

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

S.C. SUPREME COURT

Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-245
Submitted April 1, 2016 – Filed June 1, 2016

The StateRespondent

v.

Rodney Lee Rogers, Sr.Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge
2009-GS-24-1246

APPELLATE CASE NO.: 2014-000980

The StateRespondent

v.

Rodney Lee Rogers, Sr.Appellant.

RECORD ON APPEAL

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FEB 27 2015

SC Court of Appeals

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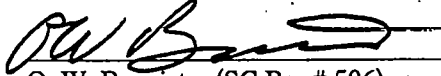
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Certificate Of Counsel

The undersigned certifies that this Record on Appeal contains all material prepared to be included by any of the parties and not any other material and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister (SC Bar # 506)

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Greenwood
STATE VS. Rodney Lee Rogers Sr.

INDICTMENT/CASE#: 09QS24-1246
A/W#: M075352
Date of Offense: 2/1/2008
S.C. Code §: 16-03-0655(A)
CDR Code #: 03B5

AKA:
Race: CAU Sex: M Age: 44
DOB: 10-01-1969 SS#: 3941
Address: 610 Old Shoals Junction Road
City, State, Zip: Ware Shoals, SC
DL#: SID#:

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Lewd Act on a Minor

CONVICTED OF or PLEADS

In violation of § 16-03-0655(A) 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 03B5
NON-VIOLENT VIOLENT SERIOUS MOST-SERIOUS Mandatory GPS(C3C) 17-25-45
w/minor 1st or Lewd Act

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (defendant's Initials)
Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Sheek, C. Vance Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 15 years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of 10 years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 5

years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred DoL Waiver Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

PTOP days/hours Public Service Employment
Obtain GED
Attend Voc, Rehab, or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
prmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:
*Fine:

Table with 2 columns: Description and Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge), § 14-1-211(A)(2) (DUI Surcharge), § 56-5-2995 (DUI Assessment), § 56-1-286 (DUI Breath Test), Proviso 47.9 (Public Def/Prob), § 14-1-212 (Law Enforce. Funding), § 14-1-213 (Drug Court Surcharge), § 50-21-114 (BUI Breath Test Fee), § 56-5-2942(1) (Vehicle Assessment), Proviso 90.5 (SCC/A Surcharge), 3% to County (if paid in installments), TOTAL \$ 133.90

GREENWOOD COUNTY
ATTEST: TRUE COPY
47.12 requires \$500 be paid to during probation.

Clerk of Court/ Deputy Clerk: Dawn D. Wall
Court Reporter: Stacy Johnson

Presiding Judge: T.L. [Signature]
Judge Code: 2008
Sentence Date: 4/17/14

WITNESSES

Kenny Downing
Greenwood County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

October Term, 2009

Indictment # 09GS24-1246

WARRANT NUMBER

M075352

THE STATE

vs.

Rodney Lee Rogers Sr.

True Bill

Diamondell

Foreman of the Grand Jury

Date: Oct-2, 2009

VERDICT

GUILTY OF LEWD ACT

ON A CHILD

Foreman SEC. 16-15-140

SEE ATTACHED

VERDICT FORM

SIGNED BY FOREMAN

T. L. [Signature] 2/17/14
DEPUTY CLERK

ATTEST A TRUE COPY
Angela Wood Hurst
ANGELA WOOD HURST
CLERK OF COURT
GREENWOOD COUNTY
S.C.

FILED GENERAL SESSIONS
6TH JUDICIAL CIRCUIT
GREENWOOD, SC
2009 APR 17 PM 11 33

STATE OF S.C. AGAINST RODNEY LEE ROGERS
#2009-GS-24-1246

ATTEST A TRUE COPY
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

Verdict

WE FIND RODNEY LEE ROGERS, SR.,
NOT GUILTY.

Ernest H. Hudley
FOREMAN.

WE FIND RODNEY LEE ROGERS, SR.,
GUILTY OF CRIMINAL SEXUAL
CONDUCT IN THE FIRST DEGREE.

FOREMAN.

WE FIND RODNEY LEE ROGERS, SR.,
GUILTY OF COMMITTING A LEWD
ACT ON A CHILD.

Ernest H. Hudley
FOREMAN.

CLERK OF COURT
GREENWOOD, SC
APR 17 AM 11:33

1 I don't believe that it's -- the testimony says he
2 inserted himself inside of her. I don't believe the
3 testimony can be interpreted that way.

4 THE COURT: Well, I mean, the issue is whether or
5 not the testimony supports anything other than a claim
6 that he had sexual intercourse with her and within the
7 confines of the definition of sexual battery. The
8 definition of sexual battery does include the provision,
9 the -- I haven't gotten exactly the wording of it, but
10 the insertion of anything into the vagina. I mean,
11 the argument is that the testimony supports that he
12 penetrated her with his finger, in addition to
13 penetrating her with his penis, and that's what I'm --
14 I have a hard time seeing that there's clear testimony
15 that he penetrated her with anything other than his
16 penis. There's no question that's what -- in my mind
17 that's what she testified to; that he penetrated her
18 with his penis. There's plenty of testimony to support
19 the idea that he touched her, but whether or not -- the
20 problem is whether or not there's testimony to support
21 beyond a reasonable doubt that he penetrated her with
22 his finger.

23 MR. SHEEK: In that case, Your Honor, would the
24 Court be charging the lesser included of CSC-3rd, which
25 would be the lesser --

1 THE COURT: Well, I don't know. You haven't -- we
2 haven't talked about that. Do you want me to -- you
3 want me to charge CSC-3rd?

4 MR. SHEEK: Yes, sir. I think there's --

5 THE COURT: What does that -- let me look and see
6 what that says. I mean, of course, touching on the
7 outside would be lewd act.

8 MR. SHEEK: And that's what the third is, a
9 codification of the old lewd act.

10 THE COURT: Let me see what that is. What section
11 is it?

12 MR. SHEEK: 16-3-65 --

13 THE COURT: I think it's 4. It looks to me 64.
14 Well, that's not -- no, that's not -- that's not. I'm
15 looking at 16-3-654. That's not what we're talking
16 about.

17 MR. SHEEK: Just one second, Judge. I'm trying
18 to -- I apologize, Your Honor. This is 2008. It would
19 be charged under the lewd act.

20 THE COURT: What?

21 MR. SHEEK: This was in 2008. It would be
22 charged --

23 THE COURT: Well, where is that?

24 MR. SHEEK: The old lewd act statute, it's been
25 redone, Judge.

1 THE COURT: Well, give me what we're dealing with
2 back in 2008.

3 MR. SHEEK: Your Honor, I apologize. It's 16-3-655,
4 Subsection C. Criminal sexual conduct with a minor,
5 third degree, if the actor is over 14, and willfully or
6 lewdly commits or attempts to commit a lewd --

7 THE COURT: Wait a minute. Let me -- let me read.
8 Are you reading 16-3-655, Paragraph 3?

9 MR. SHEEK: No, sir. Subsection C.

10 THE COURT: Do we know when this was adopted?

11 MR. SHEEK: This would have been adopted in 2010,
12 Your Honor.

13 THE COURT: Let me see here. Actually this -- I'm
14 looking at it again, and it says the 2012 amendment
15 added Subsection C related to criminal sexual conduct in
16 the third degree.

17 MR. SHEEK: That's why it's -- it would be under the
18 old lewd act.

19 THE COURT: Well, where is that?

20 MR. SHEEK: Well, that's no longer on the computer
21 because it's been repealed and replaced with this. I'm
22 having a hard copy brought over of the old lewd act
23 statute.

24 THE COURT: Okay. Well, let's -- we've got to wait
25 on that then. So this one doesn't help then because

1 this is 2012 law.

2 MR. SHEEK: Let me run and grab that for you, Judge.

3 THE COURT: Do you know what -- before this
4 amendment, do you know what the section was for a lewd
5 act?

6 MR. MORROW: Your Honor, the amendments took place
7 while I was in law school, so I learned it this way.
8 I'm trying to find it.

9 THE COURT: Okay.

10 (Recess was taken.)

11 BAILIFF: Remain seated. Court will come to order.

12 THE COURT: Are you having any luck?

13 MR. SHEEK: They're bringing over the old copy,
14 Judge. I think we're printing off a copy back there.
15 16-15-140 was the old statute number.

16 THE COURT: 16 what?

17 MR. SHEEK: 15-140.

18 THE COURT: All right.

19 MR. SHEEK: Do you have it, Your Honor?

20 THE COURT: I've got a copy of it here.

21 MR. SHEEK: Okay.

22 THE COURT: All right. Apparently this is Section
23 16-15-140, committing or attempting a lewd act upon a
24 child under 16, was the law in 2008 when this is alleged
25 to have occurred. And you want me to read it or are

1 you --

2 MR. BANNISTER: I'm familiar with it.

3 THE COURT: Okay. I think that that -- that the
4 evidence would support a conviction of that charge. I'm
5 not saying that that's what happened. I'm just saying
6 that there is evidence that would support that charge,
7 so if you're requesting that I -- heretofore, I had
8 understood you to be saying that you didn't want
9 anything other than criminal sexual conduct charged to
10 the jury, but you're asking me now to charge lewd act
11 under Section 16-15-140?

12 MR. SHEEK: Yes, sir.

13 THE COURT: Okay. I'll charge that then. So what
14 I'm gonna charge the jury is, as far as the criminal
15 sexual conduct with a minor, that requires a sexual
16 battery, and in this case that means sexual intercourse.
17 That's what I think the testimony supports. I'm not
18 saying that that's what happened, again, but that's what
19 her testimony would support; either sexual intercourse
20 took place or that he lewdly -- he committed a lewd act
21 on her as defined in Section 16-15-140.

22 MR. SHEEK: Yes, sir.

23 THE COURT: So both of those will be submitted to
24 the jury in that fashion.

25 MR. BANNISTER: And, Judge, I take it you are

1 implicitly finding then that it is -- I take it you are
2 finding that is a lesser included offense?

3 THE COURT: Yes.

4 MR. BANNISTER: Okay.

5 THE COURT: I guess that's the way I should say it.
6 It's an offense for which I think the evidence --
7 there's testimony that would support a conviction for
8 that, as I said, and that under this indictment charging
9 criminal sexual conduct with a minor as it has and all,
10 I think that I'm permitted to also submit a charge of
11 lewd act under that Section 16-15-140.

12 All right. Now so as far as arguments are concerned
13 then, are you gonna open on the law?

14 MR. SHEEK: I won't -- I will not request to unless
15 the defense wants me to, Your Honor.

16 MR. BANNISTER: I do not request him to, Your Honor.

17 THE COURT: All right. So you're gonna argue first
18 then completely and then you'll argue completely after
19 that?

20 MR. SHEEK: Yes, sir.

21 THE COURT: All right. Bring the jury in.

22 MR. BANNISTER: Judge, can I have just five minutes
23 before you do that?

24 THE COURT: Sure.

25 (Recess taken.)

1 deliberations. If I've overlooked something, I'll bring
2 you back out and tell you what I've overlooked before I
3 let you start your deliberations. So if you would go to
4 the jury room, please.

5 (Whereupon, the jury retires to the jury room.)

6 THE COURT: All right. We have the jury out. Any
7 exceptions to the charge from the State?

8 MR. SHEEK: Nothing from the State, Your Honor.

9 THE COURT: From the Defendant?

10 MR. BANNISTER: No, sir.

11 THE COURT: All right. And let me tell y'all --
12 come up here just a second and let me show you what --
13 why in particular. I do a verdict form like this a lot,
14 but in this case I think it particularly applicable, and
15 I'll tell you why, and I want the Clerk to see this.

16 (Proceedings held at the bench; not reported.)

17 THE COURT: I'll take it in there and bring the
18 alternate out.

19 (Whereupon, the jury commenced its deliberations at
20 3:49 PM.)

21 THE COURT: All right. We'll be at ease for a while
22 until we hear from the jury.

23 (Recess taken.)

24 BAILIFF: Remain seated. Court come to order.

25 THE COURT: All right. Bring the jury in. Well,

PAGE 02

WITNESSES

Kenny Downing
Greenwood County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

October Term, 2009
Indictment # 09GS24- *1246*

WARRANT NUMBER

M075352

THE STATE

vs.

Radney Lee Rogers Sr.

SOLICITORS OFFICE

Dean Conell

Foreman of the Grand Jury

Date: *Oct. 2, 2009*

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT
16-03-0655(A)

VERDICT

True Bill

Foreman

864-942-8838

09:42

04/10/2014

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

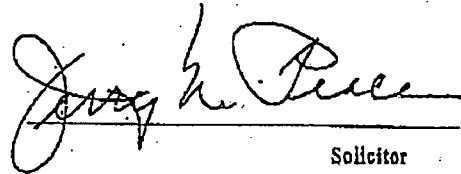
COUNTY OF GREENWOOD

**CRIMINAL SEXUAL CONDUCT
16-03-0655(A)**

At a Court of General Sessions, convened on the 2nd day of October, 2009 the Grand Jurors of Greenwood County present upon their oath:

That Rodney Lee Rogers Sr., did in Greenwood County, state aforesaid, on or about the 1st day of February, 2008 being older than the victim; willfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one Madysen Alexis Anderson, date of birth: November 11, 2003, in violation of Section 16-3-655(A) (1) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided,



Handwritten signature of Joseph H. Preece, Solicitor.

Solicitor

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge
2009-GS-24-1246

APPELLATE CASE NO.: 2014-000980

The StateRespondent

v.

Rodney Lee Rogers, Sr.Appellant.

Final Brief of Appellant

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Argument1

THE TRIAL COURT ERRED IN CHARGING THE JURY THEY COULD CONVICT THE DEFENDANT FOR A LEWD ACT ON A MINOR UNDER S.C. CODE §16-15-140 BECAUSE THE DEFENDANT WAS NOT INDICTED UNDER THAT SECTION OR §16-3-655(C) AND NEITHER SECTION IS A LESSER INCLUDED OFFENSE UNDER §16-3-655(A) UNDER WHICH THE DEFENDANT WAS INDICTED AND THEREFORE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION FOR THE CONVICTION.

Conclusion2

TABLE OF AUTHORITIES

Cases:

State v. Green, 343 S.C. 207, 5398 S.E.2d 419 (Ct. App. 2000)2

Statutes:

S.C. Code Ann. § 16-3-655(A) and (C) (Supp. 2012)1

S.C. Code Ann. § 16-15-140 (Repealed 2012 Act No. 255 eff. Jun 16, 2012)1

STATEMENT OF ISSUE ON APPEAL

THE TRIAL COURT ERRED IN CHARGING THE JURY THEY COULD CONVICT THE DEFENDANT FOR A LEWD ACT ON A MINOR UNDER S.C. CODE §16-15-140 BECAUSE THE DEFENDANT WAS NOT INDICTED UNDER THAT SECTION OR §16-3-655(C) AND NEITHER SECTION IS A LESSER INCLUDED OFFENSE UNDER §16-3-655(A) UNDER WHICH THE DEFENDANT WAS INDICTED AND THEREFORE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION FOR THE CONVICTION.

STATEMENT OF THE CASE

Rodney Lee Rogers, Sr. was arrested on April 29, 2009 on a warrant charging violation of S.C. Code § 16-3-655(A), Criminal Sexual Conduct with a minor in the first degree. He was subsequently indicted for the same charge.

On April 15, 2014 Rogers went to trial and was convicted by a jury on the unindicted charge of violating S.C. Code § 16-15-140, lewd act on a minor.

Rogers was sentenced by the Honorable T. L. Hughston to fifteen (15) years provided on the service of ten (10) years the balance suspended with probation for five (5) years.

On April 25, 2014, Rogers filed his notice of appeal with the Clerk of Court for Greenwood County. The South Carolina Court of Appeals received the Notice of Appeal on April 30, 2014.

ARGUMENT

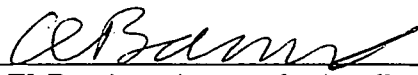
After the close of the evidentiary portion of the trial, the trial court held a charging conference with the prosecution and defense attorney. The prosecutor requested a charge to the jury on the lesser included offense of lewd act on a minor, §16-15-140. (R. pp. 4-10) The judge agreed to charge that section and did. The Appellant was convicted under that section.

Section 16-15-140 was repealed on June 18, 2012. The saving clause does not apply to the Appellant because he was never indicted for violating §16-15-140.

Section 16-3-655(C), which replaced §16-15-140, is not a lesser included offense of §16-3-655(A) for which the Appellant was indicted. State v. Green, 343 S.C. 207, 539 S.E.2d 419 (Ct. App. 2000). Therefore the trial court lacked subject matter jurisdiction which can be raised at any time, *ibid*.

CONCLUSION

The conviction of the Appellant should be vacated.



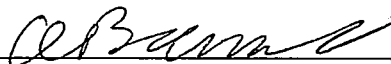
O. W. Bannister, Attorney for Appellant

June 8, 2015

Certificate Of Counsel

The undersigned certifies that this Final Brief complies with Rule 208, *SCACR* and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister
SC Bar No. 506; Fed. ID No. 1184
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Attorney for Appellant

June 8, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

RODNEY LEE ROGERS, Sr.,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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TABLE OF AUTHORITIES

Cases:

Campbell v. State, 342 S.C. 100, 535 S.E.2d 928 (2000).....3

Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997)3

State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).....3

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)2

State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1992).....3

State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981)3

State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993).....3

State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985)3

STATEMENT OF ISSUE ON APPEAL

General Sessions has subject matter jurisdiction over the offense of lewd act on a minor and the claim that lewd act on a minor should not have been charged to the jury is not preserved for review.

STATEMENT OF THE CASE

Appellant Rogers was indicted for the offense of criminal sexual conduct in the first degree on a minor under S.C. Code § 16-3-655(A). Rogers proceeded to jury trial before the Honorable Thomas L. Hughston, Jr., on April 15, 2014. Judge Hughston, at the prosecution's request and with defense counsel's acquiescence, instructed the jury on lewd act on a minor under S.C. Code § 16-15-140 as a lesser included offense. ROA. pp. 8-9. The jury convicted Rogers for lewd act on a minor. Judge Hughston sentenced Rogers to fifteen years imprisonment, suspended on ten years imprisonment and five years probation.

ARGUMENT

General Sessions has subject matter jurisdiction over the offense of lewd act on a minor and the claim that lewd act on a minor should not have been charged to the jury is not preserved for review.

Rogers argues the trial court erred by instructing the jury on lewd act on a minor and urges this Court to reverse the conviction and sentence based on subject matter jurisdiction. However, a court of General Sessions has subject matter jurisdiction to hear cases for the charge of lewd act on a minor. Rogers made no objection to the trial court's decision to instruct the jury on lewd act on a minor and therefore, waived error on appeal.

Subject matter jurisdiction is simply the power of a court to hear a certain class of cases. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Circuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 100, 610 S.E.2d at 499. Gentry further advises the following:

We note that a presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. . . . A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment. If the defendant does not object, he is deemed to have waived the right to presentment.

Id. at 102, 610 S.E.2d at 499 n. 6 (citation omitted).

Rogers did not object to the jury being instructed on lewd act on a minor, but instead acquiesced to the ruling.¹ Rogers asked the trial court whether the trial court was treating lewd act as a lesser included offense and failed to offer any argument when the trial court confirmed it was considering lewd act as a lesser included offense. ROA. p. 8-9. Rogers did

¹ Lewd act on a minor is not a lesser included offense of criminal sexual conduct with a minor in the first

not object to the trial court's ruling. Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (holding an appellate court will affirm a ruling by a trial judge if the offended party does not challenge that ruling; failure to challenge a ruling is abandonment of the issue and precludes consideration on appeal; an unchallenged ruling is law of the case and requires affirmance).

The ground asserted at trial must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993). "One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal." State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (not preserved due to failure to move for mistrial until after the verdict). "This Court cannot consider issues raised for the first time on appeal." State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1992) (finding issue not preserved where counsel accepted the trial court's ruling).

"[A] defendant's failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal." State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985). Rogers waived any challenge to the jury instructions when he failed to object during the charge conference and when he indicated no exception to the jury instructions after being asked by the trial court. See State v. Armstrong, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request

degree. Campbell v. State, 342 S.C. 100, 535 S.E.2d 928 (2000) *overruled on other grounds by Gentry*.

a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge.”). Accordingly, the issue presented should not be reviewed by this Court.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

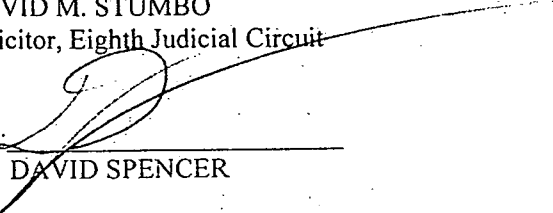
Respectfully submitted,

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March 10, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenwood County
Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

RODNEY LEE ROGERS, SR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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March 10, 2015

STATE OF SOUTH CAROLINA
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THE STATE,

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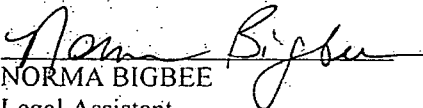
Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: O. W. Bannister, Esquire, P. O. Box 10007, Greenville, SC 29603.

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

This 10th day of March, 2015.


NORMA BIGBEE
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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge
2009-GS-24-1246

APPELLATE CASE NO.: 2014-000980

The StateRespondent

v.

Rodney Lee Rogers, Sr.Appellant.

Final Reply Brief of Appellant

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STATEMENT OF ISSUE ON APPEAL

The trial court erred in charging the jury they could convict the Appellant for a lewd act on a minor under S.C. Code §16-15-140 because the Appellant was not indicted under that section or §16-3-655(c) and neither section is a lesser included offense under §16-3-655(a) under which the Appellant was indicted and therefore the trial court lacked subject matter jurisdiction for the conviction.

STATEMENT OF THE CASE

Appellant Rodney Lee Rogers, Sr. (hereinafter "Rogers") was arrested on April 29, 2009 on a warrant charging violation of S.C. Code §16-3-655(A), Criminal Sexual Conduct with a minor in the first degree. He was subsequently indicted for the same charge.

On April 15, 2014 Rogers went to trial and was convicted by a jury on the unindicted charge of violating S.C. Code §16-15-140, lewd act on a minor.

Rogers was sentenced by the Honorable T. L. Hughston to fifteen (15) years provided on the service of ten (10) years the balance suspended with probation for five (5) years.

On April 25, 2014, Rogers filed his notice of appeal with the Clerk of Court for Greenwood County. The South Carolina Court of Appeals received the Notice of Appeal on April 30, 2014.

ARGUMENT I

THE TRIAL COURT ERRED IN CHARGING THE JURY THEY COULD CONVICT THE APPELLANT FOR A LEWD ACT ON A MINOR UNDER S.C. CODE §16-15-140 BECAUSE THE APPELLANT WAS NOT INDICTED UNDER THAT SECTION OR §16-3-655(C) AND NEITHER SECTION IS A LESSER INCLUDED OFFENSE UNDER §16-3-655(A) UNDER WHICH THE APPELLANT WAS INDICTED AND THEREFORE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION FOR THE CONVICTION.

The State argues: (1) the trial court had subject matter jurisdiction to try Rogers for a crime for which he was never indicted, never waived indictment, and was not a lesser included offense of the crime for which Rogers was tried; (2) Rogers waived his right to challenge his conviction because he did not object to the trial court charging the jury with the lesser included offense; and (3) Rogers did not preserve the issue by his failure to object at trial. Rogers will reply to each argument in turn.

The State reads State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) to clothe the trial court with subject matter jurisdiction over all crimes to include lewd act on a minor. That is correct as far as it goes. Gentry does not grant the trial court jurisdiction to try a defendant on related crimes for which the defendant has not been indicted or the prosecution has agreed to a waiver of indictment even if the defendant requests such additional charges. In State v. Dickerson, 395 S.C. 101, 716 S.E. 2d 895 (2011) the defendant requested the trial court charge the jury with an unindicted related crime. In refusing to do so, the Court held that Gentry establishes the concepts of subject matter jurisdiction and sufficiency of an indictment are distinct. Thus, the trial court has subject matter jurisdiction under flawed indictments unless the defendant raises the issue before the jury is sworn.

In Rogers' case, there was no indictment, no waiver, and no lesser included offense. Unless one of these elements is present, the trial court does not have subject matter jurisdiction. State vs. Green, 343 S.C. 207, 539 S.E.2d 419 (Ct. App. 2000) is on all fours with Rogers. In Green, the court held a defendant cannot be convicted for a crime for which he was not indicted if it is not a lesser included offense to that charged in the indictment.

The Green court noted, "[The] circuit court does not have subject matter jurisdiction to convict a defendant "unless there has been an indictment, a waiver of indictment, or unless the charge is a lesser included offense of the crime charged in the indictment." (quoting Murdoch

v. State, 308 S.C. 143, 144, 417 S.E.2d 543, 544 (1992)).

Neither Green nor Murdoch was overruled by Gentry.

Rogers submits that the trial court lacked subject matter jurisdiction to try him on an unindicted charge without a waiver and the unindicted charge was not a lesser included offense. This conclusion is in accord with the South Carolina Constitution, Art. I § 11, which requires an indictment before a citizen can be tried by the trial court.

ARGUMENT II

THE TRIAL COURT ERRED IN CHARGING LEWD ACT ON A MINOR BECAUSE APPELLANT DID NOT WAIVE INDICTMENT.

Waiver of indictment is provided for in §§17-23-120 and 130, S.C. Code Ann. A waiver must be signed by Rogers to waive indictment. Rogers never signed a waiver of indictment or orally waived an indictment.

Whether the court says Rogers did not have notice of the crime for which he was convicted or never waived indictment pursuant to statutory law the result is the same. Rogers' conviction must be set aside.

ARGUMENT III

APPELLANT DID NOT WAIVE HIS RIGHT TO APPEAL HIS CONVICTION FOR AN UNINDICTED OFFENSE BECAUSE HE DID NOT OBJECT AT TRIAL.

Article I, §11 of the South Carolina Constitution requires an indictment. Without an indictment or a waiver of indictment the trial court is without subject matter jurisdiction to try Rogers on lewd act on a minor. State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002).

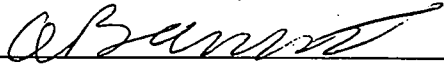
In Watson the Court stated, "In a criminal case the trial court's subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses." Id. at p. 375. This statement was approved in State v. Burton, 356 S.C. 259, 589 S.E.2d 6 (2003).

Neither Watson nor Burton was expressly overruled by Gentry.

Subject matter jurisdiction can be raised at any time: Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

CONCLUSION

The conviction of the Appellant should be vacated.




O. W. Bannister, Attorney for Appellant

June 8, 2015

Certificate Of Counsel

The undersigned certifies that this Initial Reply Brief complies with Rule 208, *SCACR* and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.

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June 8, 2015

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Rodney Lee Rogers, Sr., Appellant.

Appellate Case No. 2014-000980

Appeal From Greenwood County
Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-245
Submitted April 1, 2016 – Filed June 1, 2016

AFFIRMED

Oscar W. Bannister, of Bannister, Wyatt & Stalvey, LLC,
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Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General David A. Spencer,
both of Columbia; and Solicitor David Matthew Stumbo,
of Greenwood, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) ("[A]
defendant's failure to object to the charge as made or to request an additional

charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal."); *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) ("[S]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong, and . . . issues related to subject matter jurisdiction may be raised at any time." (citation omitted)); *id.* at 101, 610 S.E.2d at 499 ("Circuit courts obviously have subject matter jurisdiction to try criminal matters."); *id.* at 102 n.6, 610 S.E.2d at 499 n.6 ("[A] presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court.").

AFFIRMED.¹

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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JUN 16 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENWOOD COUNTY
Thomas L. Hughston, Jr., Circuit Court Judge

2014-000980

The State Respondent

v.

Rodney Lee Rogers, Sr. Appellant.

PETITION FOR REHEARING

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NOW COMES the Appellant, Rodney Lee Rogers, Sr., by and through his undersigned counsel, and moves this Court for a rehearing pursuant to Rule 221(a), S.C.A.C.R. Grounds for the said Petition are as follows:

The Appellant Rogers was convicted of a crime for which he was never indicted, never waived indictment, never consented to be tried for, and was never put on notice to prepare a defense for.

The Court of General Sessions had the subject matter jurisdiction to try defendants who are properly accused of committing a lewd act on a minor. In the within action, the circuit court did not have jurisdiction to try Appellant for a crime that was not charged before the jury was selected, during the evidentiary portions of the trial, and until after the close of all of the evidence. It was at the point the judge charged a new and different crime for which the jury then convicted Appellant.

Nowhere in the record was Appellant ever asked if he waived presentment of an indictment, agreed to being tried on an entirely new criminal charge or if he consented to so be tried.

Under the circumstances of this case, the lower court did not have subject matter jurisdiction to try this Appellant on this unindicted, unwaived criminal charge.

WHEREFORE, Appellant requests this Court to reconsider its decision.

Respectfully submitted,

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June 15, 2016

The South Carolina Court of Appeals

The State, Respondent,

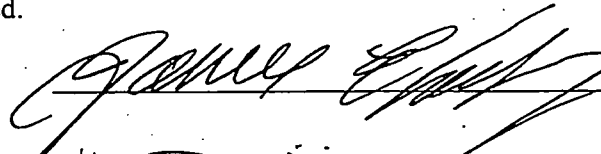
v.

Rodney Lee Rogers, Sr., Appellant.


Appellate Case No. 2014-000980

ORDER


After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:
David Matthew Stumbo, Esquire
Alan McCrory Wilson, Esquire
Oscar W. Bannister, Esquire
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FILED

August 18, 2016 27