

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SEP 22 2016

On Writ of Certiorari to the Court of Appeals
Thomas L. Hughston, Jr., Circuit Court Judge

SC Court of Appeals

Supreme Court Appellate Case No. 2016-_____
Court of Appeals Appellate Case No. 2013-002391

THE STATE,

Respondent,

vs.

RODNEY LEE ROGERS, SR.,

Petitioner.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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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

Petitioner 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. R. 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.

Rogers appealed, and the Court of Appeals affirmed in an unpublished opinion without oral argument. State v. Rodney Lee Rogers, Sr., 2016-UP-245 (filed June 1, 2016). Rogers' subsequent petition for rehearing was denied by order dated August 16, 2016. Rogers petitioned this Court for a writ of certiorari. This return follows.

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

¹ Lewd act on a minor is not a lesser included offense of criminal sexual conduct with a minor in the first degree. Campbell v. State, 342 S.C. 100, 535 S.E.2d 928 (2000) *overruled on other grounds by Gentry*.

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. R. pp. 8-9. Rogers did 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 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 the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the writ, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: 

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ATTORNEYS FOR RESPONDENT

September 22, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No: 2013-002391
Supreme Court Appellate Case No. _____

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SC Court of Appeals

THE STATE,

Respondent,

v.

RODNEY LEE ROGERS, SR.,

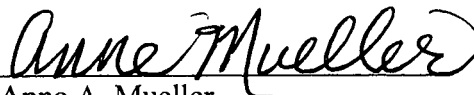
Petitioner.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Return to the Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record O. W. Bannister, Esquire, P.O. Box 1007, Greenville, SC 29603.

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

This 22nd day of September, 2016.



Anne A. Mueller
Legal Assistant
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ALAN WILSON
ATTORNEY GENERAL

September 22, 2016

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SC Court of Appeals

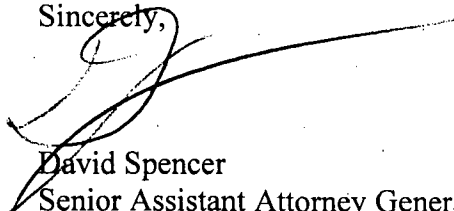
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Rodney Lee Rogers, Sr.
Court of Appeals Appellate Case No: 2013-002391
Supreme Court Appellate Case No. 2016-_____

Dear Mr. Shearouse:

Enclosed please find an original and six (6) copies of the Return to the Petition for Writ of Certiorari, including proof of service, in the above-referenced case.

Sincerely,


David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: O. W. Bannister (with two copies)
The Honorable Jenny Abbott Kitchings, Court of Appeals (with enclosure)
Ms. Trisha Allen (with enclosure)