STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

JAMES SCOTT CROSS,

PETITIONER

APPELLATE CASE NO 2016-001939

Appeal from Abbeville County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 27903

RETURN TO PETITION FOR REHEARING

The state's rehearing petition reiterates the arguments and position taken by the dissent in State v. James Scott Cross, Op. No. 27903, Shearouse's Adv. Sh. No. 30 at 49-54. However, it is apparent that the 4-1 majority of this Court in State v. Cross already considered the forceful arguments of the dissent before rendering its opinion:

> The dissent sees the avenue of bifurcation as our unconstitutional adoption or sponsorship of a new rule of procedure. Specifically, the dissent complains that our reliance upon Rule 611(a) is inappropriate. We respectfully disagree. Our reliance upon Rule 611(a) stems from our recognition of the practical effect that should be given to its very terms, i.e., the trial 'court shall exercise reasonable control over the . . . order of . . . presenting evidence so as to (1) make the . . . presentation

> effective for the ascertainment of truth.' This is not a disguise for a motivation on our part to change the law or adopt a new rule of procedure. It is simply a plain reading of the English language. While there are certainly other settings in which Rule 611(a) would be applicable, its applicability here is undeniable: a party seeks to introduce relevant evidence, the evidence must be admitted, the evidence has high prejudicial effect, and a party requests the trial court to exercise its responsibility to control the order of presentation of that evidence so as to eliminate that prejudicial effect.
>
> The dissent notes the influence the Federal Rules of Evidence have had upon the drafting of the South Carolina Rules of Evidence. The dissent points out that the 'Note' to our Rule 611(a) states that our Rule 611(a) is identical to Federal Rule 611(a). While the wording of the two rules is not identical, we agree the import of the two rules is identical. The dissent then states Rule 611(a) does not 'permit the court to create or change procedural rules.' Interestingly, Federal Rule 611(a)(1) specifically provides a trial court should exercise reasonable control over the mode and order of presenting evidence 'so as to make those *procedures* effective for determining the truth.' (emphasis added). Therefore, Federal Rule 611(a)(1) plainly cites the trial court's authority to control the *procedures* inherent in the presentation of evidence. It is apparent the drafters of Rule 611(a)(1) recognized an inherently procedural component of the mode and order of presenting evidence. It is equally apparent that, contrary to the position taken by the dissent, we are changing no procedural rule and are creating no procedural rule. We are simply recognizing what has been there all along."

State v. James Scott Cross, Op. No. 27903, Shearouse's Av. Sh. No. 30 at 44-45.

Next, the state in its petition for rehearing claims the result in this case is unfair to the trial judge. A fair reading of this record reveals the trial judge knew he could bifurcate the trial as requested by defense counsel, but he reasoned a limiting instruction for this "intelligent jury" would be sufficient to cure the prejudice. See State v. James Scott Cross, Op. No. 27903, Shearouse's Av. Sh. No. 30 at 37.

Undersigned counsel has argued previously, and reiterates, if there was any unfairness to the trial judge, it resulted from the not well reasoned, and respectfully improper, arguments at the

trial level by the state. As discussed during oral argument before this Court, the solicitor argued that trial court did not even have to conduct a Rule 403, SCRE, analysis when determining whether evidence Cross had previously been convicted of an offense listed under S.C. Code § 23-3-430(C), or whether he was required to register as a sex offender pursuant to S.C. Code § 23-3-430(D) was admissible.

Further, as also argued in the brief of petitioner and discussed at oral argument in this case, the solicitor improperly urged the trial court that the unpublished opinion in State v. Welch, 2011-UP-503 (S.C. Ct.App. filed November 10, 2011) was on point in support of the state's argument that it had the absolute right to have the devastatingly prejudicial prior conviction evidence presented to the jury as the state saw fit. However, as argued in the brief of petitioner, this was improper because unpublished opinions have no precedential value and the issue in State v. Welch was a constitutional attack on the statute itself. The issue of bifurcation as a practical discretionary remedy was not even discussed in State Welch. See Brief of Petitioner at 7, n 1.

Thus, if there was any unfairness to the trial judge in this case, it was the solicitor arrogantly and erroneously arguing to the judge that the court did not even have to conduct a Rule 403, SCRE, analysis, and by mischaracterizing the holding, and even improperly citing the unpublished opinion in State v. Welch, 2011-UP-503 (S.C. Ct. App. filed November 10, 2011).

Moreover, as this Court also addressed in its opinion, the trial court understood the Rule 403, SCRE, argument and the request to bifurcate the trial arguments, and it ruled that "[t]he probative value for the state is extreme. The prejudicial effect, in my opinion, can be addressed by simply explaining to the jury that they're to draw no inference from the fact that he was previously convicted of this. *I have every reason to believe that this is an intelligent jury. . . .*

So that would be my ruling on that. I don't see the need to bifurcate, and I appreciate your position, however, your objection is noted for the record." State v. James Scott Cross, Op. No. 27903, Shearouse's Av. Sh. No. 30 at 37. (emphasis added). The trial court simply ruled that a limiting instruction could cure the prejudice and that bifurcation was not necessary. There was no unfairness to the trial judge that occurred in this case, and if there was any unfairness to the trial judge -- that unfairness respectfully was directly attributable to the improper arguments presented by the solicitor as previously argued before this Court in briefing and at oral argument.

Finally, in oral argument before this Court, Rule 403, SCRE, Rule 611, SCRE, and the inherent power of the trial court to assure a defendant received a fair trial were discussed. As one Justice asked the state to admit, the prejudice from the jury hearing evidence a defendant on trial for a sex crime had a prior conviction for a sex crime was a "ten" on a scale of "one to ten." Further, another Justice on this Court noted the "inescapable reality" of the visceral reaction jurors have when they hear the defendant has previously been convicted of a sex crime.

As a long-time advocate before this Court, counsel respectfully submits the 4-1 majority opinion of this Court in the present case was well reasoned, it considered the arguments of the state, those made by Cross, and those advanced by the dissent, before rendering its opinion. There most respectfully at this point is no sound reason to grant rehearing, and rehearing should be denied.

Respectfully Submitted,

ROBERT M. DUDEK
Chief Appellate Defender

This 15th day of August, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James Scott Cross, #185083, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of August, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 15th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028