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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY EUGENE LOTT,

Petitioner.

Appellate Case No. 2015-001981

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent and incorporates, by reference, its arguments presented in State v. James Scott Cross Op. No. 27903 (S.C. Sup. Ct. filed July 24, 2019) upon which this Court's ruling in the instant case is premised.

I.

Of course this Court is well aware that when it stated Judge Griffith "erred" in not granting the motion for a bifurcated trial on the basis of Rule 611, SCRE, it engaged in a legal fiction. Lott, like Cross, did not argue Rule 611 required the trial court to grant a bifurcated trial,

and Judge Griffith's error would be the failure to hold the first ever bifurcated trial in a non-capital case in South Carolina. His omission is in not recognizing, *sua sponte*, a previously unannounced determination that a rule of evidence, previously interpreted to provide him the ability control over the order of witnesses or evidence,[1] or the ability of a party to lead its own witness,[2] allowed him to order a bifurcated trial. This omission is better typified as judicial restraint rather than judicial error.

First, Rule 611 was never relied on as authority by Lott at any stage of judicial proceedings and the possible application of Rule 611 was not mentioned during oral argument in the present case. Judge Griffith was never told that Rule 611 would allow him to bifurcate the proceedings. Cross's novel interpretation of Rule 611 was never argued in the present case – it is not preserved for review. Issue preservation requirements are designed "to enable the lower court to rule properly after it has considered all relevant facts, **law**, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct App. 2006) (where issue not ruled on by intermediate appellate court and no petition for rehearing is filed seeking a ruling, the issue is not appropriate for this Court's review). The State was denied the ability to argue about the applicability of Rule 611 in the instant case because it was never raised by Lott or any court prior to this Court issuing its opinion.

II.

Additionally, as noted by Justice Few in his dissent in Cross and in the State's petition for rehearing in Cross, the holding in Cross created a new procedural rule without the necessary

[1] State v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (2018).
[2] Freiburger v. State, 413 S.C. 243, 775 S.E.2d 391 (Ct. App. 2015).

legislative approval. In Cross, this Court's interpretation of Rule 611 authorized bifurcation and this Court refuted the idea that it was creating a new rule of procedure. However, the Cross opinion did not just determine the timing of the introduction of evidence, but ordered that where there was previously one trial, there shall be two, with two sets of opening arguments, two sets of testimony and evidence, two sets of closing arguments, two sets of instructions for the jury, and of course, two sets of deliberations, followed by two sets of verdicts. The verdicts would be special verdicts or interrogatories[3]: For the first verdict, the jury must decide (1) if the defendant committed a sexual battery, and (2) if the victim 16 years of age or less. A verdict in the State's favor at this stage does not find a particular crime due to the broad age-range for this element. The second verdict would decide if the defendant is required to register as a sex offender or was previously convicted of one of the enumerated crimes. Therefore, the jury does not arrive at a guilty verdict, but instead the trial court pieces together two special verdicts from each of the two guilt phase proceedings to find the defendant guilty.[4]

"Procedure has been described as the machinery for carrying on the suit, including pleading, process, evidence, and practice, and the mode or proceeding by which a legal right is enforced, that which regulates the formal steps in an action." Gardner v. Gardner, 916 P.2d 43, 46 (Kan. App. 1996). Procedural rules regulate the "'manner and the means' by which the litigants' rights are enforced, ..." Shady Grove Orthopedic Associates v. Allstate Insurance

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[3] Special verdicts in civil actions are provided for in the Rules of Civil Procedure. Rule 49, SCRE.

[4] But see Carter v. State, 824 A.2d 123, 134 (Md. Ct. App. 2003) ("Eliminating an element of a charge from the jury's consideration renders the juror's 'no more than factfinders' and denies them their role as representatives of the community's conscience."). Cross results in a jury never stating "we the jury find the defendant guilty" of the crime proscribed by 16-3-655(A)(2). Instead, a patchwork of special verdicts leads to a guilty verdict. The jury's role is watered down by the Cross procedure.

Co., 130 S.Ct. 1431, 1442 (2010). It is "a form, manner, and order of conducting suits or prosecutions . . . ." Mahoning Val. Ry. Co. v. Santoro, 112 N.E. 190, 191 (1915) (finding the legislative limitation on the trial judge's power in granting new trials in civil actions "related to a matter of practice and procedure" rather than jurisdiction). The holdings of Cross and the instant case constitute a new rule of procedure that governs more than the timing or order of evidence, but create a whole new process which should be submitted to the legislature under this State's constitution.

Under S.C. Const. Art. V, §4A, this Court is required to submit all rules governing the practice and procedure in its courts as follows:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first date of February during each session. . . .

S.C. Const. Art. V, §4A.

Then Chief Justice Bruce Littlejohn described 4A "as a rational expression of the principle of checks and balances that underlies the separation of powers doctrine." James Lowell Underwood, The Constitution of South Carolina, Vol. I, p. 173. The Chief Justice explained: "It assures the right of the court to take the lead in rule-making while allowing the Assembly the right to participate by reviewing a rule, rejecting it and suggesting other approaches. It pleases me to announce that the plan has the endorsement of our court." Id.

The process of bifurcating the trial, even if for the purpose of fragmentizing evidence with the aim of reducing the risk of unfair prejudice, is still unquestionably a new procedural rule

however well-intentioned. Accordingly, the State would respectfully suggest that bifurcation should not be justified on a rule of evidence, but instead submitted to the General Assembly as it appears is required by our state's constitution.

III.

This Court, if choosing to uphold the new procedure in Cross, should nonetheless affirm the conviction and sentence as the general concerns for the potential danger of unfair prejudice under Rule 403, SCRE did not materialize in the present case as evidenced by the jury's verdict: the jury acquitted Lott of criminal sexual conduct in the first degree – the charge for which the jury was told the prior offense could be applied to – and convicted Lott for the separate charge of lewd act on a minor.

"'Unfair prejudice' within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). In the instant case, the verdict reflects the jury made its determination on careful review of the evidence rather than on emotion or in reckless disregard of the trial court's instructions to consider the prior conviction only for proof of an element of criminal sexual conduct with a minor.

IV.

Further, Lott's prior criminal conviction became admissible as impeachment evidence

because Lott opened the door to its admission. At trial, the following exchange took place between Lott and his counsel:

> Q: Have you ever touched her, period? Hugged her or anything else?
>
> A: Well, of course I've hugged the kid. You know, she was a loveable child. I mean, you know, getting off the motorcycle or whatever. But nothing in an inappropriate way. **You don't—you just don't do that.**

ROA. p. 213, line 24- p. 214, line 5 (emphasis added).

When Lott tells the jury that "you just don't do that," the implication is that he would never touch a minor inappropriately. The State is entitled to refute that assertion by impeaching Lott with his conviction for lewd act on a minor, in which he did touch a child inappropriately. "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012); see State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991). In the present case, the State did not need to impeach Lott with his prior conviction, since it was already admitted into evidence. However, merely because the State refrained from cross-examination does not change the fact that Lott's prior conviction was rendered admissible by his testimony. Therefore, evidence of the prior conviction would have become admissible in both parts of a bifurcated trial after Lott attested to not being the kind of person to touch a child inappropriately. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

V.

This Court, in the interests of justice to the State and the victim should not retroactively apply the new holding found in Cross to the present case. Regardless of whether Rule 611, SCRE provided the authority, since the rule's enactment, for a circuit judge to bifurcate a criminal trial; the conviction would have become admissible anyway in the first proceeding of a bifurcated trial because Lott opened the door to his prior conviction. Further, the jury exercised careful deliberation in convicting Lott of only one of the two offenses, and acquitting him of the offense for which the jury was told to consider the conviction. The retroactive application of the Cross holding in this case and any other cases like it is an unjust result for the State and the victims, which will require a second trial that runs the risk of inflicting further trauma on the child victims. Maryland v. Craig, 497 U.S. 836, 855 (1990) (noting the growing body of academic literature commenting on the psychological trauma suffered by child abuse victims that testify in court). Further, the failure to retry the present case will result in Lott being no longer supervised by GPS monitoring even though he has twice been convicted of sexual assaults on two separate children. See S.C. Code § 23-3-540; see also S.C. Code § 23-3-400 ("Statistics show that sex offenders often pose a high risk of re-offending."). In the present case, regardless of the procedure for future cases, this Court should affirm the conviction and sentence because Lott received a fair trial evidenced by the carefully considered verdict.

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: _____
David Spencer
Office of the Attorney General
S.C. Bar No 68571

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER/RESPONDENT

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STATE OF SOUTH CAROLINA

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Appeal From Greenwood County
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THE STATE, Respondent,

v.

GARY EUGENE LOTT, Petitioner.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Petition for Rehearing on the Petitioner by delivering two copies of the same addressed to his attorney of record, Kathrine H. Hudgins, Esquire, SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 15th day of August, 2019.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

August 15, 2019

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: The State v. Gary Eugene Lott
Appellate Case No: **2015-001981**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the State's Petition for Rehearing, as well as proof of service in the above-referenced case. By copy of this letter I am serving opposing counsel, Kathrine H. Hudgins, with a copy of this petition.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: Kathrine H. Hudgins, Esquire (with 2 copies)
Victim Advocacy Division