



The Supreme Court of South Carolina

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September 27, 2019

The Honorable Chastity Copeland
Clerk of Court, Greenwood County
528 Monument Street Rm #114
Greenwood SC 29646

REMITTITUR

Re: The State v. Gary Eugene Lott
Lower Court Case No. 2013GS2400101
Appellate Case No. 2015-001981

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc:

Kathrine Haggard Hudgins, Esquire

David Matthew Stumbo, Esquire

David A. Spencer, Esquire

Alan McCrory Wilson, Esquire

Mark Reynolds Farthing, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Gary Eugene Lott, Petitioner.

Appellate Case No. 2015-001981

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Eugene C. Griffith Jr., Circuit Court Judge

Memorandum Opinion No. 2019-MO-033
Heard February 14, 2018 – Filed August 7, 2019

REVERSED AND REMANDED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior
Assistant Attorney General David A. Spencer, and
Assistant Attorney General Mark Reynolds Farthing, all

of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

JUSTICE JAMES: Gary Eugene Lott was indicted for first-degree criminal sexual conduct (CSC) with a minor and committing a lewd act on a minor. The young girl (Victim) was eleven years old at the time of the incident. Victim alleged Lott—a friend of her mother and step-father—had spent the night at their home and had touched her inappropriately while she was asleep on the couch in the living room. Lott denied touching Victim at any point throughout the night and denied ever touching Victim inappropriately.

Lott's first-degree CSC with a minor charge was premised on (1) the sexual battery alleged by Victim and (2) Lott's 1996 conviction for committing a lewd act on a minor, in which he was required to register as a sex offender. *See* S.C. Code Ann. § 16-3-655(A)(2) (2015) (providing a person is guilty of first-degree CSC with a minor if "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)^[1] or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)").

Prior to trial, Lott moved for the trial court to limit the introduction of evidence concerning his 1996 lewd act conviction. He argued the State sought to introduce this evidence "for the obvious purpose" of revealing to the jury his propensity to commit sexual offenses against children. Lott contended such introduction would constitute a violation of Rule 403 of the South Carolina Rules

¹ Although committing a lewd act on a minor is not currently on the list of qualifying offenses in section 23-3-430(C) of the South Carolina Code (Supp. 2018), it was listed as a qualifying offense when Lott was indicted in 2011. *See* S.C. Code Ann. § 23-3-430(C)(11) (Supp. 2010). The lewd act statute was repealed in 2012, but "[t]he crime that was lewd act is now classified as [CSC] with a minor in the third degree." *State v. McGaha*, 404 S.C. 289, 293 n.3, 744 S.E.2d 602, 604 n.3 (Ct. App. 2013). Third-degree CSC with a minor has since replaced the offense of committing a lewd act on a minor on the list of qualifying offenses. *See* S.C. Code Ann. § 23-3-430(C)(6) (Supp. 2018).

of Evidence.² The State argued evidence of the prior lewd act conviction was extremely probative because it was an element of the first-degree CSC with a minor charge that it was required to prove.

To lessen the prejudicial effect of the evidence, Lott offered to stipulate that he had previously been convicted of a crime listed in section 23-3-430(C) and that he was required to register as a sex offender pursuant to his conviction. Alternatively, Lott proposed to bifurcate the proceedings to permit the State to prove the prior conviction element *after* the jury determined whether he was guilty of the underlying sexual element of the offense.

The trial court denied Lott's requests, and the State introduced evidence of his 1996 conviction for lewd act and evidence of his sex offender registration. The jury acquitted Lott of the first-degree CSC with a minor charge but convicted him of committing a lewd act on a minor. The trial court imposed a fifteen-year prison sentence. The court of appeals affirmed. *State v. Lott*, Op. No. 2015-UP-266 (S.C. Ct. App. filed May 27, 2015). We granted Lott's petition for a writ of certiorari.

Pursuant to our recent decision in *State v. Cross*, Op. No. 27903 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 33), we hold the trial court erred in refusing Lott's request to bifurcate the trial. A bifurcated proceeding would allow the State to present evidence of all elements of the crime charged and would remove any unfair prejudice that would arise during a unitary trial. Therefore, we reverse Lott's conviction and remand for a new trial on the committing a lewd act on a minor charge. Because Lott was previously acquitted of the first-degree CSC with a minor charge, he cannot be retried for this same offense. *See State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (providing that pursuant to the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal).

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., and Acting Justice Daniel Hall, concur.

² *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

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EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Gary Eugene Lott, Appellant.

Appellate Case No. 2013-000494

Appeal From Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-266
Submitted February 1, 2015 – Filed May 27, 2015

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Deputy Attorney General David A. Spencer, both of
Columbia; and Solicitor David Matthew Stumbo, of
Greenwood, for Respondent.

PER CURIAM: Gary Eugene Lott appeals his conviction of committing a lewd act on a minor. He argues the trial court erred in refusing to require the State to stipulate Lott had "a prior conviction of a crime under section 23-3-430" of the

South Carolina Code (2007 & Supp. 2014) when proving the charge of first-degree criminal sexual conduct with a minor. He further argues the trial court erred in refusing to grant a mistrial after the State asked an investigator whether he gave Lott "a chance to give his side of the story" because the question constituted an impermissible comment on Lott's right to remain silent. We affirm pursuant to Rule 220(b), SCACR, and the following authorities.

1. The trial court did not err in refusing to require the State to stipulate Lott had "a prior conviction of a crime under section 23-3-430." *See* S.C. Code Ann. § 16-3-655(A)(2) (Supp. 2014) (providing a prior conviction of committing a lewd act on a minor is an element of first-degree criminal sexual conduct with a minor); *State v. Benton*, 338 S.C. 151, 154-155, 526 S.E.2d 228, 230 (2000) (holding "evidence of other crimes is admissible to establish a material fact or element of the crime").
2. Because the trial court sustained Lott's objection to the State's question concerning whether Lott gave "his side of the story," the trial court committed no error. Once the trial court sustained the objection, the issue became whether the trial court should grant a mistrial because of the solicitor's improper question.¹ We find the trial court acted within its discretion in denying Lott's motion for a mistrial. *See State v. Council*, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999) ("The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. A mistrial should not be granted unless absolutely necessary. Instead, the trial [court] should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." (internal citations omitted)).

AFFIRMED.²

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

¹ Although Lott analyzes the issue using the harmless error analysis set forth in *State v. McIntosh*, 358 S.C. 432, 447, 595 S.E.2d 484, 492 (2004), the proper standard for reviewing the trial court's denial of Lott's motion for a mistrial is whether the trial court abused its discretion.

² We decide this case without oral argument pursuant to Rule 215, SCACR.