ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JUN 26 2017

S.C. 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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

Petitioner Gary Lott was indicted for criminal sexual conduct with a minor in the first degree and criminal sexual conduct with a minor in the third degree. The State later amended the indictment for criminal sexual conduct with a minor in the third degree to an indictment for lewd act on a minor. A jury found Lott guilty of lewd act on a minor after trial on February 25-28, 2013, over which the Honorable Eugene C. Griffith, Jr., presided. On February 28, 2013, Judge Griffith sentenced Lott to fifteen years' imprisonment.

Lott appealed his conviction and sentence, which was affirmed by the Court of Appeals. State v. Lott, Op. No. 2015-UP-266 (S.C. Ct. App. filed May 27, 2015). Lott's petition for rehearing was denied on August 20, 2015. Lott petitioned this Court for a writ of certiorari on September 21, 2015. The State made its return on September 25, 2015. This Court granted the petition as to one of the two issues raised by order dated April 18, 2017.

STATEMENT OF FACTS

Lott's arrest and conviction came about after Victim, an eleven-year-old girl, disclosed to her step-father, Jamie Baker, that Lott touched her inappropriately. Victim testified at trial she knew Lott through her mother and Baker. ROA. p. 71. Victim testified that Lott sometimes came over to her mother and step-father's home to eat dinner. Lott would also take Victim for rides on his motorcycle. ROA. pp. 71-72. Lott stayed overnight at the Victim's step-parents'

house so he could take Victim and her siblings to school the next morning. ROA. p. 78.

That evening, Victim was sleeping on the couch when she woke up and felt someone's hands down her pants. Victim opened her eyes and saw Lott touching her. Victim testified she could tell it was Lott because the person's hands touching her were shaking, and Lott's hands shake. Victim testified that once she felt Lott's hand down her pants, she moved away and then went into the kitchen. Baker was also awake and in the kitchen. Baker told Victim to go back to bed, so she returned to her bedroom. ROA. pp. 72-75. After school the next day, Victim told Baker about Lott's inappropriate touching and Baker called Victim's mother. Lott came over to the house. After talking to Baker, Lott came into the house and told Victim "Don't tell anybody" because it would ruin her mother's friendship with him. Lott tried to convince Victim that she was only dreaming the night before. Baker came in the house and told Lott to go back outside. ROA. pp. 76-77. Victim testified that on a previous occasion when Baker went to the hospital, Lott rubbed her leg. ROA. p. 73.

Baker testified that he and Lott had known each other for over ten years. Baker woke up at around 2:00 or 2:30 a.m. because of pain in his foot. Baker went to the kitchen to clean the dishes because he could not go back to sleep. Victim walked into the kitchen around 2:00 or 2:30, Baker told her to go back to bed and she complied. ROA. pp. 127-128. Baker testified that Lott has a physical condition that causes his hands to shake. ROA. p. 123. Baker described the circumstances behind Victim's disclosure, made when she returned from school the next day:

> The bus dropped her off on the main road, I guess. I can see the bus from the porch. She kinda hopped off of it and – kinda angry-like. She walked up to me and asked if Gary was coming over. I told her that I didn't know. She said, "Well, he better not spend the night." That's when she broke down and started crying and told me what had happened.

ROA. p. 125, lines 2-10.

Baker confirmed that Lott stayed overnight several times before and that Lott helped Baker by taking the children to school after Baker was in the hospital because Baker took a lot of pain medication and slept a lot. ROA. pp. 123-124.

Baker also testified that Lott asked Baker to "fix it, to make it go away." Lott added that if Baker did make it go away, then Baker "wouldn't have to worry about anything, everything would be taken care of." Specifically, when Lott got his VA money, Baker would not have to worry about money. Tr. p. 127, lines 2-14; p. 139, lines 7-13. Lott repeatedly called Baker to see what was happening, Baker stopped answering his calls. Tr. p. 129.

Investigator Jeff Scott of the Greenwood County Sheriff's Office testified that due to Victim's tender age, he did not actually get a statement from Victim. Instead, Investigator Scott set up a forensic interview with The Child's Place, which is a child advocacy center in Greenwood. ROA. p. 151. During the interview, Victim went into great detail about Lott's inappropriate touching. ROA. pp. 158-159. Investigator Scott was able to observe Victim's interview at The Child's Place. A videotape of the interview and an anatomical drawing from the interview were admitted into evidence without objection. ROA. pp. 155-156.

Lott also testified at trial. ROA. pp. 207-214. Lott testified he had a close friendship with Baker and Victim's mother. ROA. p. 207. Lott testified that the night of the incident, he slept in the living room where Victim and her brother were also sleeping. ROA. p. 209. Lott claimed he did not touch Victim at any point during the night and denied he ever touched Victim in an inappropriate way. ROA. p. 212; p. 214.

ARGUMENT

The trial court did not err in failing to require the State to stipulate that Petitioner had a prior conviction for a crime listed in S.C. Code Section 23-3-430 where the prior conviction was an element of criminal sexual conduct with a minor in the first degree and the discretion of whether to accept the stipulation lay with the prosecution.

The trial judge correctly noted the State has a right to prove the prior conviction where it is an element of the crime. While the State may accept an offer to stipulate to a prior sexual offense made an element of first degree sexual misconduct with a minor, the State is not obligated to accept the offer.

Lott places great reliance on the case of Old Chief v. United States, 519 U.S. 172 (1997). South Carolina Courts have distinguished Old Chief in certain cases where the prior conviction was an element of an offense to be proved at trial. The South Carolina Supreme Court considered whether the prosecutor could refuse the defense's offer to stipulate to a prior offense in State v. Benton, 338 S.C. 151, 520 S.E. 2d 228 (2000). In Benton, the Court examined the defendant's attempt to force the State to stipulate that the defendant had two prior burglary convictions as an aggravating factor to prove burglary in the first degree.[1]

Citing State v. Johnson, 293 S.C. 321, 360 S.E. 2d 317 (1987), the Supreme Court noted evidence of other crimes may be admissible to establish a material fact or element of the crime charged. The Supreme Court noted that in Old Chief, the name and nature of the prior conviction were irrelevant, as they were not elements of the current charge. Benton, at 155, 520 S.E.2d at 230. This irrelevance led to the United States Supreme Court's conclusion that the

[1] For first degree burglary, the State is required to prove at least one of several enumerated aggravating factors, one of which is that the defendant has "a prior record of two or more convictions for burglary or housebreaking or combination of both." S.C. Code Ann. § 16-11-311(A)(2).

probative value of the prior conviction was outweighed by its prejudicial effect. Id. The Court concluded that for purposes of an element of first degree burglary under §16-11-311(A)(2), the probative value of admitting the defendant's prior burglary charges was not outweighed by its prejudicial effect. Id. at 155-56, 520 S.E.2d at 230.

This Court also upheld the conviction where a defendant asserted the State should have been required to accept his offer to stipulate that he was convicted of a prior burglary offense under South Carolina Code Ann. § 16-11-311(A)(2). State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). This Court acknowledged the rule in Old Chief explaining, ". . . since Congress had made it plain that distinctions among **generic felonies** were irrelevant for purposes of the crime charged, the most the jury needed to know was that the admitted conviction fell within the class of crimes that Congress felt should bar a convict from possessing a gun." Id. at 445, 486 S.E.2d at 515. However, this Court found that unlike Old Chief, a generic prior conviction was not involved. Id. at 446, 486 S.E.2d at 515. The Court went on to note that if the South Carolina General Assembly wished for the prior convictions to be used only for sentence enhancement, rather than to prove an element of the crime, then it would have done so. Id. at 447, 486 S.E.2d at 515 (emphasis added); see also, State v. Cheatham, 349 S.C. 101, 109, 561 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.").

Section 16-3-655 of the South Carolina Code states a person is guilty of first-degree criminal sexual conduct with a minor if he or she does the following:

> (2) 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) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

S.C. Code Ann. §16-3-655 (A)(2). Subsection (A)(2) is analogous to the burglary statute, wherein proof of two or more prior convictions for burglary and/or housebreaking is a necessary element of the State's case-in-chief. S.C. Code Ann. §16-11-311 (A)(2) (making two or more prior convictions for burglary and/or housebreaking an element of burglary in the first degree).

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.; see 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.").

Like Benton, the provision was added to deter repeat offenders by making the prior qualifying convictions an element of the offense. Note the legislature previously recognized the public threat of recidivism amongst sexual offenders when enacting the sex offender registry itself. See S.C. Code Ann. § 23-3-400 ("Statistics show that sex offenders often pose a high risk of re-offending.").

Therefore, consistent with the legislative intent, the Solicitor introduced the sentencing sheet for the 1996 lewd act on a minor conviction, which also ordered Lott to register as a sex offender. Through that evidence alone, the solicitor was able to prove to the jurors, who were required to find Lott guilty beyond a reasonable doubt of each and every element of the indicted offense, that Lott was previously 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.").

Case law regarding burglary in the first degree is instructive to this case. Like the two prior burglary/housebreaking convictions provision of S.C. Code Ann. §16-11-311 (A)(2), S.C. Code Ann. §16-3-655 (A)(2) requires a level of specificity far beyond the level of generality of a prior felony conviction in Old Chief. As discussed earlier, the damning quality of the prior conviction in Old Chief was that it was generic. Any prior felony would qualify to meet that element, therefore the probative value was low, while the potential for prejudice was high. In contrast, under S.C. Code Ann. §16-3-655 (A)(2), particular offenses, sexual offenses, trigger the requirement for a convicted party to register as a sex offender. The specifically-enumerated list of offenses in the statute consists only of crimes involving sexual misconduct and fails to approach the level of generality like the prior felony conviction element from Old Chief. That the offenses all relate to prior convictions for criminalized sexual conduct makes the probative value of this evidence extremely high, therefore the admission of this evidence is a necessity. Furthermore, the South Carolina General Assembly clearly recognized the importance of the admission of the evidence of the specific prior conviction in codifying §16-3-655 (A)(2) in the manner they did.

Additionally, the suggested stipulation was grossly inadequate. The State should not be required to accept it. The proposed stipulation was that Lott "is required to register under 23-3-

430(d) and has been convicted of a crime enumerated in 23-3-430(c)." ROA. p. 25, lines 16-19. As the prosecution noted, the stipulation would "leave holes in the jury's minds as to what – 'What in the world are they talking about? What kind of convictions qualify under this statute?'" ROA. p. 28, line 22 – p. 29, line 2. Citation and reference to a statute, without any indication as to the general subject matter of the statute, not only leaves the jury confused, but sends the clear message that something is being withheld from them. See Old Chief, 519 U.S. at 189 ("If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, 'never mind what's behind the door,' and the jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the 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."). Jurors should not be treated in a fashion that frankly garners mistrust between them and the officers of the court. In their role of determining the truth, jurors should not be demeaned with a message that they cannot be trusted.

The Second Circuit noted forcing the prosecution to accept a stipulation to a prior offense diminishes a core responsibility for the jury:

> Gilliam's proposal violates the very foundation of the jury system. It removes from the jury's consideration an element of the crime, leaving the jury in a position only to make findings of fact on a particular element without knowing the true import of those findings. . . . Gilliam is not charged with mere possession of a weapon, but with possession by a convicted felon. The jury speaks for the community in condemning such behavior, and it cannot condemn such behavior if it is unaware of the nature of the crime charged. . . . As representatives of the people, the jurors can rebuke the accused for violation of community standards, morals, or principles. . . . The jury is the oracle of the citizenry in weighing the culpability of the accused, and should it find him guilty it condemns him with the full legal and moral authority of the

> society. . . . It is unnecessary to engage in an extensive dialogue on jury nullification or to summarize the Founding Fathers' belief in the right of the jury to say "no." . . . Without full knowledge of the nature of the crime, the jury cannot speak for the people or exert their authority. If an element of the crime is conceded and stripped away from the jury's consideration, the jurors become no more than fact finders.

United States v. Gilliam, 994 F.2d 97, 100-01 (2d Cir. 1993); see Carter v. State, 824 A.2d 123, 136 (Md. 2003) ("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.").

Further, the trial court did not err for failing to conduct a bifurcated proceeding, as no such requirement exists and a bifurcated proceeding is unnecessary to protect Lott's rights to a fair trial. Any potential for unfair prejudice was eliminated by the trial court's charge to the jury to limit its consideration of the prior offense only for the purpose of analyzing whether the pertinent element of the present offense was met. Our appellate courts have made it clear that a similar instruction is the appropriate mechanism to remove the potential for unfair prejudice from the admission of prior burglary and/or housebreaking convictions. See State v. Simmons, 352 S.C. 342, 356-57, 573 S.E.2d 856, 864 (Ct. App. 2002) (noting that the State cannot be forced to stipulate to the prior convictions element of burglary in the first degree; however, in order to eliminate prejudice to the defendant, the State may not introduce evidence of the details of the prior convictions, and the trial judge should instruct the jury that the prior convictions should only be considered for the limited purpose of proving one of the elements of burglary in the first degree); Cheatham, 349 S.C. at 109-110, 561 S.E.2d at 623 (noting that the trial judge took every precaution to prevent the improper consideration of the defendant's prior convictions

by charging the jury to limit its consideration of the prior convictions to whether the State proved one of the elements of burglary in the first degree).

Lott also argues the State exceeded the scope of the trial court's in limine ruling by putting evidence that Lott was convicted of lewd act and was required to register as a sex offender. However, Lott did not make this objection to the trial court. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal). Further, it is clear from the sentencing sheet that Lott was required to register as a consequence of his lewd act conviction, so no prejudice accrues from having both facts before the jury. State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) ("To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice."). Finally, Lott sought and redacted the portion of the sentencing sheet that showed he was originally indicted for criminal sexual conduct, yet Lott did not seek to redact the portion of the sentencing sheet ordering him to register. Lott's counsel agreed that the redactions to the sentencing sheet were consistent with the trial court's ruling. Tr. p. 33, lines 18-21. Accordingly, the argument is not preserved since the objection was not made, but instead Lott approved of the redactions without requesting any further redaction. State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992) (finding issue waived when defense counsel affirmatively accepted the court's ruling).

At trial, the prosecution referenced the prior conviction only in the context of establishing that Lott had a prior conviction, that the conviction was for lewd act on a minor, that he was required to register as a sex offender following that conviction, and that this prior conviction led to the State's charge of criminal sexual conduct with a minor-first degree. ROA. p. 168, line 17-

ROA. p. 170, line 18. Therefore, the State did not introduce any details of the prior conviction other than what was necessary to support the State's charge of criminal sexual conduct with a minor-first degree.

At the conclusion of trial, the trial judge instructed the jury as follows: "You are to limit your consideration of this evidence of his prior conviction for the purpose of proving the elements of the offense charged herein." ROA. p. 292, lines 14-17. Later, in response to a question by the jury regarding the 1996 conviction, the trial judge instructed the jury, ". . . 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." ROA. p. 302, lines 15-20. These instructions were more than sufficient to eliminate any potential prejudice to the defendant from the admission of his prior conviction. Jurors are presumed to follow the trial court's instructions. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

Regardless of the trial court's decision not to require the State to accept the stipulation, evidence of Lott's prior criminal conviction would have become admissible anyway, as 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).

Lott's response that "you just don't do that" was an implicit assertion that he was innocent of the charges because he was not capable of such conduct. Lott's testimony intimating he was not capable of the criminal conduct alleged was sufficient to allow the prosecution to introduce evidence of Lott's prior conviction to rebut Lott's assertion. "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). Seeing as the evidence of the prior conviction would have come in regardless of whether the state was forced to accept Lott's stipulation, Lott's argument that he suffered unfair prejudice as a result of the admission of his prior conviction is without merit.

Lott also argues that the trial should have been bifurcated. In light of the efforts the trial court took to minimize any undue prejudice, 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 argument's sake bifurcation had been a permissible option available in Appellant's case. 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 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.").

Since the trial court did not err in declining to require the State to stipulate to the prior conviction, and Lott was not prejudiced by the admission of the prior conviction, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the conviction and sentence.

Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 26th day of June, 2017.

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