

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SEP 23 2015

Appeal From Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge SC Court of Appeals
Appellate Case No. 2012-212760

THE STATE,

Respondent,

v.

ALAN L. BURNS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Appellant's request for documents regarding the county grand jury, which was not based on any allegations of impropriety in the selection or qualifications of the grand jurors, but was a fishing expedition for information regarding what the grand jury considered during the deliberations leading to his indictments.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

The Charleston County Grand Jury indicted Appellant Alan L. Burns on multiple counts of first degree criminal sexual conduct with a minor and lewd act on a minor. Appellant represented himself, with two appointed stand-by counsel, and submitted a discovery request pursuant to Rule 5, SCRCrimP, seeking, *inter alia*, the following grand jury information:

25) Any and all Grand Jury information to include (sic) Date, Time, and Place of Proceedings, Transcripts, minute and/or official records to include (sic):

- (a) the names of anyone who makes a presentation or gives oral testimony
- (b) the names of all participants and their (sic) official capacity in which they participated
- (c) any and all material presented, tangible and non-tangible evidence (i.e. affidavits, statements, letters, confessions reports, photos), oral testimony, and/or physical evidence (hair fiber, debris, semen, articles of clothing, etc., etc.) etc., etc.)
- (d) any and all findings, decisions and orders.

(Rule Five [5] Specific Brady Request, dated January 13, 2011 [January 2011 Request]; Record on Appeal [R], pp., 799-802).

Appellant subsequently moved to compel and for a hearing, alleging the State “failed and/or refused to comply” with the Rule 5 request. (Motion to Compel/Motion for Discovery Hearing, filed February 3, 2011; R., pp. 803-804). At a motion hearing on April 1, 2011, the circuit court advised Appellant the grand jury proceedings were secret, and the “exact nature of their investigation is not subject to discovery.” (April 1, 2011 Hearing Transcript [April 2011 HT], pp. 14-15; R., pp. 14-15).

Appellant submitted identical discovery requests on May 30, 2011, and moved to compel by motion filed August 1, 2011. (Rule Five [5] Specific Brady Request, dated May 30, 2011 [May 2011 Request], Motion to Compel Discovery, filed August 1, 2011;

R., pp. 805-807, 808). The discovery motion and various other matters were heard on November 2, 2011, and the circuit court found the discovery matters were addressed and decided in the prior hearing. (November 2, 2011 Hearing Transcript [November 2011 HT], pp. 22, 32-41; R., pp. 44, 54-63). Appellant did not raise the discovery issues during pre-trial hearings in May 2012, June 2012, and July 2012, and the case was set for trial on August 6, 2012.

On July 31, 2012, Appellant filed a Motion for Grand Jury Inpanelment Documents and Supporting Materials. (Motion for Grand Jury Inpanelment Documents and Supporting Materials, filed July 31, 2012 [July 2012 Motion]; R., p. 809). At an emergency hearing on August 1, 2012, Appellant requested any grand jury documents, and stated he wanted to “listen to any witnesses that testified at the grand jury, and . . . the evidence that was presented to the grand jury.” After reviewing case law submitted by Appellant, the circuit court denied the motion. (Emergency Hearing Transcript [EHT], pp. 12-16; R., pp. 105-109).

The case was called for a jury trial on August 6, 2012, before the Honorable R. Markley Dennis, Jr., Circuit Court Judge. Prior to trial, Appellant moved to quash the indictments on the ground the State failed to produce documents regarding the impanelment of the grand jury, and there was no proof the grand jury was legally impaneled. The circuit court denied the motion, finding the issue was previously considered and ruled on in a prior hearing. (Trial Transcript [TT], pp. 122-127; R., pp. 111-116.¹

¹The court further clarified the ruling during trial. (TT, pp. 280-281; R., pp. 242-243).

The State presented testimony from victims and witnesses regarding Appellant's sexual molestation of several family members when they were minors. (TT, pp. 164-273, 282-381, 390-535; R., pp. 132-241, 244-343, 352-489). The State also presented expert testimony regarding the dynamics of child sexual abuse, particularly the issue of delayed disclosure. (TT, pp. 539-559; R., pp. 493-513).

At the close of the State's case, Appellant moved for directed verdict on the grounds the State failed to present any physical or scientific evidence supporting the charges, and a jurisdiction issue related to the authority of one investigator to investigate the charges and make an arrest. The circuit court denied the motion, finding there was "an abundance of evidence" on the jurisdiction issue, and "overwhelming" evidence of the charges. (TT, pp. 560-565; R., pp. 514-519).

After presenting evidence, Appellant moved for directed verdict on the jurisdiction grounds raised in his previous directed verdict motion, as well as "the theoretical illegality of the grand jury." The circuit court again denied the motion. (TT, pp. 719-724; R., pp. 647-652).

The jury convicted Appellant of all charges, and the circuit court sentenced him to consecutive and concurrent terms totaling sixty years incarceration. (TT, pp. 852-856, 867-872; R., pp. 775-779, 786-791). This appeal followed.

ARGUMENT

The circuit court properly denied Appellant's request for documents regarding the grand jury, which was not based on any allegations of impropriety in the selection or qualifications of the grand jurors, but was a fishing expedition for information regarding what the grand jury considered during the deliberations leading to his indictments.

Relying heavily on Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005), a case involving the defendant's right to obtain state grand jury impanelment documents, Appellant asserts the circuit court erred in denying his discovery requests for the county grand jury impanelment documents, specifically the qualification procedures, whether those procedures were followed, and data regarding the composition of the grand jury that indicted him. As a threshold matter, Appellant did not raise these allegations in the circuit court, or make **any** allegations involving the grand jury's selection or qualification. Even if the issue he raises on appeal is preserved, however, Appellant's reliance on Evans is misplaced.

In criminal cases, the appellate court sits to review errors of law only, and the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Banda, 371 S.C. 245, 639 S.E.2d 36, 39 (2006); *see also* State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554, 557 (Ct. App. 2010) (same). A party may not argue one ground on appeal after arguing a different ground to the trial court. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445, 448 (2003); *see also* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 693–94 (2003) (stating an issue not raised to and ruled upon by the trial court is not properly before the appellate court).

A. Preservation

Prior to his motion filed July 31, 2012, seven days before his trial was scheduled to begin after numerous continuances and motions hearings, all of Appellant's discovery requests related to the grand jury only sought information regarding the grand jury's actual deliberations. (January 2011 Request, May 2011 Request, April 2011 HT, pp. 14-15; R., pp. 799-802, 805, 14-15). The July 2012 motion contained the first reference to the "impanelment documents," but still primarily focused on information regarding matters presented to the grand jury. (July 2012 Motion; R., pp. 809).

At the August 1, 2012, emergency hearing on his motion, Appellant stated he wanted "the grand jury panel documents and any other supporting materials that was submitted to the grand jury." He further indicated he wanted "to listen to any witnesses that testified at the grand jury," and "the evidence that was presented to the grand jury." (EHT, pp. 12-14; R., pp. 105-107). In his pre-trial motion on August 6, 2012, Appellant stated he wanted impanelment documents to challenge the legality of the grand jury **as it related to the circuit court's subject matter jurisdiction.**² (TT, pp. 122-127; R., pp. 111-117).

Appellant never alleged any irregularities in the selection or qualification of the grand jury members, or sought information from the clerk of court's office regarding the qualification procedures and data reflecting the composition of the grand jury. Rather, he clearly only wanted information regarding the evidence presented to and considered by the grand jury. Thus, he did not raise the issue he now asserts on appeal, and it is not preserved for appellate review.

²In Evans, the Supreme Court conclusively settled the subject matter jurisdiction issue contrary to Appellant's stated position.

B. Impanelment Information

Appellant contends he was entitled to the grand jury impanelment documents under Evans and State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). In the absence of alleged improprieties in the selection and qualification of the grand jury members, neither case supports Appellant's position.

In Evans, the defendant was indicted by a state grand jury, and the South Carolina Supreme Court considered his request for documents relating to impanelment of the state grand jury that indicted him. The Court held the defendant had a constitutional right to demand the grand jury considering the allegations against him be properly established and constituted under the law, and nothing in the state grand jury statutes prohibited release of the impanelment documents after the state grand jury issues an indictment. 611 S.E.2d at 514-520.

The state grand jury's operations are governed by statute, and the type of criminal cases it can consider is restricted. *See generally*, S.C. Code Ann. §§14-7-1600 through -1820 (Supp. 2014) (the SGJ Act). The Legislature created the state grand jury, "in part, to improve the State's ability to detect and eliminate criminal activity," but provided for limited jurisdiction and specialized procedures. State v. Green, 337 S.C. 67, 522 S.E.2d 602, 604 (Ct. App. 1999) (The state grand jury "operates under a very specialized procedure under which a defendant is permitted to obtain and review all evidence which was considered in handing down an indictment."); *see also* State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). While many state grand jury procedures are similar to county

grand jury procedures, there are significant differences directly impacting Appellant's position.³

Impanelment of a state grand jury requires a written document, signed by the Attorney General and the State Law Enforcement Division Chief, setting out the type of offenses to be investigated and indicating impanelment serves the public interest.⁴ S.C. Code Ann. §14-7-1630(B) (Supp. 2014). Based on the contents of the written document, a circuit court judge may order impanelment of a state grand jury for an initial period of twelve calendar months, which the presiding judge may extend upon written request of the Attorney General. S.C. Code Ann. §14-7-1630(D) (Supp. 2014).⁵ The presiding judge may also discharge a state grand jury prior to the end of its term, limit the state grand jury's investigation if he determines it is acting outside its jurisdiction or proper investigative activity, or expand the scope of the original impanelment order. S.C. Code Ann. §14-7-1630 (F) and (G) (Supp. 2014); S.C. Code Ann. §14-7-1690 (Supp. 2014).

³The Legislature amended the SGJ Act in 2015, particularly regarding the documentation required to initiate a state grand jury investigation. *See* 2015 Act No. 45. None of the amendments impact the issue in this case, and the discussion herein references the statute prior to amendment.

⁴For certain types of cases, the written document also had to allege the offenses may involve multiple counties.

⁵The clerk of the state grand jury compiles a "master list" of seven hundred potential jurors from lists provided by the counties, and the presiding judge determines whether any individuals on the list are unqualified, exempt or excused from service. The clerk then prepares a "qualified state grand jury list," which must be prepared annually. When a state grand jury is impaneled, the clerk randomly draws sixty names from the qualified state grand jury list, and eighteen jurors and four alternates are randomly selected from those names. S.C. Code Ann. §14-7-1660 (Supp. 2014). Unlike county clerks of court, the SGJ Act does not require the state grand jury clerk to retain the master list, or keep a list of excused jurors indicating the reason the presiding judge disqualified, exempted or excused them. *See* S.C. Code Ann. §14-7-1530 (Supp. 2014) (county clerk of court must maintain a list of excused or disqualified jurors indicating the reasons for excusing or disqualifying them).

In contrast, county grand juries are automatically impaneled before the first general sessions term in the calendar year, without a written request from the solicitor or a law enforcement agency related to a particular type of offense, there is no “impanelment order,” and the circuit court has no authority to discharge or limit the grand jury. S.C. Code Ann. §14-7-1510 through -1540 (Supp. 2014). Unlike the state grand jury’s restricted authority, once impaneled, the county grand jury has authority and jurisdiction to hear and rule on **any** general sessions level offenses within the county.

Another stark difference between the state grand jury and county grand juries is how the cases are presented. The Attorney General or his designee “shall attend” state grand jury sessions, serve as its legal advisor, and examine witnesses, present evidence, and draft indictments or reports as directed by the state grand jury. S.C. Code Ann. §14-7-1650(A) (Supp. 2014). In contrast, counsel for the State is **not permitted** to be present during the county grand jury proceedings. Ex parte McLeod, 272 S.C. 373, 252 S.E.2d 126, 128 (1979) (reiterating the “long established public policy” prohibiting the prosecuting attorney from entering the grand jury room to present evidence). Rather, as occurred in this case, the investigative agency presents the case to the grand jury.⁶ (EHT, p. 14; R., p. 107).

Finally, for purposes of the instant case, a Brodignagian difference between the state grand jury and county grand juries is the statutory requirement that all state grand jury proceedings be recorded by a court reporter, with a transcript prepared upon request,

⁶Solicitors are also expressly prohibited from appearing as the sole witness before the grand jury. State v. Anderson, 312 S.C. 185, 439 S.E.2d 835, 836 (1993). Investigative officers may appear as the sole witness before the grand jury. State v. Whitted, 279 S.C. 260, 305 S.E.2d 245, 246 (1983) (*overruled on other grounds by State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 [1998]).

and the defendant is entitled to “review and reproduce” those recordings. S.C. Code Ann. §14-7-1700 (Supp. 2014). In addition, all evidence presented to the state grand jury must be retained by the Attorney General unless otherwise ordered by the court in a particular case. *Id.*

Significantly, between 1989 and 1990, the statutes governing county grand juries required recording of grand jury proceedings, but the Legislature repealed the statutory requirement in 1990. S.C. Code Ann. §14-7-1595, *repealed by* 1990 Act. No. 461, §1 (Supp. 2014).⁷ The Legislature clearly knew how to impose the recording requirement on county grand juries, but ultimately chose not to do so. Thus, there is no recording requirement for county grand juries, and the only document presented to the grand jury is usually the indictment itself.⁸

“The regularity of grand jury proceedings is presumed absent clear evidence to the contrary.” Evans, 611 S.E.2d at 520. A defendant must present evidence to support a motion to quash an indictment based on alleged irregularities in the grand jury composition or proceedings. *Id.*; *see also State v. Brownfield*, 60 S.C. 509, 39 S.E. 2, 4 (1901) (if allegations of grand jury impropriety are disputed by the State, defendant must present competent evidence to support grounds asserted as the basis for a motion to quash an indictment). The circuit court’s decision on the issue will be reversed only for abuse of discretion. Evans, 611 S.E.2d at 520.

In Evans, the Supreme Court outlined three categories of challenges to the legality

⁷This statute essentially mirrored many of the state grand jury recording requirements.

⁸This distinction spotlights the state grand jury’s fundamental function as an investigative entity, which is **not** a primary function of county grand juries.

of a grand jury. The first category involves “the existence of the grand jury as a body,” or “the jurors were selected in an illegal or discriminatory manner,” both of which render the indictment a nullity. The second category involves a defendant’s assertion of a lesser irregularity in the selection or makeup of the grand jury, such as disqualification of an individual grand juror, which would also render the indictment null and void. The third category involves the assertion of a truly minor irregularity in the functioning or processes of the grand jury, which does not implicate the legality of the grand jury, or rise to the level of a constitutional violation. 611 S.E.2d at 518-520.

In George, the Supreme Court remanded the case to the circuit court for a hearing on the defendant’s allegation the procedure used by Horry County to select grand jurors resulted in the systematic exclusion of blacks in Horry County over a four year period.⁹ 476 S.E.2d at 910. After remand, the Court affirmed the circuit court’s finding the defendant failed to establish any discrimination in the selection of grand jurors. State v. George, 331 S.C. 342, 503 S.E.2d 168 (1998).

Appellant acknowledges the county grand jury selection process is governed by statute, and accomplished through the county clerk of court. (Brief of Appellant, pp. 13-14). The State neither controls, nor participates in, the selection process or retention of any documents related to it, and there is no indication Appellant, or the two attorneys assisting him with the case, ever attempted to get documents from the clerk of court regarding the grand jury selection, which are a matter of public record in the custody and control of the county clerk of court.

⁹The Court cited Castaneda v. Partida, 430 U.S. 482 (1977), as the standard for inquiries into the legality of a grand jury. Appellant also cites Castaneda as support for his position, however, the defendant in that case asserted a specific allegation of discrimination in the Texas grand jury selection process. *Id.* at 485-486.

Appellant's heavy reliance on Evans in the context of this case compares apples (state grand juries) to oranges (county grand juries), while attempting to paint the oranges red in the hope this Court will overlook the significant differences between the two entities, particularly their primary functions, how they are impaneled, what documents are required to impanel them, who presents the cases before them, and retention of evidence presented. Many state grand jury statutory requirements simply do not apply to county grand juries.

As discussed above, unlike the defendants in Castaneda, Evans and George, Appellant never alleged any purported irregularities in the grand jury selection, composition or proceedings, but made a conclusory statement, based on Evans, that if the grand jury was "illegally" impaneled, the circuit court did not have subject matter jurisdiction. (Motion for Grand Jury Impanelment Documents, EHT, pp. 12-14, TT, pp. 122-127; R., pp. 105-107, 111-116). Nor does he allege any such irregularities on appeal, but continues the conclusory, one-size-fits-all approach.

In essence, Appellant takes the position merely using the word "legality" in the same sentence as "grand jury" entitles a defendant to go on a fishing expedition through any and all documents related and/or presented to the grand jury, which is contrary to the long standing principle that the grand jury's "acts and proceedings have been regarded almost sacredly secret." State v. Rector, 158 S.C. 212, 155 S.E.2d 385, 390 (1930); *see also* Evans, 611 S.E.2d at 515-516 (stringent secrecy provisions of SGJ Act mirror the uniformly held view of courts nationwide that secrecy of grand jury proceedings is desirable and necessary). The substance of Appellant's discovery requests, and the belated reference to "impanelment documents," clearly reveal such a fishing expedition

was exactly what he wanted, and the circuit court properly refused to allow it.¹⁰ Accordingly, the circuit court's ruling should be affirmed.

¹⁰A cursory review of the hearing and trial transcripts in the Record on Appeal clearly reveals all the circuit court judges who dealt with Appellant at each stage of the proceedings were incredibly patient and accommodating with him, even in the face of his blatant contempt of court.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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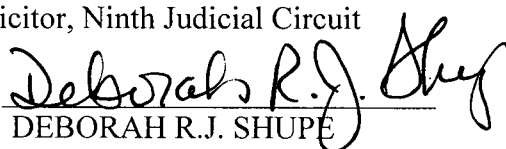
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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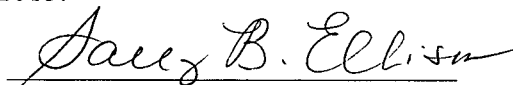
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Susan B. Hackett
Assistant Appellate Defender
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I further certify all parties required by Rule to be served have been served.

This 23rd. day of September, 2015.



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