STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY R. THOMPSON,

APPELLANT

APPELLATE CASE # 2014-000164

INITIAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

> In this trial for criminal sexual conduct with a minor first degree, the judge erred in refusing to require the State to accept the stipulation that Appellant had a prior conviction for a crime listed in S.C. Code §23-3-430 when the name and nature of the prior crime was not necessary to prove criminal sexual conduct with a minor first degree and the jury learning that Appellant had a prior conviction for criminal sexual conduct with a minor first degree was more prejudicial than probative.

Respondent argues that the issue presented on direct appeal was not preserved for appellate review because Appellant did not object to the scope and substance of the stipulation advising the jury that Appellant had a prior conviction for criminal sexual conduct with a minor first degree. (Brief of Respondent pp. 9-12). Appellant objected to the jury learning that Appellant had a prior conviction for criminal sexual conduct with a minor first degree by asking the State to stipulate to the prior conviction. Prior to trial Appellant asked the State to stipulate as to the prior conviction required by S.C. Code §16-3-655(A)(2). Counsel argued, "We would – and if the court rules against this and says, well, we're not going to enforce an election on them if they want to go forward on the direct presentment, then we would say that we should be allowed to stipulate to the fact that he has a prior." (Tr. p. 13, lines 2-6).

The trial judge understood the objection and ruled, distinguishing the present case from Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) and finding the State was not required to stipulate to the prior offense. (Tr. p. 23, line 3- p . 24, 25, lines 1-3). The judge stated, "I don't know how any court could require the State to elect under these circumstances here, or to find Rule 403 barred the jury from hearing about a stipulation such as has been proposed by the solicitor." (Tr. p. 24, lines 20-24). The judge then stated that he would instruct the jury on the limited purpose for

which the prior crime can be considered. Finally the judge stated, "So that's my ruling on that issue." (Tr. p. 25, line 3). The objection to the jury hearing that Appellant had a prior conviction for criminal sexual conduct with a minor was properly raised to the trial judge, ruled upon by the trial judge and preserved for appellate review.

The stipulation referenced by the trial judge was offered by the State and provided that the judge, rather than a live witness, would inform the jury that Appellant had been convicted of criminal sexual conduct with a minor which is an offense listed in S.C. Code §23-3-430(C) as required by the statute. (Tr. p. 19, line 20 – p. 20, lines 1-14). During the trial the State introduced a written copy of the stipulation, (Tr. p. 165, lines 22-24; State's Exhibit #7, R. p. **) and the judge told the jury, "So the stipulation is that the Defendant, Gary Reece Thompson, has 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 is currently on the South Carolina Sex Offender Registry." (Tr. p. 167, lines 17-22). Respondent argues that Appellant waived any objection to the jury learning about the prior offense by failing to object when the stipulation was read to the jury. (Brief of Respondent pp. 12 – 13). The judge, however, had already made a final ruling about the jury learning of the prior offense and no further objection was necessary. See State v. Wiles, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009); Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

Appellant did not object because the judge had already ruled that the jury would learn about the prior conviction and defense counsel acknowledged that the judge reading the stipulation to the jury was less harmful than a live witness testifying about the prior

conviction, as the State initially proposed. (Tr. p. 20, lines 15-17). Accepting the stipulation that the judge rather than a live person inform the jury of the prior offense did not waive the initial objection to the jury learning of the prior offense.

In order to prove the elements of S.C. Code §16-3-655(A)(2) the State must prove a sexual battery with a minor less than sixteen years of age by someone who has a prior conviction for an offense listed in Section 23-3-430(C) **or** who has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D). The name and nature of the offense are not necessary in order for the State to prove the elements of the offense. The State simply has to prove either a prior offense listed in Section 23-3-430(C) **or** a prior order to be included in the sex offender registry pursuant to Section 23-3-430(D), not both. In this case the jury was informed that Appellant had a prior conviction for criminal sexual conduct with a minor, one of the charges for which he stood trial, **and** that he is currently on the sex offender registry. Section 23-3-430(D) should only be applicable when the prior offense is not listed in Section 23-3-430(C) but a judge required sex offender registry.

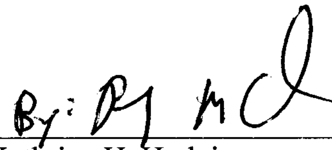
S.C. Code §16-3-655(A)(2), provides for enhancement based on a prior conviction for any of the 23 separate offenses listed in S.C. Code §23-3-430(C). The challenge in the present case is analogous to the challenge in Old Chief to 18 U.S.C. § 922(g)(1), which is triggered by a prior conviction for many different crimes. As in Old Chief, evidence of the name and nature of the prior conviction for criminal sexual conduct with a minor was unnecessary to prove the crimes charged, and was highly prejudicial as Appellant was charged with criminal sexual conduct with a minor first degree. Prejudice is further demonstrated by the improper reference to the sex offender registry. Pursuant to Rule 403, SCRE, the probative value of the name and nature of the prior conviction is

substantially outweighed by the danger of unfair prejudice in the jury hearing that Appellant had been convicted of the same crime for which he was on trial. The judge erred in allowing the jury to learn of the prior offense.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence for criminal sexual conduct with a minor first degree should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 9th day of February, 2015.

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APPELLATE CASE # 2014-000164

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of February, 2015.

By: [signature]
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 9th day of February, 2015.

[signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .