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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SCOTT CROSS,

PETITIONER

APPELLATE CASE NO. 2013-002596

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Scott Cross, Appellant.

Appellate Case No. 2013-002596

Appeal From Abbeville County
Frank R. Addy, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-257
Submitted February 1, 2016 – Filed June 8, 2016

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

PER CURIAM: James Scott Cross appeals his convictions for first-degree criminal sexual conduct (CSC) with a minor and committing a lewd act on a minor, arguing the trial court erred in (1) refusing to bifurcate his trial to allow the jury to

determine guilt and then determine if he had the requisite prior conviction to establish first-degree CSC with a minor and (2) admitting evidence of his prior conviction for CSC with a minor when its probative value was substantially outweighed by the danger of unfair prejudice. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities.

1. As to whether the trial court erred in refusing to bifurcate the proceedings: *Spencer v. Texas*, 385 U.S. 554, 568-69 (1967) (holding the Fourteenth Amendment does not require states to hold bifurcated trials when the State admits evidence of prior crimes under a recidivist statute).

2. As to whether the trial court erred in admitting evidence of his prior conviction: *See* S.C. Code Ann. § 16-3-655(A)(2) (2015) (providing a prior conviction for first-degree CSC with a minor is an element of first-degree CSC with a minor); *State v. Benton*, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000) (holding "evidence of other crimes is admissible to establish a material fact or element of the crime"); *id.* at 155-56, 526 S.E.2d at 230 (finding "the probative value of admitting the defendant's prior burglary and/or housebreaking convictions [was] not outweighed by its prejudicial effect" when the prior convictions were an element of the current charge); *State v. Williams*, 409 S.C. 455, 464, 761 S.E.2d 770, 775 (Ct. App. 2014) ("A trial [court's] decision regarding the comparative probative value and prejudicial effect should be reversed only in 'exceptional circumstances.'" (alteration by *Williams*) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008))).

AFFIRMED.

HUFF, A.C.J., and KONDUROS and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

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THE STATE,

RESPONDENT,

V.

JAMES SCOTT CROSS,

PETITIONER.

APPELLATE CASE NO. 2013-002596

Appeal from Abbeville County

Frank R. Addy, Circuit Court Judge

Opinion No. 2016-UP-257

PETITION FOR REHEARING

This Court cited Spencer v. Texas, 385 U.S. 554 (2015) for the proposition that a bifurcated trial is not **required** where the defendant's prior record or status is an element of the offense to provide a defendant a fair trial not infected by the unfair prejudice of the jury learning of his prior criminal record or status. Spencer held, as this Court stated in the opinion in this case, that the Due Process Clause does **not require *states*** to hold bifurcated trials where the state admits evidence of a defendant's prior crimes under a recidivist statute. However, respect for matters of federalism *are not involved* in this case.

One Judge presently on this Court -- as a Circuit Court Judge -- in Berkeley County ordered the relief petitioner requested in this case -- a bifurcated trial to ensure the defendant's due process right to a fair trial was protected by preventing the jury deciding his guilt or innocence from learning of his status as a sex offender or his prior record during **that stage** of the trial.

Further, Spencer was decided in 1967, and the United States Supreme Court accepted the fact in that case, for example, that joint trials of co-defendants "[f]urnish inherent opportunities for unfairness," and that limiting instructions should literally limit the unfairness. Spencer v. Texas, 385 U.S. 554, 562 (1967). Bruton v. United States, 391 U.S. 123, (1968), was obviously decided in 1968, and some State Court Judges in this state thought State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014), signaled the end of joint trials altogether.

Our Supreme Court in 1987 wrote: "We urge the state to carefully consider all the available alternatives before deciding to try co-defendants jointly, especially in a capital case. While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials." State v. Bellamy, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987).

Prior convictions or status being made an element of the crime

The more modern discussion is whether the legislature can constitutionally pass a statute, for example, of the crime of "aggravated violence." An element of this offense is that the defendant had three or more misdemeanor or felony convictions *or* committed prior bad acts which involved "disorderly conduct," or an "assault," or forced him to have the "duty to register as a status offender" of any kind, or to have his movements monitored by electronic or other device. (This would obviously cover registration as a sex offender, or being subject to GPS monitoring. These

"elements" would all be alleged in the indictment. The state would not have to stipulate to any of the above since they were elements of the crime. See State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000).

The modern discussion, respectfully, is at **what point** do convictions or status offenses being made an element of the crime by the Legislature deny a defendant his due process right to a fair trial. Petitioner alleges it is at the point in this case where the jury learned of his prior conviction for criminal sexual conduct with a minor, or his status as a sex offender, where he was on trial for the same offense. This Court should grant rehearing since the remedy of ensuring petitioner his due process right to a fair trial by bifurcating the trial was readily apparent, and the trial judge respectfully rejected the well-reasoned argument in support of that argument in this case.

Specific underlying fact

The trial judge noted that the defense objected to the state offering the prior offense into evidence while petitioner'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 petitioner was convicted on the underlying charge then a short "second phase" before the jury would be held to determine whether petitioner 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 petitioner 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.

Issue two

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 petitioner 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 petitioner's prior sex conviction *at the same time* as the charge for which petitioner 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.

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 petitioner 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.

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).

Under the procedure set forth by the defense in this case the state would address its evidence about petitioner allegedly molesting the minor. If the jury found petitioner guilty of the underlying 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 petitioner 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.[1] 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)

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

(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 trial to protect petitioner from the extreme prejudice of the jury knowing he had a prior criminal sexual conduct conviction while not prejudicing the state one iota. If petitioner 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).

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).

Petitioner's remote 1992 conviction for criminal sexual conduct with a minor, without cavil, unduly prejudiced the jury in its determination of petitioner's guilt or innocence on the underlying charge. Obviously, evidence of the 1992 conviction was not admissible under Rule 404(b), SCRE

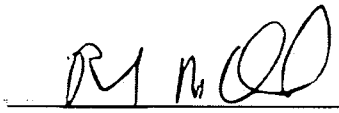
to "prove the character of a person in order to show action in conformity therewith." Moreover, prior convictions that are strikingly similar to the one the defendant is on trial for only exacerbate the danger of unfair prejudice. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

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 above, to insure petitioner had a fair trial while at the same time allowing the state to prove the element of the prior charge. The state sought to, and did, gratuitously prejudice petitioner here to the maximum degree. The judge erred by denying petitioner'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. Petitioner 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 petitioner'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, and this Court should grant rehearing.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 23rd day of June, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES SCOTT CROSS,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 23rd day of June, 2016.

RM M. Dudek

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day of June, 2016.

Samantha P. Duncan (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2016.

The South Carolina Court of Appeals

The State, Respondent,

v.

James Scott Cross, Appellant.

Appellate Case No. 2013-002596

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

A. Kent J.

John D. Geathers J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Mark Reynolds Farthing, Esquire
David Matthew Stumbo, Esquire