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Robert M. Dudek, Chief Appellate Defender
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April 5, 2023

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Robin G. Reese v. State
Appellate Case No. 2019-000141

Dear Ms. Kitchings:

This matter is scheduled for oral argument in early May, either May 1 at 10:40 or May 2 at 10:00. Pursuant to Rule 208(b)(7), SCACR, I would like to submit the following citations as supplemental authority in this matter. I believe they are pertinent and significant authorities which have recently come to my attention in reviewing this case.

Cary G. Ryals v. State, Op. No. 5971 (S.C. Ct. App. filed March 1, 2023)
People v. Sanders, --- N.E.3d ----, 39 N.Y.3d 216, 2013 WL 1824400 (2023)
State v. Middleton, Op. No. 28142 (S.C. Sup. Ct. filed March 22, 2023)

The first two opinions, Ryals and Sanders, are relevant to the second issue. Middleton is relevant to the third issue on appeal. I have enclosed a copy of the cases with this letter. Please let me know if you require further information. I have copied opposing counsel by electronic mail and attached the cases.

Sincerely,

Taylor D. Gilliam
Appellate Defender

TDG/sl
cc: David Spencer, Esquire
Robin G. Reese
Enclosure

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cary G. Ryals, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000570

ON WRIT OF CERTIORARI

Appeal From Berkeley County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5971
Submitted December 1, 2022 – Filed March 1, 2023

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Senior Assistant Deputy Attorney General William M. Blitch, Jr. and Assistant Attorney General Danielle Dixon, of Columbia, for Respondent.

THOMAS, J.: Cary Glenn Ryals argues the post-conviction relief (PCR) court erred in not finding his trial counsel was ineffective for not objecting to Ryals proceeding to trial dressed in improper prison attire and for not requesting a

continuance in order for counsel to provide proper street clothes for Ryals. We reverse and remand for a new trial.

FACTS

In May 2015, a Berkeley County grand jury indicted Ryals on the charge of operating a motor vehicle in violation of the Habitual Traffic Offender (HTO) Act. In June 2015, he proceeded to a jury trial and was found guilty as charged. The trial court sentenced him to five years' imprisonment and revoked his probation regarding a prior unrelated conviction, which resulted in ten years' incarceration. Ryals did not appeal his conviction, sentence, or probation revocation.

On January 28, 2016, Ryals filed a pro se PCR application, in which he alleged his trial counsel did not advise him of his direct appeal rights and was ineffective in failing to (1) investigate his past criminal record, (2) challenge the trial court's jurisdiction over the charge against him, and (3) object to his having to appear at his trial in prison attire. On July 26, 2017, counsel for Ryals filed an amended PCR application to include an allegation of ineffectiveness for the revocation of his probation and requested a hearing on the merits. Following a hearing on December 4, 2017, the PCR court granted Ryals a belated direct appeal but denied PCR on his remaining issues.

On September 24, 2018, counsel for Ryals filed a petition for a writ of certiorari requesting a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), addressing Ryals' direct appeal issue and asking to be relieved as counsel. The petition also included a request for a writ of certiorari on allegations that Ryals' trial counsel performed deficiently in failing to (1) investigate Ryals' criminal record and (2) object to Ryals having to appear at his trial in prison attire. The case was transferred from the supreme court to this court. On January 27, 2021, this court voted to grant certiorari on the direct appeal issue and the issue of appearing at trial in prison attire. On the same day, the direct appeal issue was dismissed by opinion. The issue of Ryals' prison attire is before us now.

STANDARD OF REVIEW

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP. "This [c]ourt

gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

LAW/ANALYSIS

Ryals argues the PCR court should have found his trial counsel was ineffective for failing to (1) object to Ryals proceeding to trial dressed in prison attire and (2) request a continuance to provide proper clothing for Ryals.

When ineffective assistance of counsel is alleged as a ground for relief, a PCR applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland* as the standard for judging ineffectiveness). It is "generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing." *Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001), *abrogated on other grounds by Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019); *see also Estelle v. Williams*, 425 U.S. 501, 512 (1976) (holding an accused may not be compelled to be tried before a jury in identifiable prison clothes); *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967) ("It is inherently unfair to try a defendant for crime while garbed in his jail uniform . . . ."); *Ring v. State*, 450 S.W.2d 85, 88 (Texas Crim. App. 1970) ("(E)very effort should be made to avoid trying an accused while in jail garb."). "Nevertheless, . . . to prevail in [a] PCR action, the *Strickland* analysis applies and [the] petitioner must establish prejudice." *Id.* at 337-38, 548 S.E.2d at 865.

The PCR court acknowledged "[t]rial [c]ounsel may have been deficient in failing to request a continuance . . . until [Ryals] could change into civilian attire"; however, relying on *Humbert*, the court ultimately denied PCR on this issue because it found Ryals failed to establish prejudice in view of the overwhelming evidence against him. *See id.* at 338, 548 S.E.2d at 866 ("Due to the overwhelming evidence against petitioner, there is not a reasonable probability the outcome of his trial would have been different had petitioner not been dressed in his prison jumpsuit.").

However, "the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Rather, in a PCR court's analysis of prejudice, the strength of the State's case "is one significant factor the [PCR] court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether [the petitioner] has met his burden of proving prejudice." *Id.* at 190, 810 S.E.2d at 845. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice":

> the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met.

Id. at 191, 810 S.E.2d at 845.

Here, there was no attempt by the PCR court to balance the impact of Ryals' forced appearance at his trial in prison clothing against the strength of the State's evidence against him.[1] "Ordinarily, the PCR court should make findings of fact on [whether counsel's error prejudiced the petitioner], not [the appellate court]." *Id.* at 195, 810 S.E.2d at 847. Nonetheless, this court is permitted to conduct the prejudice analysis. *See id.* (finding it was not necessary for the appellate court to remand the issue of prejudice to the PCR court for findings of fact because "we have conducted the prejudice analysis ourselves").

At trial, before Ryals testified, the court asked Ryals outside of the presence of the jury if it needed "to have any cause for concern" if Ryals' leg irons were removed. Ryals responded he would "comply with everything" and wished he "was dressed better than [he was] presently." The jury returned to the courtroom and Ryals' leg irons were removed. Neither Ryals nor his counsel made any objection to his clothing or the shackles.

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[1] The State's evidence consisted of testimony from an employee of the Department of Motor Vehicles (DMV) about Ryals' driving record and the notices sent by the DMV and the police officer who arrested Ryals for operating a motor vehicle in violation of the HTO Act.

Ryals' PCR application alleged "failure to object to the improper attire." At the PCR hearing, Ryals testified that in addition to having to wear a prison jumpsuit with the name of the detention center stamped on the back, he "had shackles and handcuffs on" during his trial. The PCR court questioned counsel for the State about Ryals' attire:

> THE COURT: Ms. Coleman, do you know how many – I practiced law for 20 years and been on the bench for 12. I have never as a lawyer or a judge allowed someone to be tried in prison garb. Is there a law that says or is there a case that addresses this issue?
> MS. COLEMAN: Not that I know of, Your Honor. I haven't been able to find anything. And my argument –
> THE COURT: Have you ever done that? Have you seen that?
> MS. COLEMAN: I have not, no. I have never seen that circumstance, but my argument again, that would be that the evidence against him was overwhelming so there would be no prejudice based on that fact.
> THE COURT: Based on what they presented it is not overwhelming.

The PCR court's order addressed only the issue of trial counsel's failure "to object to the trial proceeding when [Ryals] was wearing his prison clothing and was not provided with civilian attire to wear for trial," and Ryals did not move to alter or amend the order.

Ryals' brief before us now states the argument as: "The PCR court erred in not finding trial counsel ineffective for not objecting to Petitioner Ryals proceeding to trial dressed in improper prison attire and for not requesting a continuance in order for counsel to provide proper street clothes for Ryals." The facts following the issue mention that Ryals had handcuffs and shackles on at trial and the removal of Ryals' leg irons in front of the jury and cites case law pertaining to shackling in court.

This court has held "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is justified by an essential state interest—such as interest in courtroom security—specific to the defendant on trial." *State v. Heyward*, 432 S.C. 296, 324, 852 S.E.2d 452, 466 (Ct. App. 2020) (quoting *Deck v. Missouri*, 544 U.S. 622, 624

(2005)). Thus, the *Heyward* court found the trial court abused its discretion in denying Heyward's request to remove his shackles during jury selection when the record was devoid of any reason why he should have been shackled and there were no concerns of courtroom decorum or security raised. *Id.*

We find Ryals' objection to his "attire" encompasses his handcuffs and shackles. Balancing the impact of Ryals' forced appearance at his trial in prison clothing visible to the jury against the strength of the State's evidence against him, there is a reasonable probability that, but for trial counsel's failure to object to his appearance at this trial in prison clothing, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Thus, we find Ryals' trial counsel was ineffective for not objecting to Ryals proceeding to trial dressed in prison attire and for not requesting a continuance to provide proper clothing for Ryals.

CONCLUSION

Accordingly, the decision of the PCR court is

REVERSED and REMANDED.[2]

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

39 N.Y.3d 216

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

The PEOPLE &c., Respondent,
v.
Oscar SANDERS, Appellant.

No. 9
|
Decided February 9, 2023

Synopsis

Background: Defendant was convicted in the Supreme Court, New York County, Abraham L. Clott, J., of attempted assault in the first degree, assault in the second degree, and criminal contempt in the first degree and was sentenced, as a persistent felony offender, to concurrent terms of 15 years to life. Defendant appealed. The Supreme Court, Appellate Division, 194 A.D.3d 652, 147 N.Y.S.3d 56, affirmed. A judge of the Court of Appeals, 37 N.Y.3d 1029, 153 N.Y.S.3d 435, 175 N.E.3d 460. granted defendant leave to appeal.

Holdings: The Court of Appeals, Rivera, J., held that:

[1] trial court violated due process by ordering defendant to be handcuffed when jury returned to announce its verdict without providing explanation for restraints, and

[2] trial court's error in ordering defendant to be handcuffed when jury returned to announce its verdict without providing explanation was not harmless.

Reversed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (9)

[1] **Criminal Law** ⇐ Visibility of restraint; restraint not observed by jurors

Long forbidden routine use of visible shackles during guilt phase of trial in the absence of special need applies during jury's reading of its verdict and court's polling of jurors.

[2] **Constitutional Law** ⇐ Custody and restraint

Criminal Law ⇐ Visibility of restraint; restraint not observed by jurors

Criminal Law ⇐ Findings, and statement of reasons

Trial judge violated due process by ordering defendant to be handcuffed when the jury returned to announce its verdict without providing an on-the-record, individualized explanation for the restraints. U.S. Const. Amend. 14.

[3] **Constitutional Law** ⇐ Custody and restraint

The due process clause of the Fourteenth Amendment prohibits States from physically restraining a defendant during a criminal trial without an on-the-record, individualized assessment of the state interest specific to a particular trial, and thus, trial court has a constitutional obligation to conduct close judicial scrutiny before ordering a defendant restrained. U.S. Const. Amend. 14.

[4] **Criminal Law** ⇐ Necessity of Objections in General

Criminal Law ⇐ Scope and Effect of Objection

To preserve an issue for appeal, counsel must register an objection and apprise the court of grounds upon which the objection is based at the time of the allegedly erroneous ruling or at any subsequent time when the court has an opportunity of effectively changing the same.

[5] **Criminal Law** ⇐ Course and conduct of trial in general

Criminal Law ⇐ Necessity of specific objection

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Defendant's claim that trial court violated due process by ordering defendant to be handcuffed when jury returned to announce its verdict, without providing on-the-record explanation for restraints, was preserved for appeal; defense counsel noted his opposition to the handcuffing on the record based on fear that the jurors would draw negative inferences about defendant by observing him physically restrained, defense counsel's "protest" was sufficient to preserve the handcuffing issue since it made the defense's position about the handcuffing known to the court, thereby furnishing court with an opportunity to either provide an individualized explanation for the handcuffs or order the handcuffs removed. U.S. Const. Amend. 14; N.Y. CPL § 470.05(2).

[6] **Criminal Law** ⚩ Rendition and reception

The reading of the jury's verdict is an integral part of the guilt-determination phase, as verdict reported by the jury is not final unless properly recorded and accepted by the court. N.Y. CPL § 310.80.

[7] **Criminal Law** ⚩ Polling jurors

Trial court must order the jury to resume deliberations when polling elicits a negative answer from one or more jurors. N.Y. CPL § 310.80.

[8] **Constitutional Law** ⚩ Custody and restraint

Criminal Law ⚩ Innocence

Criminal Law ⚩ Polling jurors

Until the jury returns to the courtroom, publicly announces the verdict and, if polled, confirms the verdict, there is no finding of guilt, defendant is still presumed innocent, and the constitutional due process prohibition on restraining a defendant without explanation remains in full force. U.S. Const. Amend. 14.

[9] **Criminal Law** ⚩ Custody or restraint of accused; prison clothes

Trial court's error in ordering defendant to be handcuffed when jury returned to announce its verdict without providing an on-the-record, individualized explanation for the restraints, in violation of due process, was not harmless, and thus, new trial was warranted. U.S. Const. Amend. 14.

Attorneys and Law Firms

Chase McReynolds, New York, for appellant.

Philip Tisne, for respondent.

OPINION

RIVERA, J.:

*1 [1] [2] The "long forbidden routine use of visible shackles during the guilt phase of a trial" in the absence "of a special need" (*Deck v. Missouri,* 544 U.S. 622, 626, 125 S.Ct. 2007, 161 L.Ed.2d 953 [2005]) applies during the jury's reading of its verdict and the court's polling of the jurors. Here, the trial judge violated this constitutional due process prohibition by ordering defendant to be handcuffed when the jury returned to announce its verdict without providing an on-the-record, individualized explanation for the restraints. Because this error was not harmless, it requires reversal of defendant's conviction and a new trial.

***

Defendant Oscar Sanders was tried before a jury on one count of attempted assault in the first degree (Penal Law § 120.10[2]) and one count of assault in the second degree (*id.* § 120.05[2]) arising from a physical altercation with the victim and two counts of criminal contempt resulting from his subsequent violations of an order of protection. After the jury advised the court that it had reached a verdict but before the jury returned to the courtroom, defense counsel observed defendant in handcuffs. Counsel made the following objection in open court:

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"I understand that it's this court's policy, I just learned this minutes ago, to keep my client in handcuffs while the jury comes out and renders their verdict. But it's my understanding that the law allows for the defense and [p]rosecution to poll the jury with the idea in mind that perhaps the unanimity of the jury can be questioned when the foreperson announces a unanimous jury. And with that in mind, being that the defendant is in handcuffs while they announce that verdict, especially in the case of if it's a verdict of guilty, lends pressure to anyone who might dissent during that polling to be influenced negatively against anyone in handcuffs, and certainly in this case, I would say that's true for [defendant]. So I'm asking you to leave him uncuffed during the reading of the verdict for that reason."

The court responded: "All right. The application is denied. Bring in the panel." A court officer then directed everyone in the courtroom to stand as the jury entered and, after the jurors had entered, the trial judge ordered defendant to once again stand for the reading of the verdict. The jury then found defendant guilty on the above counts and the court confirmed the verdict by polling the jurors. Defendant was subsequently sentenced as a persistent felony offender to an aggregate term of 15 years to life imprisonment.

On defendant's appeal, the Appellate Division affirmed, reasoning, in relevant part, that "[a]ny error in defendant being handcuffed, without any explanation on the record, during the rendition of the verdict and the polling of the jury was harmless" because the jury had already reached its verdict and "[d]efendant's suggestion that jurors may have been inclined to repudiate their verdicts during polling, but were influenced to refrain from doing so by the sight of defendant in handcuffs, is highly speculative" (194 A.D.3d 652, 653, 147 N.Y.S.3d 56 [1st Dept. 2021]). A Judge of this Court granted defendant leave to appeal (37 N.Y.3d 1029, 153 N.Y.S.3d 435, 175 N.E.3d 460 [2021]). We now reverse.

***2** **[3]** **[4]** **[5]** The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from physically restraining a defendant during a criminal trial without an on-the-record, individualized assessment of the "state interest specific to a particular trial" (*Deck,* 544 U.S. at 628–629, 632, 125 S.Ct. 2007; *see also People v. Clyde,* 18 N.Y.3d 145, 153, 938 N.Y.S.2d 243, 961 N.E.2d 634 [2011]). A trial court therefore has a constitutional obligation to conduct "close judicial scrutiny" before ordering a defendant restrained (*Holbrook v. Flynn,* 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 [1986] [internal quotation marks omitted], quoting *Estelle v. Williams,* 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126 [1976]). It is undisputed that no such scrutiny occurred here and therefore the trial judge committed a constitutional error by ordering defendant handcuffed without placing the special need for such restraints on the record (*Deck,* 544 U.S. at 628–629, 125 S.Ct. 2007; *Clyde,* 18 N.Y.3d at 152–153, 938 N.Y.S.2d 243, 961 N.E.2d 634).*

* Contrary to the prosecution's assertion, defendant's claim is preserved. To preserve an issue for appeal, "counsel must register an objection and apprise the court of grounds upon which the objection is based 'at the time' of the allegedly erroneous ruling 'or at any subsequent time when the court had an opportunity of effectively changing the same' " (*People v. Cantave,* 21 N.Y.3d 374, 378, 971 N.Y.S.2d 237, 993 N.E.2d 1257 [2013], quoting CPL 470.05[2]). Here, defense counsel noted his opposition to the handcuffing on the record based on a fear that the jurors would draw negative inferences about defendant by observing him physically restrained. Defense counsel's "protest" was "sufficient" to preserve the handcuffing issue since it made the defense's "position" about the handcuffing "known to the court[,]" thereby furnishing the trial judge with an opportunity to either: (1) provide an individualized explanation for the handcuffs; or (2) order the handcuffs removed (CPL 470.05[2]). The trial judge did neither and instead cursorily denied the motion.

[6] **[7]** **[8]** The prosecution's claim that the constitutional prohibition articulated in *Deck* does not apply during the reading of the jury verdict and polling of individual jurors is meritless. First, *Deck* involved the application of the constitutional prohibition against restraint during the punishment phase of a capital case, which necessarily occurred after the guilty verdict had been entered (*see* 544 U.S. at 624–626, 125 S.Ct. 2007). Second, the reading of the verdict is an integral part of the guilt-determination phase. As the Court explained in *People v. Salemmo,* citing to CPL 310.80, "a verdict reported by the jury is not final unless properly recorded and accepted by the court" (38 N.Y.2d 357, 361, 379 N.Y.S.2d 809, 342 N.E.2d 579 [1976], citing CPL 310.80). Indeed, in accordance with CPL 310.80, the trial court must order the jury to resume deliberations when polling elicits a negative answer from one or more jurors.

As a consequence, until the jury returns to the courtroom, publicly announces the verdict and, if polled, confirms the verdict, there is no finding of guilt, defendant is still presumed innocent, and the constitutional prohibition on restraining a defendant without explanation remains in full force.

***3** **[9]** Under the applicable harmless error standard, we cannot say that this constitutional error was harmless beyond a reasonable doubt (*see Clyde,* 18 N.Y.3d at 153–154, 938 N.Y.S.2d 243, 961 N.E.2d 634; *see also People v. Crimmins,* 36 N.Y.2d 230, 237–238, 367 N.Y.S.2d 213, 326 N.E.2d 787 [1975]). The error here requires reversal of defendant's conviction and a new trial (*see People v. Williams,* 25 N.Y.3d 185, 195, 8 N.Y.S.3d 641, 31 N.E.3d 103 [2015]). Our decision renders defendant's remaining claims academic (*see e.g. People v. Murray,* 39 N.Y.3d 10, 16, 177 N.Y.S.3d 191, 198 N.E.3d 466 [2022]). Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Acting Chief Judge Cannataro and Judges Garcia, Wilson, Singas and Troutman concur.

Order reversed and a new trial ordered.

All Citations

--- N.E.3d ----, 39 N.Y.3d 216, 2023 WL 1824400, 2023 N.Y. Slip Op. 00692

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stewart Jerome Middleton, Petitioner.

Appellate Case No. 2020-001665

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson Jr., Circuit Court Judge

Opinion No. 28142
Heard May 19, 2022 – Filed March 22, 2023

REVERSED AND REMANDED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch Jr., of Columbia; Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

JUSTICE FEW: At Stewart Jerome Middleton's trial for criminal sexual conduct in the third degree, the State introduced a police detective's testimony that Middleton was evasive in response to her attempts to get Middleton to come in for an interview.

The trial court admitted this testimony over Middleton's relevance objection. The jury found Middleton guilty and the court of appeals affirmed. We hold the trial court erred in finding the testimony relevant because the State did not establish a nexus between Middleton's conduct and a consciousness of his guilt. We reverse and remand for a new trial.

I. Background

On December 14, 2013, the victim hosted an office party at the Embassy Suites hotel in North Charleston. Around 7:30 p.m., the victim asked a friend to help her back to her hotel room because she was too intoxicated to stay at the party. Middleton—the victim's coworker—arrived at the party around 9:00 p.m. At 10:20 p.m., the friend and his wife went to check on the victim and noticed Middleton was following them. When the friend opened the victim's hotel room using a key card the victim had given him earlier, the victim jumped out of bed, naked. The friend, his wife, and Middleton all left the room and got back onto the elevator. As the elevator doors closed, according to the friend's testimony at trial, Middleton "jumped out" of the elevator and the friend did not see him again. In the interview Middleton eventually had with the detective, he claimed he saw the victim locked out of her room covered in a towel and he left the elevator to help her. The friend testified he did not hear or see the victim in the hallway and, as far as he knew, the victim was safe in her room.

Middleton then went to the front desk and asked for a key card for the victim's room, telling the guest services manager, "I came to get a key for my girlfriend who's stuck out of her room." The victim was not Middleton's girlfriend. At about 10:25 p.m., Middleton claimed in the interview with the detective, he let the victim into her room and went in with her. Middleton stated they started kissing and eventually had consensual sexual intercourse. The victim testified at trial she did not consent to intercourse with Middleton and was incapable of consenting because she was so intoxicated. Around 11:15 p.m., the guest services manager found the victim crouched in an employee-only area of the hotel. The victim told the manager she had been raped. The manager called the police, who were dispatched at 11:38 p.m., and then paramedics took the victim to the hospital.

During trial, the State asked the detective, "How many times did you schedule an interview with him?," referring to Middleton. As the detective began her response, "I think the first --," Middleton objected on relevance grounds. The trial court overruled the objection without discussion. The detective continued,

> First time I made contact with the defendant, I want to say it was February 3rd. Don't quote me, around there, the 3rd, 4th. I know it took about 17 to 20 days for him to come in. He didn't show for the first two. He would call after the fact, or, like 24 hours later. Then -- because we were having such a difficult time getting him to actually stick to an appointment and come in, I told him, Go home. Look at your schedule. Find a day that suits you and your place of employment, and then call me and you tell me what day you want to come in, and I'll accommodate -- whatever day, whatever time, I'll accommodate you.
>
> So he left city hall, and he never called me back. So I had to reach out to him again. It was 12 or 13 days after not hearing from him, and then we finally met on February 20th.

On cross-examination, defense counsel attempted to mitigate the effect of the detective's testimony by asking if she experienced delays in interviewing other witnesses in the case. After the detective conceded she "played some phone tag" with one other witness, counsel stated, "Right, and so – it goes back to when you were trying to get people in," and asked, "Sometimes they're not able to do that immediately, are they?" The detective responded, "Your client is the only one who was ducking and dodging me." Middleton did not object to this comment.

The jury convicted Middleton of criminal sexual conduct in the third degree, and the trial court sentenced him to six years in prison, suspended upon service of six months in prison and five years of probation. Middleton appealed, and the court of appeals affirmed. *State v. Middleton*, Op. No. 2020-UP-271 (S.C. Ct. App. filed Sept. 30, 2020). We granted Middleton's petition for a writ of certiorari to address whether the trial court acted within its discretion in admitting the detective's testimony about Middleton's attempts to avoid coming in to see her for an interview.

II. Admissibility of the Testimony

We begin with the central premise of the law of evidence: "All relevant evidence is admissible . . . ," and, "Evidence which is not relevant is not admissible." Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

The State argues the detective's testimony was relevant because it showed "the process and direction of the investigation" and "the avoidance indicated a consciousness of guilt." We begin with the latter point.

A. Consciousness of Guilt

In *State v. McDowell*, 266 S.C. 508, 224 S.E.2d 889 (1976), this Court stated, "As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt." 266 S.C. at 515, 224 S.E.2d at 892. In subsequent decisions, this Court and our court of appeals have clarified that for such an act by a defendant to be relevant as "consciousness of guilt" under Rule 401, "there [must be] a nexus between the [conduct] and the offense charged." *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006) (citing *State v. Robinson*, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004)). In *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), we held there must be "an unmistakable nexus . . . by clear and convincing evidence linking the [conduct] to a guilty conscience derivative of the offense for which the defendant is on trial." 425 S.C. at 92, 819 S.E.2d at 762; *see also State v. Martin*, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013) (requiring "a nexus between the [conduct] and the offense charged").

In *Pagan*, the conduct at issue was what we called "flight," 369 S.C. at 208-09, 631 S.E.2d at 265-66, and in *Cartwright*, the conduct was a suicide attempt, 425 S.C. at 90, 819 S.E.2d at 760. Our reasoning in those cases transcends their specific facts, however, and applies to any case in which the State contends the defendant's guilty act or evasive conduct is relevant because it shows a consciousness of guilt. *See Martin*, 403 S.C. at 28, 742 S.E.2d at 46 (stating "because flight is merely one form of evasive conduct, we find the . . . test used to determine the admissibility of flight evidence is equally useful in determining the admissibility of evidence of other types of evasive conduct"). Referring to our decision in *McDowell*, the *Martin* court explained,

> The rationale underlying the admissibility of flight evidence, that "it is not to be supposed that one who is innocent and conscious of that fact would flee," applies to other forms of evasive conduct as well. The courts should not suppose a person who knew he was innocent but under suspicion would disguise himself, hide from the police, or lie to officers investigating the crime of which he is suspected. Accordingly, we find the test for determining

> the admissibility of evidence concerning flight also applies to evidence of evasive conduct.

403 S.C. at 29-30, 742 S.E.2d at 47 (internal citation omitted) (quoting *State v. Orozco*, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (Ct. App. 2011), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 500 n.5, 787 S.E.2d 480, 483 n.5 (2016), *and abrogated by Cartwright*, 425 S.C. at 91, 819 S.E.2d at 761).

In this case, therefore, we must consider whether the State established a nexus between Middleton's conduct and his charge for criminal sexual conduct in the third degree such that the conduct had "any tendency" to make Middleton's consciousness of guilt "more probable . . . than it would be without the evidence." Rule 401, SCRE. As our court of appeals stated in *Martin*, we consider the "chain of inferences leading from evidence of [the defendant's conduct]" to determine whether the inferences logically "lead to consciousness of guilt of the crime charged." 403 S.C. at 29, 742 S.E.2d at 47 (quoting *United States v. Porter*, 821 F.2d 968, 976 (4th Cir. 1987)). We begin this inquiry by looking at the typical scenario in which courts have found a defendant's conduct does in fact demonstrate a consciousness of guilt—flight. For this typical scenario, we turn to *Porter*, a case relied on by our court of appeals in *Martin*. In *Porter*, a federal Drug Enforcement Administration agent

> testified . . . he was executing a search warrant at Porter's residence in Charlotte, North Carolina, when Porter called from Tennessee and the agent answered the phone. He told Porter that a federal grand jury in Florida had indicted him for importation and possession and that he had a warrant for Porter's arrest. After the agent advised him to turn himself in, Porter hung up. Porter remained a fugitive until . . . more than a year later.

821 F.2d at 975.

The Fourth Circuit found the evidence of flight reasonably demonstrated Porter's consciousness of guilt and was therefore properly admitted. 821 F.2d at 976. The court stated, "The jury reasonably could find that he became a fugitive to escape any prosecution for his numerous violations of the drug laws . . . ." *Id.* Our court of appeals addressed this typical scenario in *Robinson*, stating, "Flight from prosecution is admissible as evidence of guilt." 360 S.C. at 194, 600 S.E.2d at 104 (quoting *State v. Pagan*, 357 S.C. 132, 140, 591 S.E.2d 646, 650 (Ct. App. 2004), *aff'd as modified*, 369 S.C. 201, 631 S.E.2d 262) (collecting South Carolina "flight"

cases). The *Robinson* court went on to caution, however, "the relevance of flight evidence is premised on a nexus between the flight *and the offense charged*." 360 S.C. at 195, 600 S.E.2d at 104.

When we compare Middleton's conduct in this case with the typical scenario of evasive conduct—flight—three differences stand out. First, in *Porter*, *Robinson*, and the cases cited in *Robinson*, the fleeing suspect/defendant was aware of an existing arrest warrant or indictment for his crimes. At the time the detective in this case sought an interview with Middleton, however, he had not been indicted and there was no warrant for his arrest. Rather, Middleton was free to refuse to meet with the detective altogether if he so chose.

Second, in every other case in which our courts have considered evidence of consciousness of guilt, the defendant's guilty act or evasive conduct was primarily some form of action. *See Cartwright*, 425 S.C. at 91, 819 S.E.2d at 761 (attempting suicide); *State v. Edwards*, 383 S.C. 66, 68, 678 S.E.2d 405, 406 (2009) (threatening a victim); *Martin*, 403 S.C. at 25, 742 S.E.2d at 45 (lying to the police to conceal his identity); *State v. Crawford*, 362 S.C. 627, 636, 608 S.E.2d 886, 891 (Ct. App. 2005) (fleeing the scene of arrest); *State v. Walker*, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (Ct. App. 2005) (fleeing residence after investigator requested defendant "stay at or nearby his home"); *Robinson*, 360 S.C. at 190, 600 S.E.2d at 101 (fleeing from a patrol car). In this case, Middleton's failure to show up for voluntary interview appointments and his delay in giving a statement to the detective were primarily inaction.

The State nevertheless argues Middleton's conduct was active: Middleton intentionally scheduled two appointments with the detective knowing he would not show up, all as an effort to hinder the investigation of his criminal activity. Here, we are drawn back to the point we noted earlier that the trial court overruled Middleton's objection "without discussion." This theory that Middleton's conduct was active—had it been presented to the trial court—could have made a valid nexus, but it must have been based on evidence and should have been subjected to the trial court's exercise of discretion. With no discussion of this potential nexus at trial, there is no basis to support the State's theory, just as there is nothing to support or refute other "innocent" reasons Middleton may have had for missing the appointments. *Cf. Commonwealth v. Molina*, 104 A.3d 430, 451 (Pa. 2014) ("[A] defendant's silence in the face of police questioning is 'insolubly ambiguous' as it could be indicative of a busy schedule, a distrust of authority, an unwillingness to snitch, as much as it is indicative of guilt.").

Third, as our cases require, we must consider precisely how a particular piece of evidence might show a defendant's consciousness of guilt. We look to see whether the "chain of inferences leading from [the] evidence," *Martin*, 403 S.C. at 29, 742 S.E.2d at 47, shows "a guilty conscience derivative," *Cartwright*, 425 S.C. at 92, 819 S.E.2d at 762, of "the offense charged," *Robinson*, 360 S.C. at 195, 600 S.E.2d at 104 (emphasis removed). At the time of Middleton's interview—and presumably beforehand as well—he did not contest he was with the victim and had intercourse with her on the night of December 14. We can hypothesize several reasons Middleton may have wanted to avoid discussing with the detective—or anyone—even the innocent version of what happened the night of December 14. Perhaps he wanted to keep his wife or a girlfriend from knowing about it, or he may simply have been embarrassed that he had even consensual sex with a coworker. Middleton's "guilt" depended not on whether he had sex with the victim, but on whether she remained too intoxicated to consent to having sex at 10:25 p.m. and, if so, whether Middleton knew or should have known that. *See* S.C. Code Ann. § 16-3-654(1)(b) (2015) ("A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if . . . [he] knows or has reason to know that the victim is . . . mentally incapacitated[] or physically helpless . . . ."). It is difficult to discern a nexus between Middleton's inaction in this case and a consciousness that the victim was too drunk to consent to sex weeks earlier.

Considering these three points, we see a significant difference between a suspect/defendant actively fleeing from authorities with knowledge of an arrest warrant or indictment for what was clearly a crime—*Porter*, for example—and this case. Here, Middleton did not flee, but avoided coming in for a voluntary interview about a situation for which no arrest warrant or indictment existed and which—according to his version of events—may not have even been a crime.

We have explained that to demonstrate the relevance of any type of evasive conduct or guilty act, the State must show a nexus between the conduct and the defendant's consciousness he is guilty of the specific crime. *See Martin*, 403 S.C. at 28-30, 742 S.E.2d at 46-47. For some types of such conduct, however, it is simply very difficult for the State to make the required showing. *See Cartwright*, 425 S.C. at 97, 819 S.E.2d at 764 (Hearn, J., concurring) ("I do not, for example, find evidence of a suicide attempt similar to evidence of flight or witness intimidation or other incriminating behavior following the commission of a crime."). Middleton argued in his brief that from merely the fact he avoided the detective under the circumstances of this case, "it was unclear just what [he] morally or legally may have been guilty of doing." We agree. As the *Cartwright* majority found regarding evidence of attempted suicide, we find missing voluntary appointments to speak to

the police under these circumstances "is not easily analogized to evidence of guilt." 425 S.C. at 91, 819 S.E.2d at 761.[1]

Therefore, the detective's testimony Middleton missed two scheduled appointments with her, she had "such a difficult time getting him to actually stick to an appointment and come in," and he delayed seventeen to twenty days before meeting with her for an interview was not relevant to show a consciousness of guilt.

B. Process and Direction of the Investigation

The State also argues the evidence was relevant to explain "the process and direction of the investigation." It is widely recognized there can be a legitimate purpose for explaining events that occurred or did not occur in the course of an investigation. *See, e.g.*, *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (explaining statements were not hearsay because they were offered "to explain why the officers began their surveillance"). When it is important to do this, the evidence will be relevant. In many cases, however, it is not at all important to explain the course of the investigation. *See, e.g.*, *State v. King*, 422 S.C. 47, 66-68, 810 S.E.2d 18, 28-29 (2017) (explaining that the course of the investigation is not always "relevant and probative" (citing *Ruiz v. Commonwealth*, 471 S.W.3d 675, 681 (Ky. 2015))). We understand the potential importance of explaining to the jury why the detective assigned to investigate a rape allegedly occurring on December 14 did not contact the only suspect until February 3 and did not conduct an interview with him until February 20. Such an explanation would logically begin, however, not with what did not happen and why between February 3 and 20, but with why the detective did not contact Middleton until February 3, over seven weeks after the crime was reported. As the detective was not asked to explain this much-larger portion of the

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[1] In *Cartwright*, because of the unique difficulties associated with evidence of suicide, we imposed specific requirements for the admission of the evidence such as "a hearing outside of the presence of the jury" in which the State must show "the defendant was aware of the occurrence of the alleged crimes" and the trial court must find "a clear and unmistakable nexus linking the suicide attempt to a guilty conscience derivative of the offense" demonstrated "by clear and convincing evidence." 425 S.C. at 91-92, 819 S.E.2d at 761-62. While we believe a hearing on the admissibility of evidence of evasive conduct will usually be necessary, and the trial court must find evidence to support the defendant's knowledge of the allegations against him, we do not find it necessary here to impose a higher standard of proof as we did in *Cartwright*.

delay—and made little effort on her own to explain it—we discount the importance of explaining how any portion of the delay in the investigation was supposedly attributable to Middleton.

The State's argument the testimony was relevant to explain the process and direction of the investigation takes us back to the detective's "ducking and dodging" comment. We have not previously discussed this comment as being inadmissible because—as noted above—Middleton did not object. We do find the comment important, however, in understanding whether the assistant solicitor genuinely sought, and the detective genuinely offered, an explanation of the process and direction of the investigation. First, the comment was not actually evidence of Middleton's conduct. Rather, the detective used the terms "ducking and dodging" in a figurative sense to characterize Middleton's actual conduct as evasive—a clearly improper and inadmissible characterization.[2] Second, the comment demonstrates the detective was not attempting to explain the process and direction of the investigation. At oral argument before this Court, counsel for Middleton argued, "She blew us up. She meant to hurt us, and she accomplished her mission." We agree. Rather than showing an attempt to explain the investigation, we are convinced the detective's only intent in giving even the testimony to which Middleton did object was to show Middleton had engaged in evasive conduct. As we explained thoroughly, this type of evidence is admissible only after the State has demonstrated the necessary nexus.

As the State failed to demonstrate the relevance of the detective's testimony, the trial court acted outside of its discretion in overruling Middleton's relevance objection.

III. Harmless Error Analysis

The State argues that even if the testimony should not have been admitted, the error was harmless. The State's harmless error argument is not that other overwhelming evidence made this error harmless beyond a reasonable doubt. *See State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (explaining that error may be found harmless when "the 'defendant's guilt has been conclusively proven . . . such that no other rational conclusion can be reached,'" or when there is other "'overwhelming

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[2] In addition to the fact the State established no nexus between the conduct and a consciousness of guilt, the detective's characterization of Middleton's conduct as "ducking and dodging" was unsubstantiated guesswork disguised as the detective's opinion as to Middleton's intent.

evidence' of a defendant's guilt" (omission in original) (first quoting *State v. Collins*, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014), then citing *State v. Kromah*, 401 S.C. 340, 361-62, 737 S.E.2d 490, 501 (2013))). Rather, the State argues the evidence had no prejudicial effect on Middleton because it "was cumulative to more damaging testimony elicited by [Middleton] on cross-examination." The State's argument is that the detective's "ducking and dodging" comment during cross-examination was "more damaging" than the testimony she gave on direct examination. While it is certainly true the "ducking and dodging" comment was very damaging, it does not render the trial court's error harmless. As we explained, the "ducking and dodging" comment was not evidence of Middleton's conduct. There is no contention Middleton was literally "ducking" or "dodging" the detective. Rather, the comment was a clearly improper and inadmissible characterization of the fact Middleton did not keep two appointments for an interview. Thus, the comment cannot be "cumulative" in the sense it rendered the direct testimony not prejudicial. Rather, it made the prejudicial testimony from direct more impactful by spinning Middleton's actual conduct as evasive when it was not necessarily so. We reject the State's harmless error argument.

IV. Issue Preservation

The State makes a strong argument none of this is preserved for our review. The State's argument is essentially that the question, "How many times did you schedule an interview with him?" calls only for a harmless, numerical answer, and defense counsel never objected to the testimony the detective gave later concerning the details of Middleton's conduct. The State argues Middleton never made clear to the trial court the reason he claimed the testimony was not relevant—that it was evidence of consciousness of guilt.

We find the issue is preserved. In the simplest terms, Middleton made a timely objection on the grounds of relevance, the evidence was not relevant, and the trial court overruled the objection. *See State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (an issue is preserved for appellate review when a timely objection is ruled upon by the trial court). Even at the initial objection, the trial court should have realized this testimony was not relevant. First, if the "how many times" question sought a harmless, numerical answer, the detective's start to her answer was a clear indication that was not the answer she planned to provide.

Second, the "how many times" question clearly sought information regarding events that occurred long after the alleged crime was over. As we explained, this post-event conduct could have been relevant to establish a consciousness of guilt or it could

have been relevant to the course of the investigation. However, our courts have cautioned against a trial court's casual acceptance of either basis for relevance. *See Pagan*, 369 S.C. at 209, 631 S.E.2d at 266 (requiring a "nexus" for evidence of "flight"); *Martin*, 403 S.C. at 28, 742 S.E.2d at 46 (stating "because flight is merely one form of evasive conduct, we find the . . . test used to determine the admissibility of flight evidence is equally useful in determining the admissibility of evidence of other types of evasive conduct"); *King*, 422 S.C. at 67-68, 810 S.E.2d at 29 (cautioning trial courts to not immediately accept the probative value of "investigative information"). The State offered no other basis on which even the numerical answer the solicitor's first question called for could be relevant. While we are careful to acknowledge that any party is entitled to elicit general background information regarding the testimony of any witness, this is not general background information. Because the "how many times" question did not relate to the alleged crime itself, and no other basis exists for the relevance of the information the question would elicit, the trial court should have sustained the objection.[3]

V. Conclusion

We find the detective's testimony that Middleton missed two scheduled appointments for an interview, she had "such a difficult time getting him to actually stick to an appointment and come in," and he delayed seventeen to twenty days before meeting with her was not relevant. The trial court should have sustained Middleton's relevance objection. We reverse and remand for a new trial.

REVERSED AND REMANDED.

KITTREDGE, Acting Chief Justice, HEARN, JAMES, JJ., and Acting Justice James E. Lockemy, concur.

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[3] Optimally, when the detective began to provide details of Middleton's conduct beyond a numerical answer to the "how many times" question, two things should have happened. First, trial counsel should have asked for an opportunity to explain the objection. Under other circumstances, trial counsel's failure to more clearly explain the objection may render the issue not preserved. Second, the trial court should have realized it erroneously overruled the initial relevance objection and initiated a hearing outside the jury's presence. Nevertheless, under the circumstances of this case, we find the issue is preserved.