

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 03 2015

THE STATE,

RESPONDENT,

SC Court of Appeals

V.

GARY R. THOMPSON,

APPELLANT

APPELLATE CASE # 2014-000164

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Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

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Opinion No. 2015-UP-524

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, counsel for Gary Reece Thompson, Jr. petitions the Court for rehearing. Counsel respectfully submits that this Court, in affirming the conviction and finding the issue was not preserved for appellate review, citing State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct.App. 2007) (finding defense counsel's statement that he had "no objection" to the introduction of evidence at trial constituted a waiver of any issue he previously has with the same evidence), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009), overlooked the fact that Appellant objected to the jury learning that Appellant had a prior conviction for criminal sexual conduct with a

minor first degree, pursuant to S.C. Code §16-3-655(A)(2), by asking the State to stipulate to the prior conviction. (R. p. 13, lines 4-6; p. 17, line 23 – p. 18, lines 1-2). The State objected to the suggested stipulation but proposed an alternative stipulation in which, **rather than calling a live witness to testify about the prior conviction**, the judge 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. (R. p. 19, line 20 – p. 20, lines 1-14).

The trial judge understood Appellant's objection to the jury learning that Appellant had a prior conviction for criminal sexual conduct with a minor but distinguished the present case from Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) finding the State was not required to stipulate to the prior offense. (R. 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." (R. 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." (R. 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.

During the trial the State introduced a written copy of the stipulation, (R. p. 150, lines 22-24; State's Exhibit #7, R. p. 366) 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." (R. p. 152, lines 17-22). Appellant did

not renew his objection because the State's stipulation was less harmful than a live witness testifying about the prior conviction, as the State initially proposed.

This Court found that 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. 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. (R. 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.

This Court's reliance on State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct.App. 2007) is misplaced because in Dicapua the sole pretrial objection to the videotape was that it lacked audio. The videotape lacking audio that was introduced in evidence at trial in the Dicapua case was not the lesser of two evils like the stipulation in the present case. While trial counsel waived the objection in Dicapua by stating he had no objection, in the present case counsel stated he had no objection in order to prevent the State from bringing in the live witness to testify about the prior conviction. Counsel did not waive his initial objection to the jury learning that Appellant had a prior conviction for criminal sexual conduct with a minor first degree pursuant to S.C. Code §16-3-

655(A)(2). This Court should find the issue preserved for appellate review and address the merits of the argument.

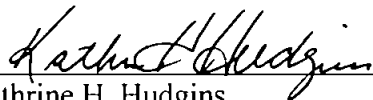
In order to prove the elements of S.C. Code §16-3-655(A)(2) the State must prove a sexual battery with a minor less than sixteen years of age by someone who has a prior conviction for an offense listed in Section 23-3-430(C) **or** who has been ordered to be included in the sex offender registry pursuant 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.

Based on the above argument, Appellant seeks rehearing and a finding that the issue is preserved for appellate review. Addressing the merits of the argument, this court should find that 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 and the error requires reversal.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

This 3rd day of December, 2015.

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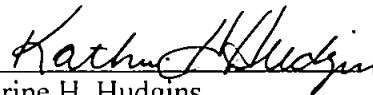
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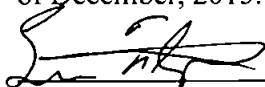
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, this 3rd day of December, 2015.



Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day  
of December, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.