18, 2010, the Horry County Grand Jury indicted Petitioner on one count of first degree criminal sexual conduct with a minor under S.C. Code §16-3-655(A)(1) (Supp. 2013). In January 2011, the Grand Jury also indicted Petitioner on one count of lewd on a minor under S.C. §16-15-140 (2003).

Petitioner had a prior conviction for lewd act on a minor, and he was on the sex offender registry. Based on those facts, on April 2, 2011, the Grand Jury indicted Petitioner on one count of first degree criminal sexual conduct with a minor pursuant to S.C. Code §16-3-655(A)(2) (Supp. 2013). Thereafter, the State *nolle prossed* the November 2010 criminal sexual conduct indictment, and proceeded to trial on the January 2011 lewd act indictment and the April 2011 criminal sexual conduct indictment.

The case was scheduled for trial the week of June 11, 2012. On April 3, 2012, Petitioner moved to prevent the State from proceeding on the April 2011 indictment, or in the alternative, to suppress evidence of his prior lewd act conviction and the required sex offender registration. Petitioner argued the State’s sole purpose for re-indicting him was retaliation for his decision to go to trial. The prosecutor responded her decision to seek the April indictment was not in retaliation, but simply because it was her first opportunity to use §16-3-655(A)(2) since most of the defendants in her cases did not have prior convictions. The circuit court ruled the State could proceed on the April 2011 indictment, but did require the State to elect whether to proceed with the prior conviction

prong or the sex offender registry prong, and the State indicated it would only present evidence of the prior conviction. (Record on Appeal [R.], pp. 1-17).

The trial commenced on June 11, 2012, before the Honorable Larry B. Hyman, Circuit Court Judge. Prior to opening statements, the State confirmed it only intended to show Petitioner's prior lewd act conviction by introducing a certified copy of the conviction, and did not intend to mention the sex offender registry. On Petitioner's motion, the sentencing judge's handwritten notes regarding conditions of the sentence, and the actual number of years of Petitioner's sentence, were redacted. (R., pp. 24-32).

During opening statements, the State indicated it had to prove a sexual battery occurred on a minor under the age of sixteen by a person with a prior conviction for lewd act, and stated there would be evidence presented showing the Victim was under the age of sixteen and Petitioner had a prior conviction for lewd act. Petitioner's counsel also referenced the prior conviction as an element the State had to prove beyond a reasonable doubt, and stated he did not "think that's going to be too difficult to do." He then stressed the prior conviction had nothing to do with the current case. (R., pp. 35-49).

Pamela Gause ("Gause") testified she babysat for the Victim and her younger sister in 2010-2011, and kept them about 150 times during that time. In May 2010, she caught the Victim and Gause's six year old daughter in the daughter's bed with their pants down and touching each other's genitalia. When Gause spoke to her daughter and the Victim about the incident, she asked the Victim if anyone had ever touched her that way, but the Victim did not respond immediately. The Victim eventually disclosed she had been molested, and told Gause who had molested her. Gause then contacted the

Victim's mother (Petitioner's daughter), and told her to come from work right away. Gause had no further involvement in the matter. (R., pp. 49-61).

The Victim's mother testified Gause called her at work one day and said there was a problem with the Victim. When the mother arrived at Gause's home, Gause told her about the Victim's disclosures. The next day, she took the Victim to the police and reported the molestation. (R. pp. 62-68).

The mother also admitted she thereafter gave the solicitor's office affidavits and a video of the Victim purporting to recant the allegations, but testified the Victim never recanted. She stated the affidavits were prepared by her mother (Petitioner's wife and the Victim's grandmother), and she signed them because the situation was tearing her family apart and her mother asked her to sign them. She further stated her mother coached the Victim to make the statements on the video. (R., pp. 68-77, 81, 86-87).

The Victim testified Petitioner touched her on her "privacy" with his hands. She stated the incidents occurred when she was asleep in her bedroom, and woke up when Petitioner put his fingers "inside of it," which felt "gross" and "uncomfortable." The Victim further testified she did not tell her mother about what happened because it would get her grandfather in trouble and she loved him. (R., pp. 88-101).

The Victim stated her grandmother made her say on the video she made the allegations up, and she "didn't feel right" about having to say it. (R., pp. 101-102). She also testified her grandmother told her to write a letter to her grandfather saying she was sorry she lied and got him in trouble. (R., pp. 115-116, 124-125).

Carol Rahter, M.D., was qualified as an expert in child sexual assault examinations. She testified she interviewed the Victim in June 2010 at the request of the Horry County Police Department, and performed a medical examination. The Victim told her about an incident of sexual assault when the Victim was seven years old, and said it occurred in Horry County. The physical examination did not reveal any abnormalities, which Dr. Rahter testified was normal given the Victim's age and the length of time since the assault occurred. (R., pp. 133-150, 157-183).

An investigator with the Horry County Police Department testified he did a background check on Petitioner during the investigation of this case, and discovered Petitioner had a prior conviction for lewd act on a minor. (R., p. 132). The State introduced, over Petitioner's objection, the redacted, certified copy of Petitioner's prior lewd act conviction. (R., pp. 200-202, 269). The circuit court instructed the jury the prior conviction was admitted "for one purpose and one purpose only and that was to establish or go to establish, whether it establishes it or not entirely up to you, but to establish one of the elements of the offense [Peticioner] is charged with," and admonished the jury to "consider it for no other purpose." (R., pp. 210-211).

During closing argument, Petitioner's counsel acknowledged the prior conviction was an element of the offense because "the legislature, in all their knowledge, upped the ante and said that we're going to make that an element of the crime." He also argued the jury would not do justice if it convicted Petitioner of the current charge because of the prior conviction. (R., pp. 214-215).

The solicitor referenced the prior conviction twice very briefly during closing argument. The first reference regarded why the legislature passed the law, and the second reference was strictly in connection with the evidence in the record as to each element of the offense. (R., pp. 233, 236-237).

Before going into the general jury charges, the circuit court again charged the jury regarding its use of the prior conviction.

Ladies and gentlemen, let me remind you again that there is evidence of a prior conviction for committing a lewd act upon a minor presented in this trial. That evidence was presented for one and one purpose alone, to meet the requirements of the statute. The statute requires that the State prove to you beyond a reasonable doubt that the defendant has been previously convicted of one of a number of offenses, lewd act is one of those included offenses. You must not consider that evidence if you believe it for any other purposes. You may be inclined to say he committed that act so he must have committed this act; that would be inappropriate. You may say someone who did that is not believable, credibility, that is not appropriate. The only purpose for which you may consider that evidence is whether or not the State has proven to you beyond a reasonable doubt that he has a prior conviction of the offense.

(R. p. 247).

After approximately forty minutes of deliberations, the jury asked to rehear the Victim's testimony and the forensic interview. It also requested a definition of penetration. The Victim's testimony was read to the jury, and without objection, written transcripts of the forensic interview as well as additional information regarding penetration were provided to the jurors. (R., pp. 254-261).

After another twenty minutes of deliberation, the jury convicted Petitioner of both charges, and the circuit court sentenced him to concurrent prison terms of fifteen years. (R., pp. 261-267). This appeal followed.

In an unpublished opinion filed December 17, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions, and denied Petitioner's Petition for Rehearing by Order filed January 23, 2015. (Appendix, pp. 1-9). On March 5, 2015, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, seeking review of the Court of Appeals decision, which this Court granted by Order dated February 16, 2016.

ARGUMENT

The circuit court properly allowed the State to present its case as indicted, the redacted, certified copy of Petitioner's prior conviction was offered as evidence of a specific statutory element of the offense rather than propensity evidence, the jury was properly instructed about the conviction's only purpose, and the probative value of the conviction outweighed its prejudicial effect as a matter of law.

Petitioner contends the circuit court erred in allowing the State to proceed under S.C. Code §16-3-655(A)(2), and introduce his 1997 lewd act conviction. He asserts the conviction's only relevance was to unduly prejudice the jury, and allowing its introduction constituted a denial of due process. While Petitioner's lengthy discussion of due process and admissibility of prior bad act evidence accurately reflects the case law on those issues, there are two fundamental flaws in his assertions relative to this case.

A. Prosecutorial Discretion

Petitioner completely ignores the well-established principle that the prosecutor has discretion to determine what charges to bring against a defendant.

“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.” Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (*quoting United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)). “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

State v. Geer, 391 S.C. 179, 705 S.E.2d 441, 449 (Ct. App. 2010) (quotations and citations in original); *see also* United States v. Batchelder, 442 U.S. 114, 123-124 (1979) (“This Court has long recognized that when an act violates more than one criminal

statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.”); Strickland v. State, 276 S.C. 17, 274 S.E.2d 430, 432 (1981) (fact that prosecuting attorney may select which of several offenses to charge is not unconstitutional) (*citing* Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 [1975]). “An accused person's protection lies in the fact that he may not be convicted unless upon a fair trial he is found guilty beyond a reasonable doubt of all of the elements of the offense of which he stands charged.” Simmons, 215 S.E.2d at 884-885.

This discretion does not end when charges are filed. Rather, it continues through the pre-trial proceedings, including plea negotiations, discovery and motions, until the case is actually tried. United States v. Goodwin, 457 U.S. 368 (1982).

In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to **realize that information possessed by the State has a broader significance**. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.

....

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some “burden” on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

. . . . A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. **An initial decision should not freeze future conduct**. As we made clear in Bordenkircher, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

Id. at 381-382 (1982) (footnotes omitted) (emphasis added).

In this case, the Grand Jury initially indicted Petitioner under S.C. Code §16-3-655(A)(1), which provides a person is guilty of first degree criminal sexual conduct with a minor if he commits a sexual battery on a victim less than eleven years of age. A conviction under that code section carries a mandatory minimum sentence of twenty-five years in prison, no part of which can be suspended and no probation granted, or life in prison. S.C. Code §16-3-655(D)(1) (Supp. 2013).

Approximately **four months** later, and well over a year **before** the case was called for trial, the Grand Jury indicted Petitioner under §16-3-655(A)(2), which provides a person is guilty of first degree criminal sexual conduct with a minor if he commits a sexual battery on a victim less than sixteen years of age, and has previously been convicted of an offense listed in S.C. Code §23-3-430(C), or been included in the sex offender registry pursuant to S.C. Code §23-3-430(D). A conviction under this code section carries a mandatory minimum prison sentence of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. S.C. Code §16-3-655(D)(2) (Supp. 2013). At trial, the solicitor elected to proceed only on the prior conviction prong, and never introduced evidence indicating Petitioner was also included in the sex offender registry. (R., pp. 16-17, 24-25).

There is no dispute the Victim was under the age of eleven at the time of the incidents, and a charge under §655(A)(1) was appropriate. On its face, however, §655(A)(2) includes victims under the age of eleven, and even though the charging decision was the solicitor's to make, she had never used §655(A)(2) before, and she

ultimately determined the sentencing parameters of §655(A)(2) were more fitting under the circumstances of the case. (R., pp. 3, 263). The solicitor acted well within her discretion in determining what charges to present to the Grand Jury in the case, Petitioner had ample notice of the charges prior to trial, and there was no due process violation in relation to the charges.

B. Prior Conviction as Element of Offense

Petitioner argues the sole reason the solicitor elected to proceed under §16-3-655(A)(2) was to circumvent the prohibition against propensity evidence. In advancing his position, however, Petitioner cites numerous federal and state cases regarding the general admissibility of propensity evidence, but glosses over the South Carolina case law regarding evidence of prior convictions in first degree burglary cases. Those cases are directly on point with the instant case regarding the admissibility of a prior conviction when the conviction itself is an **element** of the charged offense.

While generally inadmissible, propensity evidence is not prohibited, and it is admissible if offered for a purpose other than to show the defendant is a bad person, or acted in conformity with his prior conviction.¹ State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 230 (2000). “[E]vidence of other crimes **is admissible** to establish a material fact **or element of the crime charged.**” *Id.* (emphasis added). The State is still required to prove all elements of the offense charged beyond a reasonable doubt, and “due process

¹ “Propensity” is defined as a “natural inclination” or “bent.” Webster’s II New Riverside Dictionary, 549 (Rev. Ed. 1996). Thus, if the evidence at issue is not offered to show the defendant acted in conformity with his prior conduct, it is not “propensity” evidence by definition.

does not bar the admission of prior crimes simply because there is an accompanying prejudicial effect.” *Id.*; see also State v. James, 355 S.C. 25, 583 S.E.2d 745, 749-750 (2003) (same); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618, 622 (Ct. App. 2002) (same).

1. Burglary Statute

Under S.C. Code §16-11-311(A) (Supp. 2013), a person commits first degree burglary if he enters a dwelling without consent and with the intent to commit a crime therein, and one or more delineated aggravating circumstances exists. The statutory aggravating circumstances include presence or use of a deadly weapon, causing physical injury to a non-participant in the crime, the defendant has two or more prior convictions for burglary and/or housebreaking, or the entering or remaining occurs in the nighttime. The legislature chose to include the “two or more” prior convictions element of first degree burglary as a deterrent to repeat offenders.² Benton, 526 S.E.2d at 230.

If the defendant has two or more prior convictions, he cannot require the State to stipulate to the convictions, or to one of the other delineated aggravating circumstances, in lieu of presenting evidence regarding the prior convictions. Benton, 526 S.E.2d at 230 (State cannot be required to accept defendant’s stipulation to the existence of his prior convictions) (*citing* State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 [Ct. App. 1997]); Cheatham, 561 S.E.2d at 622 (State not required to accept defendant’s stipulation that

²If the Legislature intended to deter repeat burglary offenders, the intent to deter repeat sex offenders of children is necessarily more profound. As discussed below, the legislative decision to chose a different sentencing structure than the burglary statute does not change the underlying intent.

burglary occurred in the nighttime in lieu of presenting evidence of defendant's prior convictions). Allowing the State to present the prior convictions evidence does not dilute its burden of proof in violation of due process. Benton, 526 S.E.2d at 230; Cheatham, 561 S.E.2d at 622. When prior convictions are offered **to prove an element** of the charged offense, the evidence's probative value is **not** outweighed by its prejudicial effect. Benton, 526 S.E.2d at 230 (*citing* Rule 403, SCRE).

In James, the State admitted seven prior convictions, **five more** than required by the statute to prove first degree burglary. In reversing the first degree burglary conviction, the Court noted that under the rule of Old Chief v. United States, 519 U.S. 172 (1997), "the probative value of the convictions entered **beyond the two required by the statute** decreases because of the already sufficient evidence submitted to prove that element." *Id.* at 750 (emphasis added). Acknowledging "there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial," the Court found the "very great potential for prejudice" outweighed the probative value of "**all seven** prior convictions." *Id.* (emphasis supplied). In short, the probative value of the number of prior convictions required under the applicable statute outweighs the prejudicial effect as a matter of law, but admission of any prior convictions beyond that number requires a Rule 403 probative/prejudice analysis.

2. §16-3-655(A)(2)

Petitioner attempts to distinguish the burglary statute and cases by arguing §16-3-655(A)(2) is too broad because it allows the State to present evidence of a wide variety of prior convictions, including peeping, voyeurism, kidnapping, etc., while the burglary

statute only allows prior burglary and/or housebreaking convictions. He contends the State has “no legitimate state purpose in having any prior murder, lynching, hazing, assault, etc., involving a minor to be an element of CSC with a minor.” He further asserts the statute “is not reasonably designed to accomplish a purpose.” (Brief of Petitioner, p. 6). In essence, Petitioner contends §16-3-655(A)(2) is unconstitutional.

As a threshold matter, the constitutionality of the statute was not raised in the circuit court, and therefore, the issue is not preserved for appellate review. It is well established in South Carolina that an issue must be raised to and ruled on by the trial court to be preserved for appellate review. Roberts v. State, 408 S.C. 123, 757 S.E.2d 744, 748 (Ct. App. 2014) (*citing* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 [2011]). Even if properly before this Court, however, Petitioner erroneously characterizes the statute’s scope.

Contrary to Petitioner’s assertions, nothing in §16-3-655(A)(2) allows the State to use a “prior murder, lynching, hazing, assault, etc.” conviction to prove the prior conviction element of the charge. Rather, except for kidnaping (§23-3-430 (C) (15) and (16)), every crime referenced in 655(A)(2) involves some type of sexual misconduct, and many of the referenced crimes specifically involve sexual misconduct with or against a minor. It can hardly be disputed protecting children is a valid state purpose, and allowing proof of a prior conviction involving sexual misconduct involving minors as an element of a subsequent offense is a reasonable way to serve that purpose.

Further, Petitioner’s claim the only difference between 655(A)(1) and 655(A)(2) is the prior conviction element is inaccurate. The age range for the minor victims is

greater under (A)(2), and the sentencing structure is markedly different. There are many reasons the Legislature could have considered in creating an (A)(2) sentencing structure with a lower potential prison sentence, including the expanded age range and recognition of the potential prejudice, and the mere fact it has a potentially lower sentence does not render (A)(2) unconstitutional.

Finally, Petitioner's contention the manner in which the conviction was disclosed was highly prejudicial because of the way the document was redacted is meritless. Petitioner specifically requested the entire "Other Conditions" section and the actual sentence be redacted, and did not object to the way the redactions were done. (R., pp. 27-32, 201-202). Thus, he cannot now argue the redactions themselves made the document more prejudicial. *See State v. Curtis*, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (party cannot complain of error his own conduct created).

In this case, the circuit court expressly recognized the limitation established in James, and required the State to choose which part of §16-3-655(A)(2) it wanted to use. (R., pp. 16-17). At trial, the State only introduced the one prior conviction required under the statute. As a matter of law under Benton, James and Cheatham, the probative value of that evidence outweighed its prejudicial effect, and further balancing under Rule 403 was not required.

The circuit court properly instructed the jury twice regarding the limited purpose of the evidence, and admonished the jury not to use it for any other purpose. The jury deliberated for forty minutes, then asked to rehear the Victim's testimony and forensic interview, and requested a definition of penetration. After hearing the requested evidence

and receiving the requested information, the jury deliberated another twenty minutes before rendering a verdict. Thus, it is clear the jury did **not** convict Petitioner of the charged offense on the basis of his prior conviction, but carefully considered and focused on the evidence relating to whether a sexual battery occurred, and determined it did.

Based on the jury's finding a sexual battery did occur, Petitioner actually benefited from the State's decision to proceed under §16-3-655(A)(2). Since the Victim was under the age of eleven when the battery occurred, if the State had proceeded under §16-3-655(A)(1), Petitioner would have received at least the mandatory minimum prison sentence of twenty-five years, rather than the fifteen year sentence he received because the State proceeded under §16-3-655(A)(2).

The circuit court did not err in admitting evidence of Petitioner's prior lewd act conviction as evidence of an element of the offense charged, and the Court of Appeals properly affirmed the circuit court's ruling and Petitioner's convictions. Therefore, the Court of Appeals opinion should be affirmed.

CONCLUSION

Based on the foregoing, Petitioner submits the circuit court ruling, the Court of Appeals decision and Petitioner's convictions should be affirmed.

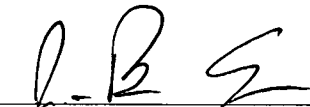
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CERTIFICATE OF SERVICE

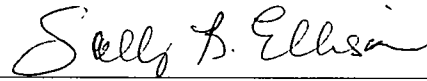
I, Sally B. Ellison, hereby certify I served the Brief of Petitioner on Petitioner by placing three copies in the United States Mail Service, postage pre-paid, addressed as follows:

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

This 27th day of April, 2016.

A handwritten signature in cursive script that reads "Sally B. Ellison". The signature is written in black ink and is positioned above a horizontal line.

Sally B. Ellison
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