STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SIDNEY STCLAIR MOORER,

APPELLANT

APPELLATE CASE NO. 2019-001636

Appeal from Horry County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 5988

PETITION FOR REHEARING

Pursuant to Rule 221(a), Petitioner Sidney Moorer respectfully petitions this Court for rehearing on three bases: (1) that the change of venue back to Horry County from Georgetown County failed to address concerns of an apparent willingness of some in Horry County to mislead the court regarding their ability to be fair and impartial; (2) that the directed verdict should have been granted as there was no direct or substantial circumstantial evidence as to Petitioner's actual participation in the kidnapping; and (3) that Petitioner's arguments as to the inadmissibility of Grant Fredrick's expert opinion testimony on the basis that it was unsupported by science was preserved for appellate review.

First, Petitioner respectfully submits that the Court overlooked or misapprehended the fact that Petitioner's motion to change venue had already been granted by the Circuit Court prior to the court hearing the State's motion to move venue back to Horry County. The court changed venue to Georgetown County due to saturation of media exposure, as well as the apparent ability and willingness of members in the Horry County populace to mislead the court regarding their ability to be fair and impartial as indicated on Facebook posts.[1] Although the trial court's concerns regarding prior media coverage appeared assuaged, it failed to address the most insidious aspect about trying Petitioner's case with an Horry County jury pool: Facebook posts from previous potential jurors indicated they "know how to get around the Judge by saying that the[y] can be unbiased." "[A] fair trial is one in which evidence subject to adversarial testing is presented to an *impartial tribunal* for resolution of issues defined in advance of the proceeding." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed. 2d 674 (1984) (emphasis added). Further, it is understood that "[j]urors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained." Near v. Cunningham, 313 F.2d 929, 933 (4th Cir. 1963) (quoting Stone v. United States, 113 F.2d 70 (6 Cir., 1940)). Here, evidence was previously produced showing ingrained bias in the Horry County jury pool, as well as an intent to circumvent judicial mechanisms designed to ensure a

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[1] Notably, Section 17-21-80 also limits cases in which the State is permitted to seek a change of venue:

> The State shall have the same right to make application for a change of venue that a defendant has in cases of murder, arson, rape, burglary, perjury, forgery or grand larceny; provided, that no change of venue shall be granted in such cases until a true bill has been found by a grand jury.

S.C. Code Ann. §17-21-80 (Westlaw, West current through 2023 Act No. 70). As such, because Petitioner was not on trial for any of the offenses listed in the change of venue statute, the State would have been barred from seeking a change of venue.

fair and unbiased petit jury to try Petitioner's kidnapping case. No evidence was later presented by the State indicating such efforts to undermine the fundamental sanctity of a fair trial had dissipated. As such, the trial court abused its discretion in granting the State's motion to change venue back to Horry County, and this Court overlooked or misapprehended these facts critical to Petitioner's constitutional right to a fair trial.

Second, Petitioner respectfully submits this Court overlooked or misapprehended the facts and law regarding Petitioner's motion for directed verdict where all the evidence produced may have indicated Petitioner's codefendant was involved, but only cast mere suspicion of guilt as to Petitioner. A trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."). When considering a motion for directed verdict of acquittal, "the trial court is concerned the existence or non-existence of evidence, not its weight." Brown, 360 S.C. at 586, 602 S.E.2d at 395.

"By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act." State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984). A case based solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." Id. 392 S.C. 134, 708 S.E.2d at 776 (citing State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). The trial court "should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574

(2000) (citing State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978)). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing State v. Lollis, 343 S.C. 580, 541 S.C.2d 254 (2001)).

In the present case, no direct evidence was presented linking Petitioner to the kidnapping. Further, the circumstantial evidence produced by the Sate against Petitioner was a compilation of facts and circumstances not amounting to proof, and implied a belief or opinion of guilt; it failed to prove Petitioner committed the act of kidnapping. In other words, "[t]he circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt." Buckmon, 347 S.C. at 322, 555 S.E.2d at 405. Accordingly, the trial court should have directed a verdict of acquittal, as the evidence presented by the State raised a mere suspicion that Petitioner actually committed this offense. See, e.g., State v. Bostic, 392 S.C. 134, 708 S.E.2d 774, 778 (2011).

Finally, Petitioner respectfully submits that the Court overlooked or misapprehended Petitioner's preservation of his arguments regarding the inadmissibility of Fredricks' opinion testimony. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." Id. (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) citing State v. Wiles, 383

S.C. 151, 156, 679 S.E.2d 172, 175 (2009)). "However, *there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence.*" Id. (emphasis added). "The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." Id.

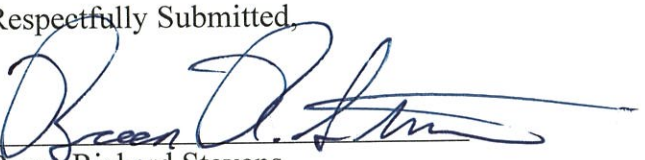
Moreover, "issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." State v. Morales, Op. No. 28154 (S.C. Sup. Ct., filed May 31, 2023). Rather, "the ultimate goal behind preservation of error rules is to ensure that an issue raised on appeal has first been addressed to and ruled on by the trial court" State v. Nelson, 331 S.C. 1 n.6, 501 S.E.2d 716, 718 n.6 (1998); see also State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Accordingly, "this Court will not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue." Chastain v. Hiltabidle, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009).

In the present case, Petitioner preserved the issue for appellate review. Specifically, Petitioner objected at the pretrial hearing not simply to the opinion of Fredricks that the truck in the video was Petitioner's to the exclusion of all others, but that such a conclusion of uniqueness was without any basis or acceptance in science. R. 115, ll. 3-6; R. 116, ln. 1—R. 117, ln. 23; R. 119, ll. 1-24; R. 126, ln. 9—R. 128, ln. 20. This objection was again raised at trial immediately before Fredricks' testimony, essentially asking the court to limit Fredricks' opinion testimony to the scope of the qualifications. R. 1406, ln. 22—R. 1407, ln. 128; R. 1437, ll. 3-12; R. 1438, ll. 1-5. At both times, the trial court indicated it would allow Fredricks to testify. Specifically at trial, even after purportedly sustaining Petitioner's objection as to whether the truck on video matched his particular

vehicle, the court still permitted Fredricks to testify as to his "determination" rather than "whether it was a match." R. 1437, ll. 13-18. Simply stated, the trial court's ruling was a euphemistic distinction without a difference: Fredricks was permitted to opine as an expert witness that "no vehicle shares the same headlight spread pattern," agreed with the assistant solicitor that "the headlight spread pattern in this case matched on [Petitioner's] to the vehicle on [video]", and then agreed with the State again that he came "to this determination" by going "beyond eyeballing." R. 1441, ln. 19—R. 1443, ln. 1. At each point, Petitioner properly raised the issue before the court, and at each point the court permitted Fredricks to testify to his expert opinion "determination." Under such circumstances, Petitioner fulfilled his duty to object to the issue: he did so during pretrial, during trial immediately prior to the witness's testimony, and during the testimony as well. The trial court was aware of the issues before it as well as the arguments of counsel, and made its rulings.

Accordingly, Petitioner Sidney Moorer respectfully requests this Court to grant his Petition for Rehearing.

Respectfully Submitted,



Breen Richard Stevens
Appellate Defender

This 22nd day of June, 2023.

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APPELLATE CASE NO. 2019-001636

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 Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Sidney Stclair Moorer, #373721, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 22nd day of June, 2023.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

From:	Leverett, Scott
To:	SC - SPENCER DAVID
Cc:	SC - MUELLER VIRGINIA; Stevens, Breen
Subject:	Sidney StClair Moorer - Petition for Rehearing - Appellate Case No. 2019-001636
Date:	Thursday, June 22, 2023 11:00:00 AM
Attachments:	Sidney StClair Moorer - Petition for Rehearing - Appellate Case No. 2019-001636.pdf AG Coverletter.pdf

Dear Mr. Spencer,

Attached please find a copy of the petition for Rehearing in the above referenced case that is being filed today, June 22, 2023, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Breen Stevens
Appellate Defense