

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-000071

THE STATE,

Respondent,

v.

LESLIE DAVIS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Evidence of a prior sex-crime conviction "must" be admitted to prove an element of first degree criminal sexual conduct with a minor under S.C. Code §16-3-655 (A)(2). However, the court should bifurcate the trial on motion of the defendant. In this case, Davis did not move to bifurcate his trial. Did the trial court err in admitting his prior sex-crime conviction?

STATEMENT OF THE CASE

An Horry County grand jury indicted Leslie Davis for First Degree Criminal Sexual Conduct with a Minor (CSCM 1st) pursuant to S.C. Code Ann. 16-3-655 (A)(2).¹ Davis proceeded to jury trial on January 7–10, 2019, before the Honorable Benjamin H. Culbertson. The State presented evidence that Davis vaginally and anally raped his eight-year-old daughter. (Tr.p.174). In order to satisfy the prior conviction element of CSCM 1st, the State presented an official record of Davis's 1986 conviction for "rape in the first degree" from New York. (Tr.p.238). Davis was convicted and sentenced to 30 years' incarceration. In this direct appeal, he argues his conviction should be reversed based on the trial court's admission of evidence of his prior sex-crime conviction.

¹ (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

...

(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).

STANDARD OF REVIEW

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence is shown great deference by the appellate court and should be reversed only in exceptional circumstances. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014).

ARGUMENT

The trial court correctly admitted a prior sex-crime conviction because it formed an element of the charged offense.

The trial court correctly admitted evidence of Davis's prior sex-crime conviction because it formed an element of the charged offense. The appropriate method of avoiding the prejudicial effect of a prior sex-crime conviction in a CSCM 1st prosecution pursuant to S.C. Code § 16-3-655 (A)(2) is to bifurcate the proceeding. Davis did not move to bifurcate his trial. Instead, Davis asked the Court to require the State to stipulate to his prior conviction and, apparently, to prevent the jury from even hearing that a prior sex-crime conviction was an element of the charged offense. The trial court correctly refused this request because a prior sex-crime conviction "must" be admitted to prove an element of CSCM 1st. State v. Cross, 427 S.C. 465, 484, 832 S.E.2d 281, 291 (2019), reh'g denied (Sept. 19, 2019). Furthermore, the issue as raised is not preserved for review because Davis based his trial objection on constitutional grounds, not Rule 403. Finally, the record of Davis's prior conviction was cumulative to other unobjected-to testimony, making any error in its admission harmless. This Court should affirm.

a. Scope of appeal/ issue preservation.

The scope of this appeal is narrow: whether the trial court should have required the State to stipulate that Davis had a prior sex-crime conviction rather than allow the state to admit a record of the conviction. It is important to note at the outset what is not before this Court:

1. **Bifurcation.** Davis never requested bifurcation, as the defendant did in Cross. Accordingly, the trial court never ruled on that issue and it is not raised on appeal.
2. **Constitutional arguments.** At trial, Davis argued at length about the unfairness inherent in the State's ability to prosecute him under subsection (A)(2), when his crime could have been prosecuted under subsection (A)(1).² He argued the statute allowing this was unconstitutional. While Davis does comment in his brief on the State's charging decisions, he does not raise any constitutional grounds in his allegation of error. Instead, his argument focuses exclusively on Rule 403, SCRE. Accordingly, any constitutional arguments—e.g., about the ability of the State to elect which subsection under which to prosecute Davis, or the constitutionality of the statute—are not before this Court. State v. Hornsby, 326 S.C. 121, 125, 484 S.E.2d 869, 871 n.1 (1997) (explaining “issues which are not argued in brief are deemed abandoned and preclude consideration on appeal”).

Furthermore, the argument Davis makes on appeal—that the prior conviction should have been excluded under Rule 403, SCRE—is not preserved for review. His trial objection was on constitutional grounds. He specifically argued his prosecution under code section 16-3-655 (A)(2) would violate his Fifth and Sixth Amendment trial rights because the statute requires introduction of a prior sex-crime conviction.

² (A) A person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age.

(Tr.p.109–13). Davis all but conceded the prior conviction was admissible under judicial precedent, recognizing the case law was “staggeringly against” his position. (Tr.p.114). He also admitted the State could not prove its case without the prior conviction. (Tr.p.112, lines 3–10). Nevertheless, he argued the statute “through legislative action deprives [a] Defendant of a fundamental right to a fair trial.” (Tr.p.111, lines 20–22). The trial court understood the objection as arguing “it’s an unconstitutional statute.” (Tr.p.115, line 18; Tr.p.119, lines 22–25)). Davis did not correct the trial court’s understanding of the issue. Because Davis’s argument at trial was not based on Rule 403, the argument is not preserved for appellate review. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999) (explaining the ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial).

b. (A)(1) and (A)(2) are distinct crimes.

Even if preserved, the issue is meritless. Davis claims his prior conviction “was not even a necessary element of the offense.” Brief of Appellant at 11. He is mistaken. While the prior conviction is not an element of CSCM 1st under 16-3-655 (A)(1), it is an element under (A)(2).

(A)(1) and (A)(2) are distinct crimes. They have different elements and different penalties. See State v. Brandt, 393 S.C. 526, 539, 713 S.E.2d 591, 597 (2011); S.C. Code Ann. § 16-3-655 (D). As noted above, Davis has not challenged on appeal the right of the State to elect which crime to prosecute when his conduct meets the

elements of both offenses.³ Accordingly, the trial court's ruling—that the State was entitled to proceed under either section—is the law of the case. The question is only whether the State should be prevented from proving one of the elements of the charged offense.

c. Evidence of the prior conviction was admissible to prove an element of CSCM 1st.

There is no way around the fact that a prior sex-crime conviction is an element of CSCM 1st under S.C. Code 16-3-655 (A)(2). For this reason, evidence proving the conviction must be admitted into evidence.

Davis claims the Court should have required the State to enter into a stipulation to prevent the jury from hearing about his prior conviction. This argument fails for two reasons. First, one party cannot force another party to enter into a stipulation. See State v. Hamilton, 327 S.C. 440, 444, 486 S.E.2d 512, 514 (Ct. App. 1997) (explaining “a stipulation is an agreement between the parties to which there must be mutual assent”); State v. James, 355 S.C. 25, 34, 583 S.E.2d 745, 749 (2003) (“[T]he State cannot be forced to accept a defendant’s stipulation to prior convictions because that would interfere with the State’s right to prove its case with ‘evidence of its own choosing.’”). Davis argued at trial that the court should take judicial notice

³ Even if he had, the argument is meritless. See State v. Thrift, 312 S.C. 282, 291, 440 S.E.2d 341, 346 (1994) (“Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.”); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

of the prior conviction and treat it as a sentencing enhancer: “it would not be unreasonable for the Court as an element to decide that issue. The Court is made aware of it and it’s a sentencing matter.” (Tr.p.112, lines14–16). But it is not a mere sentencing matter—it is an element of the offense. In a jury trial, it is the jury that must reach a determination of guilt for a charged offense based on proof of each element. While a defendant can waive his right to a jury trial, he cannot do so piecemeal. The State was required to prove the prior conviction and “could not be forced to accept [the] offered stipulation.” Hamilton, 327 S.C. at 443, 486 S.E.2d at 513.

Second, any stipulation specific enough to meet the prior conviction element would have carried the same prejudicial effect. The prior conviction element of (A)(2) is not a generic “felony” conviction as in Old Chief. See Old Chief v. United States, 519 U.S. 172, 179 (1997). The element is conviction of a prior sex crime, specifically those enumerated in § 23-3-430(C), or sex offender registration. Thus, even the minimum amount of information required to meet this element will always carry the stigma associated with prior sex crimes. See State v. Hamilton, 327 S.C. 440, 446, 486 S.E.2d 512, 515 (Ct. App. 1997) (“Generic statements about his prior offenses by the solicitor would not have been possible. Even if the judge had required the State to ‘stipulate’ that Hamilton had the legal status to be charged with first degree burglary, the jury would have known he had committed either two prior burglaries or housebreakings when they were instructed as to the elements of the crime . . .”).

Davis cites State v. Cross, 427 S.C. 465 (2019), to support his argument, but Cross forecloses his position. There, the Supreme Court was presented with the question whether a trial court should bifurcate a trial for CSCM 1st under subsection (A)(2) on motion of the defendant. The Court held that it should. But in doing so, the Court recognized the prior conviction must come in. Because it forms an element of the crime, the conviction has “insurmountable probative value” and it “must” be admitted. State v. Cross, 427 S.C. 465, 480–84, 832 S.E.2d 281, 289–91 (2019), reh'g denied (Sept. 19, 2019) (explaining “evidence of Cross's conviction for a specific offense under section 23-3-430(C) was admissible to prove the prior-conviction element of first-degree CSC with a minor. Therefore, the State must be allowed to introduce the conviction.”). Faced with this reality, the Court held the trial court should have bifurcated the trial to better control the “mode and order” of introducing the evidence under Rule 611, SCRE. It was not a question of “if” the prior conviction should come in, but “when.” Bifurcation was necessary because the prior conviction was admissible.

Cross recognized that the appropriate way to limit prejudice in these cases is to bifurcate the proceeding to delay admission of the prior conviction until after the jury has determined guilt on the sexual act directly giving rise to the charge. Had Davis moved to bifurcate his trial pursuant to Rule 611, he would be entitled to relief under Cross. But he did not. Instead, he argued the evidence should not come in at all, a proposition rejected in Cross. Because it conflicts with controlling precedent, his argument fails. This Court should affirm.

d. Harmless error.

While Davis objected to the admission of the official record of his conviction from New York, he did not object to an Horry County police officer's testimony that he was required to register as a sex offender in Horry County. (Tr.p.252-254). Nor did he object to the officer's testimony that Davis had been convicted of first degree rape in New York. (Tr.p.253, lines 3-6). Accordingly, the record of his prior conviction was cumulative and any error in its admission was harmless. State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence."). Finally, the trial court instructed the jury that the prior conviction could not be used as proof that Davis committed the alleged sexual battery, reducing the prejudicial effect. (Tr.p.422). This Court should affirm:

CONCLUSION

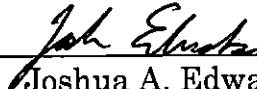
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 20, 2020

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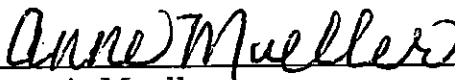
Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by delivering two copies of the same addressed to his counsel of record, Adam Ruffin, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

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

This 20th day of February, 2020.


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RE: State v. Leslie Davis
Appellate Case No. 2019-000071

Dear Mr. Ruffin:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and enclosed)~~
Victim Advocacy Division

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