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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals
APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Maite Murphy
Circuit Court Judge

Court of Appeals Opinion No. 5908
Supreme Court Case No. 2022-000850

The State of South Carolina .....Respondent,

v.

Gabrielle Oliva Lashane Davis-Kocsis .....Petitioner.

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I. The Court of Appeals' opinion conflicts with a South Carolina statute and 39-year-old precedent of this Court.

The State does not effectively rebut Petitioner's argument that the plain and ordinary meaning of section 16-3-910 of the South Carolina Code forbids imposition of a sentence for kidnapping on one who has also been convicted of and sentenced for murder, without any limitation on the identity of the alleged murder and kidnapping victims.[1] The State, like the Court of Appeals, relies on dictum from *State v. Vazquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005). The issue before the *Vazquez* court was whether "the trial judge erred in sentencing [the defendant] for the kidnapping of the murder victims." *Id.* What was not before the *Vazquez* court was the general proposition of whether a defendant may be sentenced for the kidnapping of persons other than the murder victim(s) under section 16-3-910. *See State v. Harrison*, 432 S.C. 448, 464, 854 S.E.2d 468, 476 (2021) (explaining that "[c]ourts do not give advisory opinions or answer questions that are not asked"). As set forth in Petitioner's brief, that issue was before this Court in *State v. Livingston*, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984) and *State v. Stroman*, 281 S.C. 508, 514, 316 S.E.2d 395, 400 (1984), which all parties acknowledge have never been overruled.

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[1] The State has not objected to the consideration of Petitioner's sentence until now. Even if the issue of Petitioner's sentence is not explicitly preserved, the Court of Appeals was correct to apply *State v. Vick*, 384 S.C. 189, 201-203, 682 S.E.2d 275, 281 (Ct. App. 2009), to consider this issue in the interest of judicial economy. (Opinion p. 16).

The State's concession that the "reason" for the statutory provision prohibiting a sentence for kidnapping for a person also sentenced for murder is "largely unknown" (Resp. Brief p. 11) opens the door for Petitioner's construction of section 16-3-910.[2] (Pet. Brief pp. 5-9). Only the Petitioner's construction of section 16-3-910 "gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." *Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). Only the Petitioner's construction of section 16-3-910 "read[s] the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal quotations omitted). Only the Petitioner's construction of section 16-3-910 "construe[s this penal statute] strictly against the State and in favor of the defendant." *Rainey v. State*, 307 S.C. 150, 151-52, 414 S.E.2d 131, 132 (1992).

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[2] Petitioner reiterates her argument presented in her petition for writ of certiorari that the legislative history and rules of statutory construction show the Legislature intended to prohibit sentences for kidnapping whenever a defendant was convicted of murder regardless of the identity of the victims because the Legislature took no action to amend the prohibition portion of the statute in 1991, when it amended the sentencing range. The Legislature was aware of this Court's opinion in *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984) vacating a kidnapping sentence where the defendant was not convicted of murder of the kidnapping victim. When the Legislature fails to alter a statute over a long period of time, "its inaction is evidence the Legislature agrees with th[e] Court's interpretation." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003).

II. Admission of the 911 call recording conflicts with Rule 403, SCRE and this Court's precedent interpreting it.

In a footnote, the State claims that "Petitioner's argument that the trial court erred by admitting the 911 call without listening to it first...is not preserved for appellate review" because "Petitioner did not raise this issue to the Court of Appeals in its [sic] initial, final, or reply brief, at oral argument, or in its [sic] petition for rehearing." (Resp. Brief p. 13 n.8). The State is simply wrong on all accounts.[3] First, and foremost, Petitioner informed the Court of Appeals in his reply brief that "it appears the trial court did not listen to this recording before ruling it admissible." (Reply Brief p. 3 n.1). The Court of Appeals later noted in its opinion, without objection by the State: "[t]he [trial] court had not listened to [the 911 call] at the time of the pretrial ruling." (Opinion p. 4 n. 1). Additionally, the trial court's failure to listen to the 911 call prior to admitting it is not a separate basis for reversal. Rather, the trial court's failure to listen to the 911 call shows how the trial court abused her discretion when she allowed the State to introduce it over objection.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v.*

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[3] Assuming, *arguendo*, this issue is not explicitly preserved it should nonetheless be considered. This Court has recognized issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) ("'[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.'").

Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429-430, 632 S.E.2d at 848. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (internal quotation omitted). The trial judge's failure to listen to the 911 recording was a complete abdication of the judge's duty to exercise discretion. How could the trial judge determine the probative value and danger of unfair prejudice of the 911 recording without listening to it?

Though their preservation is unlikely,[4] the State's brief advances two other post hoc justifications for the admission of the 911 call. The State argued the 911 recording was admissible as evidence of truthful character under Rule 608, SCRE. (Resp. Brief p. 17). However, under that rule "the evidence may refer only to character for truthfulness". Rule 608(a), SCRE. The 911 call refers to many things, but Alexis Murray and Whitney Chance's "character for truthfulness is not one of them. It is also extrinsic evidence prohibited by Rule 608(b), SCRE. The State also attempted to shoehorn in the 911 call as a "prior consistent statement" under Rule 801(d)(1)(B), SCRE. (Resp. Brief p. 17). However, "[t]he plain language of Rule 801(d)(1)(B) only

[4] While this Court may affirm for any ground(s) appearing in the Record on Appeal, the ground(s) must actually appear in the Record on Appeal. *See* Rule 220(c), SCACR; *Bishop v. S.C. Dept. of Mental Health*, 331 S.C. 79, 93, 502 S.E.2d 78 (1998) (Toal, J., dissenting) ("To make a factual determination, there must be facts before us. To suggest that we may affirm on the basis of the mere allegations of the parties is to impermissibly expand the scope of Rule 220(c)."). The State's Rule 608 and 801 arguments were not advanced to the trial court, so the State never laid the predicate foundation for them.

permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence." *State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240 (2001) (emphasis added). This requirement is not met when the credibility of the witness is called into question. *Id.*

The outsize weight the jury gave the 911 call (and therefore undue prejudice), evidenced by their request to hear it during deliberations, is unaddressed by the State. (Pet. Brief pp. 11-12). Instead, in a desperate effort to distract this Court from the undue prejudice of the 911 call, the State cited *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003), a capital case where this Court affirmed a trial court's decision to admit a 911 call. (Resp. Brief p. 18). The State's reliance on *Shuler* is misplaced.

Shuler was charged with three counts of capital murder for the deaths of his girlfriend, her thirteen-year-old daughter, and her mother. *State v. Shuler*, 353 S.C. 176, 180, 577 S.E.2d 438, 440 (2003). During the guilt phase, the trial judge allowed a *redacted* tape of several 911 calls to be played for the jury. *Id.* at 181, 577 S.E.2d at 440. During the sentencing phase, the trial judge allowed the State to introduce the unredacted 911 calls. *Id.* at 182, 577 S.E.2d at 441. On appeal, this Court affirmed the trial court's decision to allow the jury to hear the unredacted 911 calls during the sentencing phase. *Id.* at 184, 577 S.E.2d at 442.

This Court's ruling was based upon "the purpose of the sentencing phase in a capital trial." *Id.* (emphasis added). This Court explained that the purpose of the sentencing phase "is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender." *Id.* Most important for consideration

in the instant matter, this Court explained that "[e]vidence which would ordinarily be inadmissible in the guilt phase of trial may be introduced during the penalty phase" due to the unique purpose of the sentencing phase in a capital trial. *Id.* (emphasis added).

This Court further explained that the 911 tape was relevant to establish a statutory aggravating circumstance of physical torture, which the State alleged supported imposition of the death penalty. *Id.* at 185, 577 S.E.2d at 442. Consideration of the State's burden to prove the aggravating circumstance beyond a reasonable doubt weighed heavily in this Court's analysis of the 911 tape's relevancy and probative value. *Id.*

The key to understanding this Court's decision in *Shuler* is recognizing that the Rule 403, SCRE analysis performed by this Court concerned determining the probative value of evidence for purposes of a capital sentencing proceeding. When a jury is tasked with determining whether a defendant is sentenced to death, the jury must turn its attention to the specific circumstances of the crime and the characteristics of that particular defendant. As the *Shuler* case itself demonstrates, the Rule 403, SCRE analysis is markedly different for a guilt phase proceeding. The trial judge permitted only the redacted version of the 911 calls to be played for the jury in the guilt phase as the probative value of the calls was substantially outweighed by the danger of unfair prejudice of certain extremely emotional portions of the calls. In the instant matter, the jury was not considering the specific circumstances of the crime and the characteristics of Petitioner in order to determine

a sentence; instead, the jury was deciding whether the State carried its burden of proof. Thus, the Rule 403, SCRE analysis used in *Shuler* is inapplicable to Petitioner's issue presented.

CONCLUSION

The Court of Appeals should be reversed.

Dated: March 10, 2023

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Julianna E. Battenfield, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) which is juliannabattenfield@scag.gov; and Gabrielle Oliva Lashane Davis Kocsis, #341232, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 10th day of March, 2023.

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