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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

REPLY TO RETURN TO
STATE'S PETITION FOR REHEARING

In reply to Lott's return to the State's Petition for rehearing, the State would respond:

I. Obviously the trial court questioned the existence of a mechanism for ordering a bifurcated trial when it responded Lott's motion was "very interesting" and recognized the State's burden of proving a prior offense to establish the element of the offense. This reflects the trial court's intrinsic understanding as to the lack of existing authority to chop proof of the elements of a crime into a series of special verdicts. It was Lott's responsibility to assert Rule 611, SCRE as allowing this novel trial procedure. If such authority was patent as the Cross majority indicated in its opinion, then Lott should have asserted this argument instead of making a conclusory argument. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005)

("The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error.").

II.

Lott responds to Justice Few's dissent from Cross, rather than the State's arguments put forth in the State's petition for rehearing. However, this Court should not divert its attention from the obvious procedural implications from an unnaturally broad reading of Rule 611, SCRE. Besides the inherent mitosis of a criminal trial creating in duplicate every part of a trial procedure, the Cross ruling also denies the jury its role as the consciousness of the community and denies the victims the opportunity for closure with a jury affirmatively announcing the defendant's guilt, rather than just a series of unlimited affirmative answers to interrogatories. 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."). Such a broad and novel interpretation of Rule 611 allows a circuit court to do what the Supreme Court is not, which is create whole new modes of trial and procedure without legislative procedure.

It is simply patent that Cross creates new procedure. "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 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.

III.

Lott relies on the jury's note to the trial court asking about the elements of lewd act in 1996 as proof that the jury did not follow the trial court's previous limiting instruction. That argument is reasonable until considering the trial court's response to the jury's note: "In regards to the sentencing sheet and your request for a definition of what the lewd act was in 1996, you're not to consider that case or its definition under the law in regard to this. That is a conviction for the purpose of whether or not the State proved the element of having a prior conviction. It is limited to that purpose only." R. p. 302, lines 13-20. This instruction ensured the jury would not consider the lewd act conviction for an improper purpose, which is further evidenced by the verdict itself. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court's jury charge). Given the clear curative instruction the trial court provided when responding to the jury's note, the unavoidable implication of reversal in this case based on the holding in Cross is that this Court lacks confidence in the ability of our courts' juries to follow simple and stern instructions.

IV.

The State reiterates its point that the conviction became admissible when Lott tried to insinuate he was not the kind of person to touch a child inappropriately. That the Solicitor

elected not to cross-examine Lott on this point is not fatal to this conclusion – the Solicitor did not need to cross-examine because the conviction was already admitted into evidence.

V.

Lott did not respond to the State's argument against the retroactive application of Cross to the instant case. 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. 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,

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September 2, 2019

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Reply to Return to State's Petition for Rehearing on Respondent 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 3rd day of September, 2019.

Anne Mueller

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