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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2013-002596

THE STATE,

Respondent,

vs.

JAMES SCOTT CROSS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his broad discretion by admitting the evidence of Appellant's prior conviction as proof of an element of first-degree criminal sexual conduct with a minor because the probative value of that evidence, which was necessary and essential to prove an element of the charged offense, was not substantially outweighed by the evidence's potential for undue prejudice. Furthermore, in light of the trial judge's efforts to minimize the evidence's potential for undue prejudice by limiting the information admitted in regard to the prior conviction and by issuing limiting instructions to the jury multiple times during trial, the trial judge did not abuse his broad discretion by denying Appellant's motion seeking a bifurcated trial even assuming the trial judge had the discretionary authority to bifurcate the trial.

STATEMENT OF THE CASE

In April of 2006, the Abbeville County Grand Jury indicted Appellant James Scott Cross for one count of committing or attempting to commit a lewd act upon a minor child. Thereafter, in September of 2013, the Abbeville County Grand Jury indicted Appellant for one additional count of first-degree criminal sexual conduct with a minor. On October 21, 2013, a jury trial was commenced in the Abbeville County Court of General Sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty-five years for first-degree criminal sexual conduct with a minor and fifteen years for committing or attempting to commit a lewd act upon a minor child. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

On December 29, 2005, a mother ("Mother") and father ("Father") were spending time at their home in Iva, South Carolina, with their thirteen-year-old daughter ("Victim"), nine-year-old son, and nine-year-old nephew. (R. pp. 64-65; p. 67; pp. 136-137; pp. 172-174; p. 190; pp. 221-222; p. 226). Later that day, several of Mother and Father's friends came over to visit, including Appellant James Scott Cross and his wife.[1] (R. pp. 65-66; p. 139; pp. 175-176; pp. 190-191; p. 211; pp. 222-223). After Appellant and the others arrived, Mother, Father, Appellant's wife, and another of their friends, Jeremy Hanks, remained inside the home, watched television, and chatted. (R. pp. 211-212; p. 224). Meanwhile, Appellant, who was thirty-five years old at the time, accompanied Victim and the other children outside and played hide-and-seek with them until it became dark outside. (R. p. 65; pp. 67-68; pp. 124-125; pp. 139-140; p. 193; pp. 211-212; p. 225).

During the last game of hide-and-seek, Victim hid by herself behind a bushy tree located at the rear of her home in an unlit area. (R. p. 68; pp. 74-75; p. 119; p. 140; p. 177). As she did so, Appellant approached her hiding spot and began kissing her and touching her breasts and vagina. (R. p. 68). He then forced her to the ground and pulled her pants down. (R. pp. 68-69). Terrified, Victim attempted to call for help, but Appellant covered her mouth with his hand and threatened to hurt her if she made any noise. (R. p. 69). He then inserted his penis into Victim's vagina and raped her for several minutes until he was finished. (R. p. 69). After that, Appellant threatened to harm Victim or her family if she revealed what had occurred. (R. p. 69).

[1] During trial, Mother explained she had been best friends with Appellant's wife, who was Appellant's fiancée at the time of the incident, and had participated in her wedding to Appellant shortly after the date of the incident but prior to Victim's disclosure of the sexual assault. (R. p. 223; pp. 234-235).

Once the sexual assault was over, Victim went back into her home and ran to her bedroom while Appellant, who was sweating profusely and appeared to be nervous, quickly gathered his wife and abruptly ended his visit with Victim and her family. (R. p. 70; pp. 76-77; pp. 145-146; p. 176; p. 197; pp. 212-213; p. 229). Victim then remained in her room for roughly an hour before going to the bathroom, taking a bath, and throwing her clothes into the laundry. (R. p. 71; p. 230). After that, Victim returned to her bedroom, took out her diary, and wrote down the details of the incident with Appellant in an effort to comfort herself. (R. p. 71). However, she decided not to reveal the sexual assault to her parents at that time. (R. p. 76).

A few weeks later, Victim went to her grandparents' house for a visit. (R. pp. 85-86; pp. 179-180; p. 230). While she was gone, Father went into her room one night, found her diary, and began to read through it. (R. p. 86; pp. 179-180; p. 230; p. 239). Upon doing so, he came across the passage in which Victim detailed the incident involving Appellant, and he immediately showed it to Mother. (R. p. 180; pp. 230-231). The two then decided to wait until the morning before calling for Victim to return home, and, once she was back home, they spoke with her about what they read in her diary. (R. p. 87; p. 184; p. 231). At that time, Victim revealed she had been sexually assaulted by Appellant on the date of the incident, and her parents responded by quickly reporting the sexual assault to law enforcement. (R. p. 87; pp. 180-181; pp.231-232).

Thereafter, Sergeant Deputy Leslie Norman of the Abbeville County Sheriff's Office met with Victim, who appeared to be shaken up and traumatized, to discuss the incident. (R. p. 161; p. 169). During their conversation, Victim reported she was sexually assaulted by Appellant behind a tree during a game of hide-and-seek. (R. p. 162; p. 167). Sergeant Deputy Norman then referred Victim for a forensic interview, and

Victim again disclosed she was sexually assaulted by Appellant behind her home during a game of hide-and-seek. (R. p. 165; pp. 285-288; pp. 294-296). After that, Victim was referred for a physical examination and was examined by Dr. Lyle Pritchard, an expert in pediatrics. (R. pp. 153-156). During that examination, Dr. Pritchard discovered a small cleft in Victim's hymen that could have resulted from trauma, but her findings were otherwise normal. (R. p. 157; p. 160).

Subsequently, Appellant was arrested and indicted for one count of committing or attempting to commit a lewd act upon a minor child along with one count of first-degree criminal sexual conduct with a minor pursuant to S.C. Code Ann. § 16-3-655(A)(2) based on the fact he had previously been conviction of first-degree criminal sexual conduct with a minor. (R. pp. 9-10; p. 28; pp. 435-438). He then proceeded to trial. (R. p. 2).

At the outset of trial, defense counsel moved for Appellant's trial to be bifurcated due to the potential for prejudice he contended the evidence of Appellant's prior conviction would cause if it were introduced to prove the prior conviction element of first-degree criminal sexual conduct with a minor.[2] (R. pp. 29-30). In support of that motion, defense counsel argued Appellant should first be tried on the lewd act charge and on an unindicted charge of second-degree criminal sexual conduct with a minor. (R. p. 29). Then, if Appellant was convicted of the unindicted second-degree criminal sexual conduct with a minor charge, defense counsel proposed evidence of Appellant's prior conviction could be submitted to the jury to allow the jury to decide whether the State had proved Appellant was actually guilty of all of the elements of the indicted offense of first-degree criminal sexual conduct with a minor. (R. p. 29). However, in the event the

[2] Notably, in seeking bifurcation, defense counsel conceded to the trial judge the United States Supreme Court had previously found the introduction of a prior conviction to prove an element of an offense in a non-bifurcated trial did not violate a defendant's due process rights. (R. pp. 29-30)

bifurcation motion was denied, defense counsel asked the trial judge to conduct an analysis pursuant to Rule 403, SCRE, in regard to the evidence of the prior conviction while contending Appellant should be permitted to stipulate he had previously been convicted of an offense sufficient to prove the prior conviction element of first-degree criminal sexual conduct with a minor. (R. pp. 30-32).

In response, the solicitor noted Appellant had been indicted for first-degree criminal sexual conduct with a minor pursuant to S.C. Code Ann. § 16-3-655(A)(2), which required proof of a prior conviction for an offense listed in S.C. Code Ann. § 23-3-430(C) in order to establish one of the elements of the offense, and had previously been convicted of first-degree criminal sexual conduct with a minor, which was an offense listing in S.C. Code Ann. § 23-3-430(C). (R. pp. 32-33). As a result, the solicitor contended he was entitled to prove all of the elements of the indicted offense of first-degree criminal sexual conduct with a minor to the jury and asserted proving those elements would not deny Appellant his right to a fair trial. (R. pp. 33-34).

After considering the arguments of counsel, the trial judge determined the evidence of Appellant's prior conviction was of essential probative value since it constituted direct proof of an element of first-degree criminal sexual conduct with a minor. (R. p. 35). Furthermore, regarding the evidence's potential for undue prejudice, the trial judge found he could minimize any risk of such prejudice by providing a limiting instruction to the jurors in regard to the limited nature for which they could consider the prior conviction evidence while confirming he would do so at both the time the evidence was introduced and as part of his final jury instructions to the jurors.[3] (R. pp. 35-36). In

[3] Specifically, the trial judge ruled: "I'm basically finding I don't know what could be more probative – when we're dealing with an element of the crime nothing could be more probative than the fact that there's an indictment indicating that he was convicted of or pled guilty of a crime. I don't know that you get better

light of those findings, the trial judge determined there was no need for Appellant's trial to be bifurcated and denied defense counsel's bifurcation motion. (R. p. 36).

Thereafter, during trial, Victim recounted the details of the sexual assault and identified Appellant in the courtroom as her assailant. (R. pp. 65-76). Following her testimony, the solicitor moved for certified copies of an indictment and sentencing sheet from Appellant's prior conviction to be admitted into evidence, and defense counsel objected "to an attorney moving anything into evidence."[4] (R. p. 134). The trial judge then admitted the evidence, and the solicitor advised the jury it indicated Appellant had previously been convicted of first-degree criminal sexual conduct with a minor. (R. pp. 134-135). At that point, the trial judge presented a limiting instruction to the jury in regard to the evidence of Appellant's prior conviction, stating:

> Now, ladies and gentlemen, I need to explain something to you with regard to this. In this case the State has introduced this previous conviction whereby the Defendant was convicted of criminal sexual conduct with a minor. The only reason that this conviction is being admitted, ladies and gentlemen, the only reason that this previous conviction is being admitted is that it is an element – it is one of the elements of the underlying charge that we are trying here today. So this conviction can only be considered by you, if at all, or if you conclude that it's true, as an element of the current charge of CSC with a minor first degree, and this indictment, or this conviction, can be considered by your for no other purpose whatsoever. Again, the prior conviction is only evidence of one of the elements that the State has to prove that I'll explain to you later in order to support a conviction in the case that we are

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evidence of that in terms of proving an element that the legislature has decided to include within the CSC first, or CSC with a minor first. So clearly the 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. They certainly seem very intelligent. And I'm more than happy to even consider [defense counsel] any sort of limiting charge or instruction that he would want me to give . . . to them both at the time the indictment is introduced into evidence and at the conclusion of trial. So I'd be more than happy to entertain anything that you may want to present to the Court in the way of a limiting instruction so that they're – so that any risk of prejudice is minimized to the highest degree possible. So that would be my ruling on that. I don't see the need to bifurcate and I appreciate your position[.]" (R. pp. 35-36).

[4] Notably, the certified copy of the indictment from Appellant's prior conviction was edited to remove any reference to the age or name of Appellant's earlier victim. (R. pp. 130-131; pp. 430-432).

currently trying. You cannot consider in any way, shape or form the Defendant's prior record or this prior conviction as evidence of his guilt of the charge that we're trying or the case that we are trying today.

(R. p. 135). The trial then continued forward without objection. (R. p. 135).

Subsequently, at the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 387-418). During those instructions, the trial judge explained to the jurors they must accept the law as it was charged to them and were required to apply it "exactly" as it was stated.[5] (R. p. 409). Furthermore, the trial judge instructed the jurors on the elements of first-degree criminal sexual conduct with a minor, including on the element requiring proof Appellant had previously been convicted of an offense listed in S.C. Code Ann. § 23-3-430(C), before reiterating:

> Now, ladies and gentlemen, the fact that the Defendant has previously been convicted of criminal sexual conduct with a minor can only be considered by you as an element of the present charge of criminal sexual conduct with a minor first degree and for no other purpose. You must not consider the Defendant's prior record or his prior convictions as any evidence of guilt with respect to the charges for which the Defendant is currently on trial.

(R. pp. 413-414).

Thereafter, at the conclusion of trial, the jury convicted Appellant of both of the indicted offenses. (R. p. 420). The trial judge then sentenced Appellant to an aggregate twenty-five-year term of imprisonment for the convictions. (R. pp. 428-429).

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[5] Significantly, that jury instruction was consistent with the preliminary instructions the trial judge presented to the jury at the outset of trial. (R. p. 51). Specifically, during his preliminary instructions, the trial judge explained: "The law is given by the court as the only law that you may consider. You have to accept it and follow it even though you may disagree with it. The law does not permit me to have an opinion about what the facts are, ladies and gentlemen, and similarly you cannot disagree with me about what the law is or what the law ought to be. Your job will be to take the law as I give it to you, apply it to the facts as you find them to be from the testimony and evidence presented. And after doing that you'll render your verdict, a true and just verdict under the oath that you have just taken." (R. p. 51).

ARGUMENT

The trial judge did not abuse his broad discretion by admitting the evidence of Appellant's prior conviction as proof of an element of first-degree criminal sexual conduct with a minor because the probative value of that evidence, which was necessary and essential to prove an element of the charged offense, was not substantially outweighed by the evidence's potential for undue prejudice. Furthermore, in light of the trial judge's efforts to minimize the evidence's potential for undue prejudice by limiting the information admitted in regard to the prior conviction and by issuing limiting instructions to the jury multiple times during trial, the trial judge did not abuse his broad discretion by denying Appellant's motion seeking a bifurcated trial even assuming the trial judge had the discretionary authority to bifurcate the trial.

Appellant contends the trial judge erred by denying his motion for a bifurcated trial on his first-degree criminal sexual conduct with a minor charge and by admitting the evidence of his prior conviction as proof of an element of that offense. In support of that contention, Appellant maintains the trial judge committed an abuse of discretion by determining the prior conviction evidence was not unduly prejudicial and deprived him of his right to a fair trial by denying his bifurcation motion. Contrary to those contentions, the trial judge properly considered the probative value of the prior conviction evidence, which was necessary to prove the prior conviction element of first-degree criminal sexual conduct with a minor, in relation to the evidence's potential for undue prejudice, which the trial judge determined could be minimized through limiting instructions and by limiting the information presented in regard to Appellant's prior conviction. After conducting that comparative analysis, the trial judge correctly determined the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice in light of the essential nature of the evidence as proof of the charged offense and the steps that could be taken to minimize any potential prejudice. Furthermore, based on the curative measures the trial judge implemented during trial in regard to the prior conviction evidence, the trial judge's decision not to bifurcate the trial – assuming for

argument's sake bifurcation was an appropriate measure – was not an abuse of his broad discretion in conducting the trial. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Likewise, decisions regarding the conduct of a criminal trial are left largely to the sound discretion of trial judges, and a trial judge's ruling on the conduct of a trial will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007); see State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) ("Necessarily the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ANALYSIS

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ").

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other

grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). However, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In the case at bar, Appellant was charged with committing first-degree criminal sexual conduct with a minor in violation of S.C. Code Ann. § 16-3-655(A)(2). Pursuant to that statutory section, an individual is guilty of first-degree criminal sexual conduct with a minor if he or she "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)."[6] S.C. Code Ann. § 16-3-655(A)(2). Notably, in delineating the elements of the offense, the legislature chose not only to make the age of the victim and the commission of a sexual battery elements of the offense but, in order to deter recidivist sex offenders, also elected to make the fact the offender had previously committed an offense that required him or her to be placed on the sex offender registry an element of the offense. Id.; cf. State v. Benton, 338 S.C. 151, 154, 526 S.E.2d 228, 230 (2000) ("To deter repeat offenders, the General Assembly chose to include two or more prior burglary and/or housebreaking convictions as an element of first degree burglary."). Thus, in order to prove Appellant's guilt for the charged offense, the solicitor was required to prove Appellant committed a sexual battery with a victim under the age of sixteen and was on the sex offender registry by virtue of a conviction for a delineated offense – such as first-degree criminal sexual conduct with a minor – or by virtue of a sentencing judge making a determination there was good cause for him to register as a sex offender.

In order to prove the element of first-degree criminal sexual conduct with a minor that required a showing Appellant was a recidivist sex offender, the solicitor in Appellant's case introduced into evidence certified copies of the indictment and sentencing sheet from Appellant's prior conviction for first-degree criminal sexual

[6] Regarding the statutory sections referenced in S.C. Code Ann. § 16-3-655(A)(2), S.C. Code Ann. § 23-3-430(C) outlines a list of different offenses involving criminal conduct of a sexual nature that require offenders to register as sex offenders in South Carolina upon conviction. See S.C. Code 23-3-430(C) (requiring sex offender registration for anyone convicted of twenty-two delineated South Carolina offenses, including first-degree criminal sexual conduct with a minor, or "any other offense specified in" the federal Sex Offender Registration and Notification Act). Likewise, S.C. Code Ann. § 23-3-430(D) provides a trial judge with discretion to place any offender convicted of an offense **not** listed in Section 23-3-430(C) on the South Carolina sex offender registry if good cause is shown. See S.C. Code Ann. § 23-3-430(D) ("Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.").

conduct with a minor, which unquestionably was a qualifying offense pursuant to the requirements of the statute. See S.C. Code 23-3-430(C)(4) (identifying first-degree criminal sexual conduct with a minor as one of the offenses requiring sex offender registration upon conviction). Through that evidence alone, the solicitor was able to prove to the jurors, who were required to find Appellant guilty beyond a reasonable doubt of each and every element of the indicted offense, Appellant had previously been convicted of an offense listed in S.C. Code Ann. § 23-3-430(C). See In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) ("[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime."). For that reason, the evidence of Appellant's prior conviction, which had been redacted to remove the age and name of Appellant's earlier victim in an effort to minimize its potential for prejudice, had immense probative value in Appellant's case as it established an element of the offense that necessarily had to be proven, and, since that evidence was essential to prove the charged offense, the probative value of the evidence was not – and could not be – substantially outweighed by a danger of unfair prejudice, which was particularly true in light of the limiting instructions the trial judge presented to the jury in regard to the evidence of the prior conviction both after it was introduced and before the jurors began their deliberations.[7] See United States v. Gaudin,

[7] Notably, Appellant did **not** object to the sufficiency of the trial judge's limiting instructions during trial or allege those instructions were unlikely to be followed by the jurors. See State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("[A]s the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review."); see also State v. Mitchell, 330 S.C. 189,

515 U.S. 506, 510 (1995) ("[The Fifth Amendment and Sixth Amendment to the United States Constitution] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); see also Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." (citations omitted)); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."); cf. State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) ("The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented."). As a result, the trial judge did not abuse his discretion in admitting the evidence of Appellant's prior conviction for the limited purpose of proving an element of the indicted offense after appropriately evaluating the comparative value of that evidence.[8] See State v. Cheatham, 349 S.C. 101, 109-110, 561

195, 498 S.E.2d 642, 645 (1998) (instructing an appellant cannot complain on appeal about a particular ruling if the appellant acquiesces to that ruling during trial). Therefore, Appellant is precluded from challenging the sufficiency of the limiting instructions for the first time on appeal. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

[8] Interestingly, in challenging the trial judge's ruling on the comparative probative value and potential prejudicial effect of the evidence of Appellant's prior conviction, Appellant focuses his argument on appeal solely on that evidence's potential for undue prejudice while making no argument in regard to the trial judge's finding the evidence had essential probative value that was not substantially outweighed by the

S.E.2d 618, 623 (Ct. App. 2002) ("It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first degree burglary does not constitute unfair prejudice in this case. Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice."); see also Old Chief v. United States, 519 U.S. 172, 183, n. 7 (1997) ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.").

Furthermore, in light of the efforts he took to minimize any undue prejudice coupled with his correct findings regarding the comparative probative value and potential prejudicial effect of the prior conviction evidence, the trial judge did not abuse his broad discretion in denying Appellant's motion seeking a bifurcated trial, which was a method of trial to which Appellant had no specific and inalienable right, even assuming for

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danger of unfair prejudice in light of the fact it was necessary to prove an element of the charged offense. (App. Br. pp. 11-13). Instead, after focusing his argument only on one aspect of the comparative value of the evidence, Appellant shifts his focus to Victim and points out various issues he has with her testimony, including in regard to her troubles in remembering details of an event that occurred nearly eight years earlier, her enrollment in self-contained classes while she was attending school, and her failure to go beyond the ninth grade with her schooling. (App. Br. pp. 12-13). Appellant then concludes his appellate argument, which is purportedly designed to establish the trial judge abused his discretion in ruling on the comparative probative value and potential prejudicial effect of the prior conviction evidence, by making a troubling and unsubstantiated claim Victim's family was "dysfunctional . . . sexually and otherwise" while including no reference to any part of the record that would support such a claim. (App. Br. p. 13).

argument's sake bifurcation had been a permissible option available in Appellant's case.[9] See State v. Bennett, 256 S.C. 234, 242, 182 S.E.2d 291, 295 (1971) ("Appellant contends that it was prejudicial error to deny his motion for two trials, one on the question of guilt, and the other for determining the sentence. **Such is not required by either the common law, the statutory law, or the constitution of this State.** It has now been settled by the United States Supreme Court that a bifurcated trial is not required by the United States Constitution." (emphasis added)). That is true because, just as the trial judge recognized in issuing his ruling, the trial judge had means available to him to minimize the risk of undue prejudice the evidence of Appellant's prior conviction

[9] Notably, Appellant has not identified any authority that would specifically authorize a trial judge in South Carolina to bifurcate a criminal trial to prevent the jury from considering all of the elements of a single offense at the same time during a unitary trial, and our criminal procedure rules do **not** expressly authorize such a trial method even though bifurcated trials are authorized in the context of a civil trial under our civil procedure rules. See Rule 42(b), SCRCP (stating a trial judge "**may** order a separate trial . . . of any separate issue . . . always preserving inviolate the right of trial by jury" (emphasis added)); see also State v. Wren, 322 S.C. 103, 106, 470 S.E.2d 111, 112 (Ct. App. 1996) ("The Rules of Civil Procedure apply to '. . . every trial court of civil jurisdiction within this State . . . .' Because this was a criminal case, the Rules of Civil Procedure **were not applicable**." (emphasis added and citation omitted)); see generally Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "). In fact, many courts have determined a trial judge **cannot** properly bifurcate a criminal trial simply to prevent the jury from considering an element that is potentially more prejudicial than other elements at the same time it considers those other elements. See Carter v. State, 374 Md. 693, 710, 824 A.2d 123, 134 (Md. 2003) ("Many courts have concluded that a trial judge does not possess authority to bifurcate a defendant's charge to prevent the jury from considering an element of that charge."). Significantly, the reason for such a prohibition is the trying of the elements of a single offense separately has the potential to disrupt the orderly trial of criminal cases and to impact the reliability of a jury's judgment. See People v. Fullerton, 186 Colo. 97, 100-101, 525 P.2d 1166, 1167-1168 (Colo. 1974) ("[T]he prior conviction does not go merely to the punishment to be imposed, but rather is an element of the substantive offense charged. The distinction is critical. The potential prejudice to the defendant from a unitary trial of the issues must be weighed against the need to prevent undue interference with the administration of criminal justice. . . . [W]here, as here, the issues sought to be tried separately are both elements of the same crime, the potential for disruption of the orderly trial of criminal cases is great. Many crimes contain one element which is more prejudicial than another. Were we to permit bifurcation in this case, every crime which contains two elements, one of which is prejudicial to the accused, could result in a bifurcated trial. . . . A defendant's right to a fair trial can be safeguarded without the disruption of trials which the bifurcated proceeding necessarily entails. The proper way for the court to prevent the possibility that evidence offered to establish one element of the crime will influence jury findings as to the other elements is to give careful and thorough jury instructions."); Carter, 374 Md. at 713, 824 A.2d at 136 ("The jury's role in deciding guilt or innocence involves more than merely finding innocuous facts; rather, it requires a judgment about an individual's behavior based on an established code. This determination cannot be reached reliably without a full appreciation of the criminality of one's behavior."); see generally Old Chief, 519 U.S. at 189 ("[T]he prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.").

could cause **aside from** employing the abnormal remedy of bifurcating the trial on the different elements of the charged offense. See Spencer v. Texas, 385 U.S. 554, 568 (1967) ("Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."). Critically, just as our appellate courts have instructed should be done in first-degree burglary cases when evidence of two or prior burglary or housebreaking convictions is introduced, the trial judge redacted facts from Appellant's earlier indictment that were unnecessary to prove to the charged offense and issued two separate limiting instructions to prevent the jury from considering Appellant's prior conviction for any purpose other than as evidence of the element expressly requiring proof of that prior conviction.[10] See Benton, 338 S.C. at 156, 526 S.E.2d at 230-231 ("To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered."); State v. Simmons, 352 S.C. 342, 357, 573 S.E.2d 856, 864 (Ct. App. 2002) (explaining a trial judge should limit evidence of prior convictions offered to prove an element of first-degree burglary by excluding particular information about the details of the prior convictions and by issuing a limiting instruction to the jury upon request); State v. Hamilton, 327 S.C. 440, 447, 486 S.E.2d 512, 516 (Ct. App. 1998)

[10] Significantly, the trial judge's issuance of a limiting instruction instead of bifurcating the trial was entirely consistent with the method to be followed when evidence of limited admissibility is introduced during trial as outlined by the South Carolina Rules of Evidence. See Rule 105, SCRE ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

("When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered."); see also United States v. Gilliam, 994 F.2d 97, 100 (2nd Cir. 1993) ("[W]here the district court issues a proper curative instruction, we must presume that a conscientious jury will only use the proof of the prior conviction to satisfy the element of the crime."). Based on those curative measures, a bifurcated trial was not necessary in order to ensure Appellant received a fair trial under the circumstances. See Spencer, 385 U.S. at 563-564 (instructing the admission of evidence of a prior conviction in a non-bifurcated trial does not violate a defendant's constitutional rights or deny the defendant a fair trial). Therefore, the trial judge did not abuse his broad discretion by denying the request for a bifurcated trial. See State v. Brown, 180 N.J. 572, 585, 853 A.2d 260, 267-268 (N.J. 2004) (finding Brown was not denied the right to a fair trial by the trial judge's denial of his motion for a bifurcated trial since the trial judge took steps to eliminate any prejudice that could have resulted from the admission of evidence of Brown's prior conviction, including issuing a limiting instruction and limiting the information that could be introduced in regard to the prior conviction); see also State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) ("The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.").

In conclusion, the trial judge in Appellant's case followed the procedure outlined and approved by our appellate courts for minimizing prior conviction evidence's potential for undue prejudice after correctly finding the probative value of that evidence was not substantially outweighed by its danger for undue prejudice in light of the fact it

was necessary to prove an element of first-degree criminal sexual conduct with a minor. Cf. Simmons, 352 S.C. at 358, 573 S.E.2d at 856 (finding no error in the admission of prior conviction evidence offered to prove an element of an offense where "[t]he jury was not informed of the specific details of the crimes or convictions" and "[t]he jury was instructed that they should consider the convictions only as proof of an element of first degree burglary and that they were not to consider the convictions as proof that Simmons was guilty of the current crime"). Under those circumstances, the trial judge did not abuse his broad discretion in conducting Appellant's trial even assuming for the sake of argument he had the discretionary authority to bifurcate it. See Spencer, 385 U.S. at 564 ("[A] state rule of law 'does not rule afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' " (citations omitted)). Accordingly, for the foregoing reasons, Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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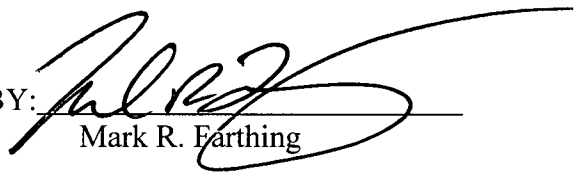
BY: 
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July 27, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2013-002596

THE STATE,

Respondent,

vs.

JAMES SCOTT CROSS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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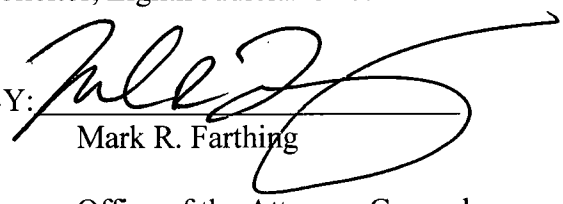
BY: 
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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 27th day of July, 2015.

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