STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2014-000164

THE STATE,

Respondent,

vs.

GARY REECE THOMPSON, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's issue on appeal regarding the stipulation presented to the jury during trial was not properly preserved for appellate review because that issue was never raised to or ruled upon by the trial judge and was different from the argument that was actually raised by defense counsel. Furthermore, notwithstanding any other issue preservation concerns, Appellant's issue with the stipulation was not properly preserved for appellate review because defense counsel expressly waived any objection he may have had to that stipulation by directly stating he had no objection to the stipulation when it was offered into evidence. However, even if Appellant's challenge to the stipulation was somehow preserved for appellate review, the trial judge did not abuse his broad discretion in permitting the solicitor to introduce the stipulation that was presented during trial, and that stipulation's probative value was not substantially outweighed by any danger of unfair prejudice in light of the essential nature of the stipulation towards proving an element of first-degree criminal sexual conduct with a minor and the trial judge's presentation of limiting instructions to the jury in regard to the limited purpose for which the stipulation could be considered.

STATEMENT OF THE CASE

In September of 2010, Appellant Gary Reece Thompson, Jr. was arrested after his minor stepdaughter revealed Appellant had sexually abused her over the course of several years. In November of 2013, Appellant was indicted by the Greenville County Grand Jury for one count of first-degree criminal sexual conduct with a minor and one count of disseminating obscene material to a minor. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for the "most serious" offense of first-degree criminal sexual conduct with a minor. On January 13, 2014, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable D. Garrison Hill, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of life without parole pursuant to S.C. Code Ann. § 17-25-45 for first-degree criminal sexual conduct with a minor along with a consecutive term of imprisonment of five years for disseminating obscene material to a minor. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In 2010, the victim ("Victim"), who was nine years old at the time, falsely alleged at the behest of her mother, Jessica Taylor ("Mother"), her paternal uncle had sexually abused her. (Tr. p. 138; p. 245; pp. 281-282). In response, Victim was referred to the Children's Advocacy Center in Spartanburg, South Carolina, and met with Tricia Austin, a licensed professional counselor at the center, on June 15, 2010. (Tr. p. 279; pp. 281-282). During Austin's meeting with Victim, Victim admitted her paternal uncle had never sexually abused her. (Tr. p. 145; p. 307). However, Victim spontaneously disclosed she had been sexually abused many times by her stepfather, Appellant Gary Reece Thompson, Jr. (Tr. pp. 286-288; p. 294; p. 306; p. 309).

Following Victim's disclosure, Austin reported the allegations to Lieutenant Ty Miller of the Greenville County Sheriff's Office, and he began an investigation into the reported sexual abuse. (Tr. pp. 168-170; pp. 288-289). As a result of the investigation, Appellant and Mother were arrested in September of 2010. (Tr. p. 175; p. 177). Lieutenant Miller then obtained a search warrant for Appellant's home and discovered pornography consistent with pornography Victim had described being shown to her by Appellant during the time period she was being abused. (Tr. p. 135; pp. 177-180).

Subsequently, Appellant was indicted for first-degree criminal sexual conduct with a minor and disseminating obscene material to a minor, and he proceeded to trial. (Tr. pp. 46-48; Indictments). At the outset of trial, defense counsel moved for the trial judge to preclude the solicitor from prosecuting Appellant for first-degree criminal sexual conduct with a minor pursuant to S.C. Code Ann. § 16-3-655(A)(2) because he contended there was no question Appellant could instead be prosecuted pursuant to S.C. Code Ann. § 16-3-655(A)(1) in light of the fact Victim was unquestionably under the age of the

eleven at the time she was sexually abused. (Tr. pp. 7-8). In response, the solicitor indicated she was entitled to proceed forward with the prosecution under any theory supported by the evidence just as a prosecution for first-degree burglary involving prior convictions as an aggravating circumstance would be permitted to go forward even if other aggravating circumstances could also be proven aside from the existence of two or more prior qualifying convictions. (Tr. pp. 9-12).

Following the solicitor's remarks, defense counsel again urged the trial judge to force the solicitor to prosecute Appellant for a violation of S.C. Code Ann. § 16-3-655(A)(1) instead of a violation of S.C. Code Ann. § 16-3-655(A)(2). (Tr. pp. 12-14). However, in the event he would not do so, defense counsel asked the trial judge to permit him to stipulate to the existence of Appellant's qualifying prior conviction while also precluding the solicitor from presenting that stipulation to the jury. (Tr. pp. 13-14; p. 17). In response, the solicitor asserted the South Carolina Supreme Court had previously rejected a similar argument the State could be forced to stipulate to an element in the context of first-degree burglary. (Tr. pp. 14-15). However, the solicitor offered to stipulate to the prior conviction in Appellant's case while noting the stipulation had to be presented to the jury due to the fact the existence of a prior conviction was an element of the charged offense that necessarily had to be found by the jury. (Tr. pp. 14-15; p. 18).

After considering the arguments of counsel, the trial judge declined to preclude the solicitor from prosecuting Appellant pursuant to S.C. Code Ann. § 16-3-655(A)(2) and declined to bar the jury from hearing the stipulation to which the parties agreed in regard to the existence of Appellant's prior conviction. (Tr. pp. 23-24). In reaching that decision, the trial judge found the probative value of Appellant's prior conviction was "essential" to prove a violation of the statute and determined the situation in Appellant's

case was distinguishable from the situation in Old Chief v. United States, 519 U.S. 172 (1997), due to the fact the prior conviction necessary to prove first-degree criminal sexual conduct with a minor in South Carolina had to be for a specific type of offense related to the charged offense. (Tr. pp. 23-24). However, the trial judge indicated he would provide a limiting instruction to the jury when the stipulation was introduced if one was desired. (Tr. pp. 24-25).

Subsequently, during trial, Victim testified about the abuse she suffered at the hands of Appellant. (Tr. pp. 130-135). Specifically, Victim stated Appellant was physically abusive towards her, her mother, and her three sisters, and she reported Appellant began sexually abusing her when she was six years old. (Tr. p. 130). In regard to the abuse, Victim testified Appellant painfully inserted his penis into her vagina and anus on numerous occasions, performed oral sex on her and forced her to perform oral sex on him multiple times, and showed her "a bunch" of pornographic films depicting women engaged in sexual acts. (Tr. pp. 130-135). Furthermore, Victim stated Appellant threatened to kill her or hurt her mother if she did not engage in the sexual acts with him, and she indicated she did not reveal the abuse earlier because she was frightened of Appellant. (Tr. p. 136).

At the conclusion of Victim's testimony, the solicitor moved to admit the stipulation regarding Appellant's prior conviction and publish it to the jury. (Tr. p. 165). In response, defense counsel stated: "[T]he Defense has no objection, Your Honor." (Tr. pp. 165-166). Thereafter, the stipulation was admitted into evidence without objection, and the trial judge presented the following limiting instructions to the jury:

> Now, this particular stipulation, before it is read to you, I want to instruct you on something else. And you'll, also, recall that I made what probably

> seemed a curious statement earlier as well.[1] And that is that you can use some evidence for one purpose and one purpose only, and not for any other purpose. And this stipulation you're about to read can only be used by you, the jury, for a very limited purpose. And that purpose is simply on the issue of whether the State has met its burden of proof as to an element of the crime of criminal sexual conduct with a minor in the first degree. And you can give this stipulation whatever weight you decide to in that regard. You may not consider this stipulation for any other purpose. Your oath forbids you, for example, from using the evidence of this stipulation as proof of whether [Appellant] committed the acts for which he's on trial here today, except on that issue of that element of the offense. So the law doesn't allow you to use the stipulation as proof of [Appellant]'s guilt for any charge that he's on trial for here today, except for deciding whether the State has met its burden of proof about a prior offense.

(Tr. pp. 166-167). Following those limiting instructions, the trial judge presented the agreed-upon stipulation to the jurors, which instructed them Appellant "[had] been convicted of criminal sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and [was] currently on the South Carolina Sex Offender Registry." (Tr. p. 167). The trial judge then again instructed the jurors they could only consider the stipulation that had just been presented to them for the limited purpose identified to them and not for any other purpose. (Tr. p. 167).

As the trial continued, Lieutenant Miller testified about his investigation into the reported sexual abuse, and Wiley Garrett, a therapist assigned to work with Victim after she disclosed the sexual abuse, noted Victim was exhibiting symptoms of trauma subsequent to the abuse. (Tr. pp. 170-175; p. 184; pp. 192-193). Additionally, Dr. Nancy Henderson, a board-certified child abuse pediatrician, testified about her physical examination of Victim after the abuse was revealed, indicated Victim disclosed during the examination she was sexually abused between the ages of six and nine, and stated the

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[1] Regarding that "curious statement," the trial judge had earlier stated to the jurors during his preliminary instructions: "Now, some evidence can be used for limited purposes. And I'll tell you more about that later. But simply because something comes into evidence for one purpose doesn't mean you can use it for other purposes. So bear that in mind as well. And remember, too, that this is an important trial for both sides, of course." (Tr. p. 109).

examination results were normal. (Tr. pp. 205-206; p. 212; pp. 215-218). However, Dr. Henderson noted normal examination results were extremely common in sexual abuse cases and did not mean no sexual abuse had occurred due to the fact injuries to the genital area heal very rapidly. (Tr. pp. 217-218; p. 229). Furthermore, Mother, who had earlier pled guilty to unlawful conduct towards a child, testified for the prosecution, indicated Appellant treated Victim very differently from her other children, noted Victim and her other children began to exhibit sexualized behavior after Appellant moved into their home, and stated she awakened one time and saw Appellant on the floor with his face at Victim's crotch. (Tr. pp. 230-231; pp. 239-245; p. 269). Mother also candidly acknowledged she instructed Victim to falsely accuse her paternal uncle of sexually assaulting her, and she admitted Victim informed her Appellant was touching her genital area but did not do anything in response.[2] (Tr. p. 241; p. 245). Finally, following Mother's testimony, Austin testified about her meetings with Victim and confirmed Victim disclosed she had been sexually abused by Appellant. (Tr. pp. 286-288; p. 294; p. 306; p. 309).

Thereafter, at the conclusion of the evidentiary phase of trial, the parties rested their cases and presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 319-372). As part of his jury instructions, the trial judge advised the jurors they must apply the law as he provided it to them and informed them they must follow all of his instruction. (Tr. pp. 360-361). Furthermore, in regard to the evidence of Appellant's prior conviction, the trial judge instructed the jury:

> You have heard evidence that the Defendant was convicted of a crime other than the one for which is now on trial. This testimony, if you

[2] During her testimony, Mother also indicated Appellant wanted her to wear her hair in ponytails, pretend to be a little girl, and call him "Daddy" when they engaged in sexual intercourse. (Tr. p. 244).

> conclude it is true, may only be considered by you for the limited purpose for which I told you that it could be. And that is whether the State has met its burden of proof as to an element of the crime for criminal sexual conduct in the first degree with a minor. You may not consider it for any other reason or any other purpose. You may not and must not consider this evidence of the commission of another offense as proof of Mr. Thompson's guilt of the crime that we are charging – guilt of the crime that he is on trial for here today, other than to the extent I've told you that you could do so.

(Tr. p. 365).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (Tr. p. 375). Following the verdict, the trial judge sentenced Appellant to life imprisonment without the possibility of parole for first-degree criminal sexual conduct with a minor based on the fact Appellant had previously been convicted of that same "most serious" offense. (Tr. pp. 379-380). Additionally, the trial judge sentenced Appellant to a consecutive five-year term of imprisonment for disseminating obscene material to a minor. (Tr. p. 380).

ARGUMENT

Appellant's issue on appeal regarding the stipulation presented to the jury during trial was not properly preserved for appellate review because that issue was never raised to or ruled upon by the trial judge and was different from the argument that was actually raised by defense counsel. Furthermore, notwithstanding any other issue preservation concerns, Appellant's issue with the stipulation was not properly preserved for appellate review because defense counsel expressly waived any objection he may have had to that stipulation by directly stating he had no objection to the stipulation when it was offered into evidence. However, even if Appellant's challenge to the stipulation was somehow preserved for appellate review, the trial judge did not abuse his broad discretion in permitting the solicitor to introduce the stipulation that was presented during trial, and that stipulation's probative value was not substantially outweighed by any danger of unfair prejudice in light of the essential nature of the stipulation towards proving an element of first-degree criminal sexual conduct with a minor and the trial judge's presentation of limiting instructions to the jury in regard to the limited purpose for which the stipulation could be considered.

Appellant contends the trial judge erred in refusing to require the solicitor to accept a stipulation that would have solely informed the jury of the general fact Appellant had a prior conviction for an offense listed in S.C. Code Ann. § 23-3-430 without revealing any other information about his prior conviction. In support of that contention, Appellant maintains the admission of any additional information to the jury about his prior conviction, such as the information presented to the jury through the stipulation that was introduced during his trial, was not necessary to prove his guilt for first-degree criminal sexual conduct with a minor and was more prejudicial than probative. Initially, Appellant's appellate issue with the admission of the agreed-upon stipulation that was introduced during his trial was not preserved for appellate review because defense counsel did not object to the scope or substance of that stipulation as Appellant is now doing on appeal and, instead, simply raised a pre-trial objection to the presentation of any stipulation **to the jury**. Additionally, Appellant's appellate issue regarding the introduction of the stipulation presented to the jury during his trial was likewise not

preserved for appellate review because defense counsel expressly waived any objection he may have had to the stipulation by expressly informing the trial judge he had no objection to the stipulation when it was offered into evidence during trial. However, regardless of any issue preservation concerns, the trial judge did not abuse his broad discretion in accepting the stipulation offered by the solicitor – and agreed upon by defense counsel – because the stipulation's probative value, which was extremely high due to the essential nature of the stipulation towards proving an element of first-degree criminal sexual conduct with a minor, was not substantially outweighed by any danger of unfair prejudice, which was greatly reduced by the trial judge's instructions to the jurors informing them they could only consider the stipulation for a limited purpose. Appellant's convictions should be affirmed.

A. **Issue Preservation**

In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and **arguments**." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (emphasis added).

In the case sub judice, Appellant contends on appeal the trial judge erred in refusing to require the solicitor to accept a stipulation allegedly proposed by defense

counsel that would have informed the jury Appellant had previously been convicted of an offense listed in S.C. Code Ann. § 23-3-430(C) without disclosing the specific name and nature of Appellant's prior offense. Importantly though, that particular argument was never raised by defense counsel to the trial judge during trial, and defense counsel never proposed to the trial judge such a limited stipulation be given. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) ("Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review."). Instead, after unsuccessfully moving for the solicitor to be precluded from prosecuting Appellant for an offense that was unquestionably supported by the evidence, defense counsel asked the trial judge to force the solicitor to stipulate to Appellant's prior conviction **and** to prevent the stipulation itself from ever being presented to the jury.[3] Thus, in Appellant's case, defense counsel's pre-trial issue in regard to the stipulation was not based on the stipulation itself or on the contents of that stipulation but was based on the presentation of the stipulation to the jury, which was an entirely different issue from the issue Appellant is now raising on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but **it must be clear that the argument has been presented on that ground.**" (emphasis added)). Because defense counsel did not raise the issue Appellant is now raising on appeal to the trial judge, Appellant's appellate issue cannot properly be

[3] In seeking to stipulate to the prior conviction element without that element being presented to the jury, defense counsel argued: "If you want to analogize it much the way [the solicitor] does with a burglary case and analogize that to a DUI second or third case, when those cases are tried – and there's a long line of cases that indicate this is the proper way to proceed. It is routinely stipulated by the parties that there is that prior DUI. It's a necessary element of the offense. But, yet, the jury doesn't hear about it." (Tr. p. 13). Notably, defense counsel's argument in favor of not presenting the stipulation to the jury was virtually identical to the argument raised by defense counsel and rejected in an earlier South Carolina case in which proof of the defendant's prior convictions was being offered to prove an element of the offense of first-degree burglary. Cf. State v. Hamilton, 327 S.C. 440, 442, 486 S.E.2d 512, 513 (Ct. App. 1997) ("Prior to trial, [Hamilton]'s counsel offered to stipulate to the prior burglary convictions **upon the condition that the information not be provided to the jury.**" (emphasis added)).

considered or addressed for the first time on appeal. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another 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."). As a result, Appellant's appellate challenge to the stipulation presented in his case was not properly preserved for appellate review and should be rejected on issue preservation grounds. 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."); cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (holding Benton's challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

However, even assuming Appellant's appellate issue could somehow have been properly preserved for appellate review through defense counsel's pre-trial argument, any issue with the stipulation that was presented to the jury **still** could not appropriately be raised or addressed on appeal because defense counsel expressly waived that issue during trial. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Critically, after the solicitor moved to present to the jury the precise stipulation Appellant now contends should not have been presented, defense counsel specifically informed the trial judge he had no objection to

that stipulation.[4] See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."); see also State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."). Accordingly, because defense counsel directly affirmed he had no objection to the stipulation when it was offered into evidence, any issue defense counsel may have had in regard to the stipulation was expressly waived, and Appellant is precluded from now raising an issue with the stipulation on appeal. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."). Appellant's convictions should be affirmed

B. Propriety of the Admission of Appellant's Prior Conviction

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary

[4] Notably, defense counsel also personally signed the stipulation itself. (State's Ex. # 7 – Stipulation).

ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); 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. 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."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("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."). "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).

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; 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). Significantly though, 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. Id. It is only unfair prejudice that must be avoided. Id.

Trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727

S.E.2d at 757. 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)."[5] 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

[5] Significantly, Section 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, Section 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.").

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. Benton, 338 S.C. at 154, 526 S.E.2d at 230 ("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 who either had been placed on the registry following a conviction for an offense specified in Section 23-3-430(C) or had been placed on the sex offender registry for good cause, the solicitor in Appellant's case introduced into evidence a stipulation agreed upon and signed by defense counsel. That stipulation, which was admitted without objection, proved Appellant's status as a recidivist sex offender by instructing the jury: "[Appellant] has been convicted of Criminal Sexual Conduct with a Minor First Degree, an offense listed pursuant to S.C. Code 23-3-430 (C) and is currently on the South Carolina Sex Offender Registry." (Tr. pp. 165-167; State's Ex. # 7). As a result, the stipulation had immense probative value in Appellant's case as it established an element of the offense that necessarily had to be proven, and, since the stipulation – or comparable evidence – was necessary to prove the charged offense, the probative value of the stipulation was not

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 that stipulation on multiple occasions both before and after the stipulation was introduced. See United States v. Gaudin, 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."); 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. Cheatham, 349 S.C. 101, 109-110, 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. 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 generally Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions.").

On appeal, Appellant maintains the trial judge erred in allowing the introduction of the stipulation offered by the solicitor – and agreed upon and signed by defense counsel – because he alleges informing the jury Appellant had a prior conviction for first-

degree criminal sexual conduct with a minor and was on the sex offender registry as opposed to generally informing the jury Appellant had a prior conviction for an offense listed in S.C. Code Ann. § 23-3-430(C) was far more prejudicial than probative. In support of that contention, Appellant avers the introduction of the name and nature of his prior offense was entirely unnecessary for the State to prove the elements of first-degree criminal sexual conduct with a minor and analogizes the situation in his case to the situation in Old Chief v. United States, 519 U.S. 172 (1997).[6]

Importantly though, the situation in Old Chief was far different than the situation in Appellant's case. In Old Chief, the United States Supreme Court addressed whether the Federal Rules of Evidence required a district court judge to accept a defendant's offer to concede the fact of a prior conviction and prevent the prosecutor from introducing evidence in regard to the name and nature of that prior conviction in a prosecution for unlawful possession of a firearm by a felon. Old Chief, 519 U.S. at 174. In a sharply-divided decision, a narrow majority of the Supreme Court determined a district court judge was, in fact, required to accept such an offer in the context of such a case because "[t]he statutory language in which the prior-conviction requirement [was] couched show[ed] no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies[.]" Id. at 186. However, in Appellant's case, Appellant was not charged with an offense prohibiting a broad class of offenders from some future conduct based on the existence of a conviction for a broad class of potentially-dissimilar offenses. Cf. Hamilton, 327 S.C. at 446, 486 S.E.2d at 515 ("Here, however, a generic prior conviction was not

[6] Demonstrating the disparity between Appellant's argument on appeal and defense counsel's argument during trial, defense counsel did **not** raise an argument based on Old Chief to the trial judge and, in fact, indicated to the trial judge he was not familiar with that case. (Tr. p. 18).

involved."). Instead, Appellant was charged for an offense requiring proof of a prior conviction for a highly specific type of offense – a sex crime resulting in placement on the sex offender registry – that was of the same type of offense for which Appellant was on trial. See S.C. Code Ann. § 16-3-655(A)(2) (instructing "[a] person is guilty of criminal sexual conduct with a minor in the first degree" 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) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)"). Thus, unlike the offense involved in Appellant's case, the legislature in South Carolina determined the particular nature of an offender's prior conviction was critical and, just as the trial judge found, essential to prove the crime for which Appellant was charged. See Benton, 338 S.C. at 154, 526 S.E.2d at 230 (recognizing the legislature's inclusion of an element requiring proof of a prior conviction for burglary or an offense of a similar nature in the first-degree burglary statute reflected the legislature's intention to deter repeat offenders). As a result, the decision in Old Chief was simply not applicable to Appellant's case and did not render the stipulation introduced during Appellant's trial erroneous.[7]

Significantly, the limitation to the stipulation Appellant now contends on appeal should have been imposed would defeat the clear legislative purpose behind the inclusion of the statutory element requiring proof of a prior conviction for an offense of a sexual nature because it would remove all context from the prior conviction in the eyes of the

[7] Notably, the majority in Old Chief directly acknowledged the limited nature of its holding in that case, instructing: "[O]ur holding is limiting to cases involving **proof of felon status**. 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." Old Chief, 519 at 183, n. 7 (emphasis added).

jurors and would leave them simply speculating in regard to what Appellant's prior conviction was for, what the significance of the statutory provision referenced in the stipulation was, and why the general statement regarding the prior conviction was even presented to them at all, which could potentially result in significant prejudice to the prosecution. 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."). In light of the fact the stipulation in Appellant's case was highly probative and essential to proving Appellant's guilt for first-degree criminal sexual conduct with a minor and was not unduly or overly prejudicial in light of the trial judge's multiple limiting instructions, the trial judge did not abuse his broad discretion in permitting the solicitor to introduce the stipulation admitted in Appellant's case.[8] See

[8] Likewise, although not an issue in Appellant's case in light of the fact the solicitor agreed to stipulate to the facts related to Appellant's prior conviction, the solicitor could properly have introduced some other evidence in regard to the prior conviction instead of admitting the stipulation, and the trial judge would not have abused his discretion by permitting the solicitor to do so as long as that other evidence did not contain particular information about the facts of Appellant's prior offense. See 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.' " (citation omitted)); Cheatham, 349 S.C. at 110, 561 S.E.2d at 623 ("[T]he State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt."); see also Benton, 338 S.C. at 156, 526 S.E.2d at 231 ("Particular information regarding the prior crimes should not be admitted."); see generally 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."); State v. Thrift, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (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. . . . The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion[.]" (emphasis added and footnotes

Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-594 ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."); cf. State v. Simmons, 352 S.C. 342, 359, 573 S.E.2d 856, 865 (Ct. App. 2002) ("[T]he trial court properly allowed the State to present evidence of Simmons' prior burglary/housebreaking convictions as an element to support first degree burglary."). Appellant's convictions should be affirmed.

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omitted)); State ex. rel. Rawlinson v. Ansel, 76 S.C. 395, 405, 57 S.E. 185, 189 (1907) ("All the authorities agree that, in the exercise of a discretionary official act, an executive officer cannot be restrained, coerced, or controlled by the judicial department.").

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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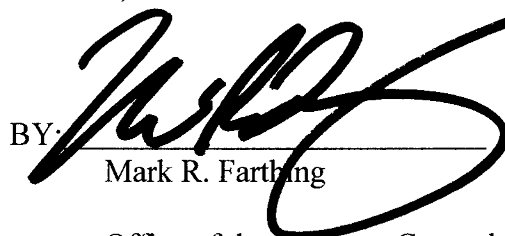
Attorney General

MARK R. FARTHING
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit



BY: ______________________
Mark R. Farthing

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ATTORNEYS FOR RESPONDENT

January 28, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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SC Court of Appeals

Appeal from Greenville County
Honorable D. Garrison Hill, Circuit Court Judge
Appellate Case No. 2014-000164

THE STATE,

Respondent,

vs.

GARY REECE THOMPSON, JR.,

Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. 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 28th day of January, 2015.

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January 28, 2015

Kathrine H. Hudgins, Esquire
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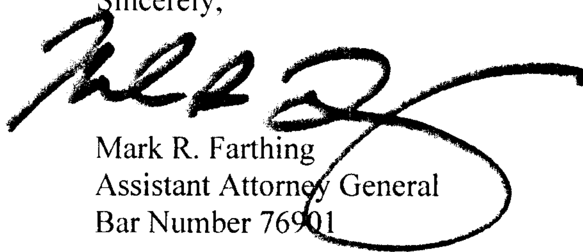
RE: State v. Gary Reece Thompson, Jr. – Appellate Case No. 2014-000164

Dear Ms. Hudgins:

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

Sincerely,



Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: **Honorable Jenny A. Kitchings (original and one enclosed)**
Victim Services

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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