STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

Opinion No. 2022-UP-118 (S.C. Ct. App. Filed March 23, 2022)

THE STATE,

RESPONDENT,

V.

DONALD RAY RICHBURG,

PETITIONER

APPELLATE CASE NO. 2019-001007

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 19, 2022.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by affirming the trial judge's ruling that the video recording of Petitioner's arrest was admissible where Petitioner's girlfriend and child were present, and the officers threatened to arrest Petitioner's girlfriend and send their child to DSS if Petitioner did not come out of hiding and therefore its probative value was substantially outweighed by the danger of unfair prejudice?

2.

Whether the Court of Appeals erred by finding Petitioner's second issue was unpreserved for appellate review where counsel's request to cross-examine the lead investigator about Petitioner's second statement to law enforcement was reasonably understood by the trial judge as a request to admit the evidence under Rule 106, SCRE which was the same argument made on appeal?

3.

Whether the Court of Appeals erred by affirming the trial judge's ruling prohibiting defense counsel from cross-examining the lead investigator about Petitioner's second statement in which he admitted to being present at the scene of the shooting where the state had already introduced Petitioner's first statement in which he denied being present at the scene and Petitioner's co-defendant testified that Petitioner was present at the scene but not involved in the shooting which was consistent with Petitioner's second statement?

STATEMENT OF THE CASE

Petitioner was indicted by the Sumter County grand jury for four counts of assault and battery in the first degree and one count of discharging a firearm into a dwelling. R. 301. Petitioner's trial was held before the Honorable George M. McFaddin and a jury from June 10 – 12, 2019. R. 1. Petitioner was represented by Jason Bridges and the state was represented by Tyler Brown. R. 1. Petitioner was found guilty on each count and sentenced to ten-years imprisonment on each count, all sentences to run concurrently. R. 287 – 295.

The Court of Appeals affirmed Petitioner's convictions without oral argument in State v. Richburg, Op. No. 2022-UP-118 (S.C. Ct. App. Filed March 23, 2022). Petitioner filed a petition for rehearing on March 31, 2022. The Court of Appeals denied the petition for rehearing on May 19, 2022.

This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

1.

The Court of Appeals erred by affirming the trial judge's ruling that the video recording of Petitioner's arrest was admissible because Petitioner's girlfriend and child were present, and the officers threatened to arrest Petitioner's girlfriend and send their child to DSS if Petitioner did not come out of hiding and therefore its probative value was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

Randall Stewart, with the Sumter County Sheriff's Office, was the lead investigator assigned to a shooting that took place on June 17, 2018, at the home of Jeremy Brinson. R. 171, l. 1 – 172, l. 16. After speaking with Brinson, Stewart developed Ronnie Smith as a possible suspect. R. 193, ll. 6 – 20; R. 199, ll. 16 – 24. Smith admitted to being the shooter and implicated Petitioner as the driver during the shooting. State's Ex. 85.

Stewart obtained arrest warrants for Petitioner, but he was unable to contact him. The warrants were then turned over to the Fugitive Task Force Team. R. 214, ll. 9 – 15. Ronald Dodson, a member of the Task Force, testified that he located Petitioner at a hotel in Sumter on August 17, 2018. R. 158, l. 21 – 159, l. 19. Dodson and several other officers responded to the hotel to arrest Petitioner. R. 161, l. 12 – 162, l. 6. One of the officers who responded to the hotel was wearing a body camera which showed the arrest of Petitioner. R. 162, l. 12 – 163, l. 3; State's Ex. 7.

The body camera footage showed multiple armed officers at the hotel room where Petitioner was located with his girlfriend, Courtney, and their child. State's Ex. 7 at 0:00 – 2:00. The officers threatened to "call DSS" if Courtney did not cooperate with their efforts to arrest

Petitioner. State's Ex. 7 at 2:00 – 2:30. Courtney opened the hotel door with a young child in her arms and stated that she was getting ready to bathe the child and the bath water was running. When asked whether anyone was in the hotel room with her, she said "no." State's Ex. 7 at 3:15 – 3:20. The officers threatened to arrest Courtney and take her child to DSS if they found Petitioner inside the hotel room. State's Ex. 7 at 3:30.

The officers entered the hotel room and discovered that Petitioner was "in the ceiling." State's Ex. 7 at 5:15. The officers again threatened Courtney: "When I get [Petitioner], you're going to jail and your baby's going to DSS." State's Ex. 7 at 5:15 – 5:25. The officers also threatened Petitioner: "The baby is going to DSS if you don't bring your ass down now." State's Ex. 7 at 5:58 – 6:03. Shortly after this Petitioner can be seen emerging from the bathroom and being put in handcuffs by the officers. State's Ex. 7 at 6:30 – 7:15.

Defense counsel made a pretrial motion to exclude the body camera footage of Petitioner's arrest under Rule 403, SCRE because the probative value of the video was substantially outweighed by the danger of unfair prejudice to Petitioner. R. 24, l. 19 – 26, l. 2. The assistant solicitor responded that the body camera footage showed evidence of flight which created an inference of Petitioner's guilt. R. 26, l. 5 – 9. The judge ruled that the body camera footage was admissible, and it was played to the jury over defense counsel's renewed objection. R. 29, ll. 7 – 9; R. 162, l. 20 – 163, l. 23.

Discussion

Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

The trial judge erred in admitting the video of Petitioner's arrest over defense counsel's objection. The video's probative value consisted solely of showing Petitioner's flight. However, the video showed much more than that. The video showed law enforcement officers threatening to arrest Petitioner's girlfriend for "harboring" when she told the officers on the scene that Petitioner was not inside the hotel room. Even more significantly, it showed the officers threatening to take Petitioner's child and place him in DSS custody.

In State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), the Court of Appeals held that the defendant's statements to law enforcement were involuntarily made and inadmissible. The reason the Court found the defendant's statements to be inadmissible in Corns was because his statements were made in response to the officers threatening to arrest his wife and take his children to DSS. Id. at 552, 426 S.E.2d at 327. The Court of Appeals determined that the threats made against the defendant's wife and children amounted to improper influence rendering his confession involuntary. Id.

Although Corns dealt with the admissibility of a defendant's statement, the opinion highlights the problematic nature of officers making threats against a defendant's family. To the extent that a threat against a defendant's family may render his statements in response to such a threat inadmissible, so too should a video recording showing these threats being made be closely scrutinized under Rule 403, SCRE. While Petitioner did not make any incriminating statements on the video, he did apparently heed the officer's demands only in response to those threats being made to him. See State's Ex. 7.

Although evidence of flight may be admissible to show a guilty conscience, it is not always admissible. See State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) (recognizing that evidence of flight may be used to show a guilty conscience but holding that defendant's failure to

stop for a blue light was inadmissible because it was not motivated by the outstanding murder charge); State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013) (evidence that Martin gave false information to police was inadmissible because there was no nexus between the false information and the charged crime).

The objection made in this case was not to evidence of Petitioner's flight but rather to a video of his arrest which contained extremely prejudicial information regarding the arrest of his girlfriend and the placing of his child into DSS custody. R. 24, l. 19 – 26, l. 2. There was no contention by the defense that the state could not present testimony regarding Petitioner's evasive behavior after warrants were issued for his arrest. However, the state cannot introduce evidence where the probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

The extremely prejudicial nature of the content of the video lies primarily in the insinuation that Petitioner was abandoning his son and girlfriend. The jury could view the video as showing Petitioner to be a bad father and boyfriend which was not a proper consideration for the jury. The video was unnecessary and a gratuitous attack on Petitioner's character while providing minimal probative value. It showed that Petitioner was willing to allow his girlfriend to be arrested and have his child taken into DSS custody instead of surrendering to the police himself.

The question before the jury was whether Petitioner knowingly participated in the shooting of the Brinson's house. The jury did not need to consider whether Petitioner was a "good" or "bad" father to his child, or significant other to his girlfriend. However, the video

introduced this exact consideration into the jury's deliberations by showing the presence of Petitioner's child and the officer's threatening to take the child into DSS custody. The trial judge erred in admitting the body camera footage of Petitioner's arrest because its probative value was substantially outweighed by the danger of unfair prejudice.

2.

The Court of Appeals erred by finding Petitioner's second issue was unpreserved for appellate review because trial counsel's request to cross-examine the lead investigator about Petitioner's second statement to law enforcement was reasonably understood by the trial judge as a request to admit the evidence under Rule 106, SCRE which was the same argument made on appeal.

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). "In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). "A party need not use the exact name of a legal doctrine in order for the issue to be preserved, but it must be clear the argument has been presented on that ground." State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010).

The four basic requirements for issue preservation are: "The issue must have been (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, 912–13 (Ct. App. 2004) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)). Further, a party cannot make a different argument on appeal than the argument made at trial. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). If a party fails to raise an issue at trial, then the issue is waived on appeal. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

However, "issue preservation is not a 'gotcha' game" and "[i]nstead of being hyper-technical, [appellate courts] approach preservation with a practical eye." State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019); see also State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (holding that hearsay objection was preserved where the basis for the objection was apparent from the context and it was clear that both the state and trial judge understood the objection to have been based on hearsay).

In viewing defense counsel's argument at trial with a practical eye and in fairness to the trial judge, counsel's request to cross-examine the lead investigator about Petitioner's prior statements to law enforcement was reasonably understood by the trial judge as a request to admit the evidence under Rule 106, SCRE. This issue was initially raised by the state in which it objected to the admission of the prior statement under Rule 106, SCRE. Furthermore, the state cited to State v. Tennant, 383 SC 245, 678 S.E.2d 812 (Ct. App. 2009) and State v. Oglesby, 384 SC 289, 681 S.E.2d 620 (Ct. App. 2009) for support – both Rule 106, SCRE cases. R. 216, l. 11 – 219, l. 16. Therefore, the issue was raised to the trial judge as a Rule 106, SCRE issue.

Defense counsel argued that the second statement was necessary to complete the jury's understanding of the case. Counsel argued:

> I also think[] there's a context – there has been some discussing that [Petitioner] attempted to give an alibi prior to his arrest. I think this circles back on that and says he abandoned that and ... he admitted to being there. Because I think that, you know, - I don't have to diffuse that I'm putting up an alibi defense because I'm not. I think that this – in no terms is this a self-serving statement for me to merely ask Investigator Stewart, Did he later admit to being there, without, you know, having to say, Did you do an interview, Was it recorded, anything like that.
>
> That would just be my contention. This is not a self-serving statement *and it is kind of required to kind of put to bed that this is not an alibi situation.*

R. 220, ll. 5 – 18 (emphasis added).

In Petitioner's first statement, he stated that he had been with Smith earlier in the day but was not with Smith at the time of the shooting. R. 299. In Petitioner's second statement, he told the investigator that he was present with Smith at the time of the shooting but did not know that Smith was going to shoot at the Brinson's house. See State's Ex. 6. In other words, Petitioner's first statement was that of an alibi defense whereas his second statement was a mere presence defense. The state only introduced Petitioner's first statement. R. 210, l. 5 – 211, l. 11. Defense counsel's argument was reasonably understood in the context it was made as an argument that the second statement was necessary to complete the context of the first statement.

In the specific context of this case, where defense counsel was responding to the state's Rule 106, SCRE argument by indicating that the second statement was necessary to show that Petitioner abandoned his defense of alibi, counsel was arguing for the admission of the statement pursuant to Rule 106, SCRE. This was the same argument that was made on appeal and the Court of Appeals erred in holding that this issue was unpreserved for appellate review.

3.

The Court of Appeals erred by affirming the trial judge's ruling prohibiting defense counsel from cross-examining the lead investigator about Petitioner's second statement in which he admitted to being present at the scene of the shooting because the state had already introduced Petitioner's first statement in which he denied being present at the scene and Petitioner's co-defendant testified that Petitioner was present at the scene but not involved in the shooting which was consistent with Petitioner's second statement.

Relevant Facts

A pretrial Jackson v. Denno[1] hearing was held to determine the admissibility of Petitioner's statements to law enforcement. Investigator Stewart took two statements from Petitioner during his investigation. R. 5, l. 19 – 6, l. 2; R. 16, l. 7 – 19, l. 14; R. 298, 299; R. 300; State's Ex. 6. The first statement was prior to Petitioner's arrest and the second was after. R. 6, ll. 3 – 22; R. 15, ll. 16 – 25.

In Petitioner's first statement to Stewart, he stated that he had been with Smith earlier in the day but was not with Smith at the time of the shooting. R. 299. In Petitioner's second statement, he told Stewart that he was present with Smith at the time of the shooting but did not know that Smith was going to shoot at the Brinson's house. See State's Ex. 6. The judge ruled that both statements were admissible.[2] R. 22, l. 10 – 23, l. 15.

Petitioner's co-defendant, Ronnie Smith, also gave a video recorded statement in which he admitted he was the shooter and implicated Petitioner as a knowing and willing participant. See State's Ex. 85. However, Smith's testimony at trial on cross-examination was that although

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1 Jackson v. Denno, 378 U.S. 368 (1964).

2 Defense counsel objected to the admissibility of the first statement but not the second statement. R. 19, l. 21 – 20, l. 2.

Petitioner was the driver at the time of the shooting, Petitioner did not know that Smith was going to shoot at the house. R. 130, l. 17 – 137, l. 5.

The state only introduced Petitioner's first statement in its case in chief which was introduced and published to the jury during Stewart's direct examination. R. 210, l. 5 – 211, l. 11. Before defense counsel cross-examined Stewart, the state moved to prevent counsel from questioning Stewart regarding Petitioner's second statement. The solicitor argued that the second statement was not admissible pursuant to Rule 106, SCRE because the second statement was given six months after the first statement. The assistant solicitor cited to State v. Tennant, 383 SC 245, 678 S.E.2d 812 (Ct. App. 2009) and State v. Oglesby, 384 SC 289, 681 S.E.2d 620 (Ct. App. 2009) for support. R. 216, l. 11 – 219, l. 16.

Defense counsel responded that he did not intend to introduce Petitioner's full statement but did intend to ask Stewart whether Petitioner "later admit[ed] to being on the scene." R. 219, ll. 19 – 24. Counsel argued that was not a self-serving statement because it was an admission by Petitioner that he was present at the scene. R. 219, l. 24 – 220, l. 18. The judge agreed with the state and did not allow defense counsel to cross-examine Stewart regarding Petitioner's admission that he was with Smith at the time of the shooting. Specifically, the judge stated: "I'm going to adopt the State's position on this." R. 222, ll. 1 – 5.

Discussion

Rule 106, SCRE provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In State v. Terry, 339 S.C. 352, 355-356, 529 S.E.2d 274, 276 (2000), this Court held that a defendant who elected not to testify at his trial could not introduce his statements to law

enforcement pursuant to Rule 804 (b)(3), SCRE. Specifically, Terry had argued that he should be allowed to introduce his confession as a statement against interest because he was "unavailable" by virtue of his exercising of his fifth amendment right to remain silent. Id. The Court disagreed and determined that "Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield." Id. at 356, 529 S.E.2d at 277.

This Court again dealt with the issue of whether a non-testifying defendant may introduce his statement to law enforcement in State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). In Cabrera-Pena, this Court found that the trial judge erred in not allowing the defendant, who was proceeding pro se, to cross-examine the officer on his written statement. The Supreme Court noted that its previous holding in Terry, 339 S.C. 352, 529 S.E.2d 274 (2000) had been misconstrued to the extent it was being read for the proposition that a non-testifying defendant's exculpatory statement can never be admitted under any circumstances. Cabrea-Pena, 361 S.C. at 377, 605 S.E.2d at 524.

The Cabrea-Pena Court pointed out that Terry dealt specifically with whether a defendant was "unavailable" for hearsay purposes when he invoked his fifth amendment right against self-incrimination and its holding was limited to such a situation. Id. In relying on Rule 106, SCRE and State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975), the Cabrea-Pena Court reached the conclusion that the defendant's statement was admissible: "Under Jackson, once the state elected to utilize Officer Membreno's testimony to elicit incriminating statements made by Cabrera–Pena, justice required that his remaining statements tending to explain or qualify those statements should have been considered in connection therewith. Accordingly, we find Cabrera–Pena's cross-examination of Membreno was improperly limited." Cabrera-Pena, 361 S.C. at 378,

605 S.E.2d at 525 (2004). In State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975), this Court stated:

> When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it.

Jackson, 265 S.C. at 284, 217 S.E.2d at 797 (internal quotations omitted).

Here, the trial judge erred in refusing to allow defense counsel to cross-examine the lead investigator regarding Petitioner's admission that he was present with Smith at the time of the shooting. This statement fell within Rule 106, SCRE as being another recorded statement that ought to have been considered in fairness along with the statement which the state had already introduced. Further, the state elicited testimony from Smith that Petitioner was with him at the time of the shooting but was not aiding and abetting. R. 137, l. 12 – 139, l. 5.

The state introduced Petitioner's first statement which was a denial of any involvement or presence at the scene but then attempted to hide from the jury the fact that Petitioner subsequently admitted that he was present on the scene. The trial judge's ruling preventing defense counsel from being able to explain and qualify the statement which had already been used by the state was error. See Jackson, 265 S.C. at 284, 217 S.E.2d at 797.

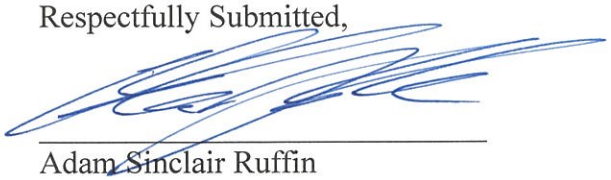
Even though Petitioner's second statement was given six months after his first statement, they both dealt with the exact same subject matter and were closely related. It was disingenuous for the state to give the jury the impression that Petitioner *only* denied being present at the scene when in reality he later admitted to being present at the scene. As in Cabrea-Pena, it was the state that chose to introduce Petitioner's first statement denying involvement. Once the state

introduced Petitioner's first statement, it would have only been fair that Petitioner be permitted to qualify and explain that statement by showing to the jury the fact that he later admitted to being present at the scene. This is especially true because Petitioner's second statement was also consistent with Smith's testimony at trial. R. 130, l. 17 – 137, l. 5. The Court of Appeals erred in affirming the trial judge and Petitioner's conviction should be reversed. See State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004); State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975); Rule 106, SCRE.

CONCLUSION

Based upon the foregoing argument, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to the Court of Appeals to allow full briefing on the issues presented.

Respectfully Submitted,



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of June, 2022.

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Jun 17 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George M. McFaddin, Circuit Court Judge

Opinion No. 2022-UP-118 (S.C. Ct. App. Filed March 23, 2022)

THE STATE,

RESPONDENT,

V.

DONALD RAY RICHBURG,

PETITIONER

APPELLATE CASE NO. 2019-001007

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals in this case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Donald Ray Richburg, #340617, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 17th day of June, 2022.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

From:	Leverett, Scott
To:	William Blitch
Cc:	Caroline Collins; Ruffin, Adam
Subject:	Donald Richburg - Petition for Writ of Certiorari to the Court of Appeals - Appellate Case No. 2019-001007
Date:	Friday, June 17, 2022 4:30:00 PM
Attachments:	AG coverletter.pdf Donald Richburg - Petition for Writ of Certiorari to the Court of Appeals - Appellate Case No. 2019-001007.pdf

Dear Mr. Blitch,

Attached please find a copy of the petition for writ of certiorari to the Court of Appeals in the above referenced case that is being filed today, June 17, 2022, with the Supreme Court and the Court of Appeals.

-Scott Leverett
Admin. Asst. for Adam Ruffin
Appellate Defense