

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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GARY EUGENE LOTT,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001981

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Appeal from Greenwood County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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Opinion No. 2019-MO-033

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**RETURN TO PETITION FOR REHEARING**

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This Court unanimously and correctly found that, pursuant to the recent decision in State v. Cross, Op. No. 27903, (S.C. Sup. Ct. filed July 24, 2019) (Shearouse's Adv. Sh. No. 30 at 33), the trial court erred in refusing to bifurcate the trial proceeding. The majority in Cross correctly held that the trial court had the authority to grant the motion to bifurcate and found the trial court's refusal to grant the motion was an error of law. Id. at 46. The majority in Cross explained writing:

Rule 403, SCRE, provides the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, etc. Here, the probative value of the evidence of the prior conviction is undeniable, as the State must prove the

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conviction as an element of the crime charged. However, even evidence with such significant probative value remains subject to the application of Rule 403, and the trial court is duty-bound to determine whether the probative value of this evidence is substantially outweighed by one or more of the considerations identified in Rule 403. Evidence of the 1992 conviction is in no way probative of the threshold issue of whether Cross committed a sexual battery upon Minor in 2005. Necessarily, therefore, the question of when evidence of the prior conviction should be admitted comes sharply into focus. In this case, the integrity of Rule 403 and the obligation of the State to introduce necessary evidence are both salvaged by the application of Rule 611(a), SCRE, which provides in pertinent part: "The court *shall exercise reasonable control over the mode and order of* interrogating witnesses and *presenting evidence* so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . . ." (emphasis added). Under the facts before us, Rule 611(a) required the trial court to exercise control over the order of presenting evidence in such a way that (1) allowed the State to prove an element of the crime, and (2) at the same time guarded against a violation of Rule 403.

State v. Cross, Op. No. 27903, (S.C. Sup. Ct. filed July 24, 2019) (Shearouse's Adv. Sh. No. 30 at 43-44). The majority in Cross reversed the convictions and remanded for a new trial correctly finding that "the trial court's limiting instruction did not cure the overwhelming danger of unfair prejudice from the introduction of Cross's 1992 conviction." Id. at 47. This Court in the present case correctly found that the trial court's error in refusing to bifurcate the proceedings requires reversal. This Court should deny the State's petition for rehearing.

#### I.

In the petition for rehearing the State first argues that, "Cross's novel interpretation of Rule 611 was never argued in the present case – it is not preserved for review." (State's petition for rehearing p. 2). The issue of whether the trial judge erred in refusing to bifurcate the proceeding is preserved for appellate review. At trial Lott moved to bifurcate. (R. p. 42, line 17 – p. 43, lines 1-4). The State opposed the motion but did not argue that the Judge lacked the authority to bifurcate. (R. p. 43, lines 5-10). Instead, the State argued, "Your Honor, that is the

first that I've heard of that. We obviously oppose that. I think we have the right to present our case to the jury on all the elements. I don't see any basis for the bifurcation." (R. p. 43, lines 5-10). The judge denied the motion for bifurcation writing, "Consistent with my prior ruling, I am not going to bifurcate this because I think that is an element that the State is under a burden of proof by reasonable doubt. So I am not going to do that. I understand your Motion, it's very interesting, but I am not going to grant it." (R. p. 43, line 22 – p. 44, lines 1-3). The prior ruling referenced by the trial judge was the denial of Lott's offer to stipulate to the prior conviction because its probative value was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403. The judge denied the motion to bifurcate focusing on the probative value of the State proving an element of the crime without addressing the danger of unfair prejudice from the jury learning of the prior conviction before determining guilt. The Judge did not find that he lacked the authority to bifurcate.

On appeal the State argued that the judge was not required to bifurcate writing, "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 purpose of analyzing whether the pertinent element of the present offense was met." (Brief of Respondent p. 9). Later the State wrote, "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 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 in Appellant's case." (Brief of Respondent p. 12). The State then cited State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971), for the proposition that bifurcation was not required.

As the majority in Cross found, "Under the facts before us, Rule 611(a) required the trial court to exercise control over the order of presenting evidence in such a way that (1) allowed the State to prove an element of the crime, and (2) at the same time guarded against a violation of Rule 403." While Rule 611 was not specifically cited, the record reveals that all parties believed the judge had the authority to bifurcate. The judge simply denied the motion to bifurcate. The issue of whether the trial court erred in refusing to bifurcate the trial is properly before this Court.

## II.

Relying on the dissent in State v. Cross, Op. No. 27903, (S.C. Sup. Ct. filed July 24, 2019) (Shearouse's Adv. Sh. No. 30 at 49-54), the State argues that "[T]he holding in Cross created a new procedural rule without the necessary legislative approval." (State's petition for rehearing pp. 2-3). The majority disagreed writing:

The dissent sees the avenue of bifurcation as our unconstitutional adoption or sponsorship of a new rule of procedure. Specifically, the dissent complains that our reliance upon Rule 611(a) is inappropriate. We respectfully disagree. Our reliance upon Rule 611(a) stems from our recognition of the practical effect that should be given to its very terms, i.e., the trial 'court shall exercise reasonable control over the . . . order of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of truth.' This is not a disguise for a motivation on our part to change the law or adopt a new rule of procedure. It is simply a plain reading of the English language. While there are certainly other settings in which Rule 611(a) would be applicable, its applicability here is undeniable: a party seeks to introduce relevant evidence, the evidence must be admitted, the evidence has high prejudicial effect, and a party requests the trial court to exercise its responsibility to control the order of presentation of that evidence so as to eliminate that prejudicial effect.

State v. Cross, Op. No. 27903, (S.C. Sup. Ct. filed July 24, 2019) (Shearouse’s Adv. Sh. No. 30 at 44). The majority additionally wrote, “It is apparent the drafters of Rule 611(a)(1) recognized an inherently procedural component of the mode and order of presenting evidence. It is equally apparent that, contrary to the position taken by the dissent, we are changing no procedural rule and are creating no procedural rule. We are simply recognizing what has been there all along.” Id. at 45. The majority addressed the issues presented by the dissent and correctly found that the decision did not change or create a procedural rule.

### III.

The State also argues in the petition for rehearing that “[T]he general concerns for the potential 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.” (State’s petition for rehearing p. 5). The prior conviction for lewd act was only probative as to that element of criminal sexual conduct with a minor first degree. The prior lewd act conviction was not probative as to whether Lott committed either criminal sexual conduct with a minor first degree or lewd act. The fact that the jury did not find a sexual battery and acquitted Lott of the criminal sexual conduct with a minor first degree does not remove the danger of unfair prejudice. The jury found Lott guilty of the same charge for which the jury knew he had been convicted previously.

In addition to learning that Lott had a prior conviction for lewd act, the jury also learned that Lott was required to register as a sex offender, creating further danger of unfair prejudice. At trial the sentencing sheet from the prior lewd act conviction was introduced in evidence, over

objection, as State's Exhibit #3. (R. p. 167, line 15 – p. 168, lines 1-8; R. p. 171, line 20 – p. 172, lines 1-8; R. p. 320). During trial the investigator incorrectly testified that Petitioner had a prior conviction for criminal sexual conduct. (R. p. 168, lines 18-21). The investigator then corrected himself and testified that the prior conviction was for lewd act. (R. p. 168, line 23). The judge provided a curative explanation. The State then questioned the investigator further about the prior conviction and asked, "What was another condition of the court upon that conviction? That is written on State's Exhibit #3?" (R. p. 171, lines 16-18). The investigator responded, "To register as a sex offender." (R. p. 171, line 19). The jury heard that Petitioner had a prior conviction for lewd act on a minor **and** that Petitioner was required to register as a sex offender through testimony and State's Exhibit #3.

Also, the judge in the present case did not give a limiting instruction when the State introduced evidence of the prior conviction. (R. pp. 170-172). The only limiting instructions were given during the judge's general charge to the jury at the end of the trial. The judge instructed the jury, "The State is introducing as evidence a sentencing sheet that shows that Mr. Lott pled guilty to a crime enumerated in this code section, which required him to register as a sex offender. You are to restrict your consideration of his guilt or innocence to the evidence presented at trial. You are to limit your consideration of this evidence of his prior conviction for the purpose of proving the elements of the offense charged." (R. p. 292, lines 7-17). There was no objection to the charge. (R. p. 298, lines 5-6). The judge provided the same instruction when he re-charged the jury on the definitions of the two offenses. (R. p. 300, line 23 – p. 301, lines 1-2). The jury was confused by the testimony and evidence of the prior conviction and during deliberations asked for the definition of lewd act in 1996. (R. p. 302, lines 13-25; p. 324). The question demonstrates that the jury did not follow the limiting instruction given by the judge. The judge then advised the jury, "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).

In Cross the trial judge gave a detailed limiting instruction when the prior conviction was introduced and again at the end of the trial. The majority in Cross correctly found that "the trial court's limiting instruction did not cure the overwhelming danger of unfair prejudice from the introduction of Cross's 1992 conviction." State v. Cross, Op. No. 27903, (S.C. Sup. Ct. filed July 24, 2019) (Shearouse's Adv. Sh. No. 30 at 47). In the present case the limiting instruction was only given at the end of the trial and was not as detailed as the limiting instructions given in Cross. As in Cross, the limiting instruction did not cure the overwhelming danger of unfair prejudice. Unlike in Cross, the jury in the present case also learned that Lott pled guilty and was required to register as a sex offender. There was overwhelming danger of unfair prejudice in the present case.

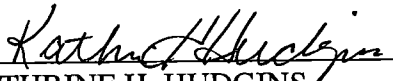
#### IV.

Finally, the State argues in the petition for rehearing that admission of the prior conviction was harmless because the prior conviction "became admissible as impeachment evidence because Lott opened the door to its admission." (State's petition for rehearing pp. 5-6). At trial, however, the State did not ask Lott any questions on cross-examination. (R. p. 214, lines 18-25). The State can only speculate that the prior conviction would have become admissible. This Court should not find the error of refusing to bifurcate the proceedings harmless by guessing how the trial judge may have ruled on an evidentiary matter.

V.

The unanimous decision in the present case, relying on the majority opinion in Cross, carefully considered the arguments made by the State and those advanced by the dissent in Cross before rendering the well reasoned opinion that the trial court erred in refusing the request to bifurcate the trial. This Court did not overlook or misapprehend any matters of law or fact. The State's petition for rehearing should be denied.

Respectfully Submitted,

  
KATHRINE H. HUDGINS  
Appellate Defender

This 26<sup>th</sup> day of August, 2019.

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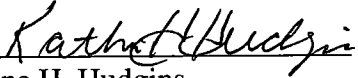
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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gary Eugene Lott, at 1729 Fruit Hill Road, Saluda, SC, 29138, this 26<sup>th</sup> day of August, 2019.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 26<sup>th</sup> day of August, 2019.

\_\_\_\_\_(L.S)  
Notary Public for South Carolina  
My Commission Expires: October 26, 2019.

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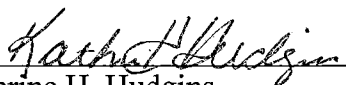
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Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE

ME this 26<sup>th</sup> day of August, 2019.

  
(L.S)

Notary Public for South Carolina

My Commission Expires: October 26, 2019.