

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Judge
Appellate Case No. 2014-002322

Curtis Brent Gorney.....Appellant,

v.

State of South Carolina.....Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. RESPONDENT IGNORES THE RELEVANT LAW REGARDING ADMISSIBILITY OF EVIDENCE AND JURY VIEWS

The standard for photographic evidence and that of a physical view of the scene is vastly different in South Carolina. *Rule 402, SCRE* and *S.C. Code Ann. §14-7-1320*. Rule 402, SCRE states, “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina.” (emphasis added). Relevant evidence is defined as “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 allowance of a jury view is governed by statute and requires a much higher level of relevance than the admission of photographs. *S.C. Code Ann. §14-7-1320*. A view will only be permitted when “such view is necessary to a just decision.” *Id.* In creating this provision, the legislature made clear that there is something fundamentally different about a physical view of the scene, that the normal rules of evidence should not apply, and statutorily require a higher standard of scrutiny and relevance should be invoked.

II. RESPONDENT’S ASSERTION THAT ANY RISK OF IMPARTIALITY IS MITIGATED BY THE TRIAL JUDGES INSTRUCTIONS TO THE JURY IS NOT SUPPORTED BY THE FACTS OR THE CASE LAW

The Supreme Court of South Carolina held that an unauthorized visit to the scene of the alleged acts constitutes juror misconduct. *Holy Cross v. Orkin Exterminating Co.*, 682 S.E.2d

489, 384 S.C. 441 (S.C. 2009). In *Holy Cross*, the Court held that such misconduct by one juror was mitigated by the Trial Judges instructions "...that they should not undertake any investigation into the facts or law not presented to them during the course of the trial." *Id.* Respondent is quick to point out that in the immediate matter the trial Judge instructed the jury to "decide the case based solely, 100 percent on the evidence presented here in this courtroom" and further instructed them to "not try to find out information from any source outside the four walls of this courtroom." *Initial Brief of Respondent*, p.13-14.

Despite the Judges instructions, it is well settled that an unauthorized visit to the scene of the alleged crime constitutes juror misconduct. *Holy Cross v. Orkin Exterminating Co.*, 682 S.E. 2d 489, 384 S.C. 441 (S.C. 2009). In the immediate case each juror was engaged, whether voluntarily or by force/necessity, in such misconduct. Respondent's argument that any impact of constantly viewing the scene, which constitutes juror misconduct, was mitigated by the judges instructions requires one to suspend disbelief, deny human nature, and ignore the fact "that in spite of forms [jurors] are extremely likely to be impregnated by the environing atmosphere." *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

III. RESPONDENT'S ASSERTION THAT APPELLANT'S MOTION FOR CHANGE OF VENUE PERTAINED ONLY TO ALLEGED CRIMES OCCURRING AT THE COURTHOUSE IS MISPLACED

Respondent asserts that Appellant's Motion to Change venue pertained only to the charges arising from the events which occurred at the courthouse, namely the charges relating to the alleged attempted murder of Johnny Nolan and Olivia Weaver. As such, Respondent maintains that if Appellant is entitled to relief such relief should only extend to those charges and the other convictions and their sentences should remain unaffected. *Initial Brief of Respondent* Foot

note 5, p. 19. In support of this assertion Respondent cites the following exchange between the Court and Defense Counsel:

THE COURT: ...Let me just ask this, I'm just kinda thinking out loud, and, and I realize we have three indictments alleged [attempted] murder. One is where the alleged attempted murder takes place on the Road to Pageland, and, again, I'm thinking out loud. All right. Let's assume I was inclined to grant your motion concerning the change of venue as it relates to the two shootings here in - - on the street out in front of the courthouse. What would prevent the state from deciding just to go forward on the one indictment related to the alleged shooting on the road to Pageland?

MR. COCKRELL: Your Honor, I'd, I'd ask the Court for at least a recess in time for me to at least research and either have a motion or - - in limine in regards to any of the events leading up to that, and, and may just renew altogether my, my [change] of venue motion because it's too, too close in time.

Transcript p. 55-56 l. 21-13.

It is clear from the record that the Court's questions to Defense Counsel were hypothetical in nature and do not amount to a ruling by the Court. Additionally, Respondent's assertion that "Defense counsel did not object or attempt to clarify the [J]udge's understanding on this point" is factually inaccurate. *Initial Brief of Respondent*, Footnote 5, p. 19. In fact, Defense Counsel responded to the hypothetical inquiry by stating that he would first ask for more time to research the issue, would file a Motion in Limine to suppress evidence of the alleged acts at the courthouse, and might renew the Change in Venue Motion due to the relationship between the alleged occurrences. *Transcript* p. 56 l. 8-13. In essence Respondent argues that Appellant failed to preserve the issue as it relates to the charges which resulted from conduct not occurring at the courthouse. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will

not be considered on appeal.” *State v. Dunbar*, 587 S.E.2d 691, 356 S.C. 138 (S.C., 2003) (citing *Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001)).

The exchange between the Court and Defense Counsel did not necessitate any action by Defense Counsel to preserve this particular issue. The Trial Judge made it abundantly clear that he was not ruling or attempting to create “the law of the case.” *Initial Brief of Respondent* Footnote 5, p. 19. Instead, he was “just kind of thinking out loud.” *Transcript*, p. 55 l. 21-22. In essence, the Trial Court engaged in a line of hypothetical questioning to inform its subsequent ruling. However, the action which Defense Counsel indicated he would take, in the event that the situation described by the Trial Court occurred, would have served to preserve the issue at question. *Transcript* p. 56 l. 8-13.

While Respondent’s argument on this point is without merit; this line of questioning by the Trial Court demonstrates the novelty of the issue raised and the uncertainty of the law on point. Had the circumstances described by the Trial Court come to pass, Appellant would have renewed his Motion for Change of Venue and/or filed a Motion in Limine to suppress evidence of the events which occurred at the courthouse. Such a chain of events, undoubtedly, would have created another diverse set of issues that may have been brought before this Court for Review.

IV. THE IMMEDIATE CASE AND STATE V. BAUMRUK

As has been discussed in the previous briefs, case law directly on point is exceedingly rare. In fact, *State v. Baumruk* appears to be the only recorded case on point. 85 S.W.3d 644 (Mo., 2002). As such, Respondents go to great lengths to distinguish it from the immediate case.

However, the similarities greatly outweigh the differences. *Id.* In both cases the crime occurred at the courthouse. *Id.* In both cases the witnesses were primarily employed at the courthouse. In both cases there was significant pretrial publicity. *Id.* Respondent's focus on and assertion that somehow the alleged actions of Appellant were less heinous or traumatic than the alleged crimes in *Baumruk* is without merit.

It is worth pointing out that Baumruk's trial did not occur in the courtroom where the alleged crime occurred and the St. Louis County Courthouse is a large facility with multiple courtrooms. *Transcript*, p. 65-66 l. 20-6. There is nothing in the opinion to indicate that the Jurors viewed the actual scene. In the immediate case all of the jurors regularly viewed the scene of the alleged crime.

V. OVERWHELMING EVIDENCE OF GUILT IS

Appellant argument is a simple one. A jury cannot be impartial while they sit at the scene of an alleged horrific crime. Such a procedure creates "an unacceptable risk" of impermissible factors coming into play," and such risk creates an environment of inherent prejudice which necessarily offends Defendant's right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 504 -05 (1976). Simply providing a jury of twelve is not enough. The state must provide a panel of "Impartial, indifferent jurors. . . This is true regardless of the heinousness of the crime charged [or] the apparent guilt of the offender. . . " *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546 (1965).

Respondent's citation to *Snyder v. Massachusetts* is extremely relevant due to the distinguishing factors between *Snyder* and the immediate case. 291 U.S. 97, 122 (1934). In *Snyder*,

the Trial Court held a jury view in accordance with the statutes of the State of Massachusetts. In regarding Snyder's due process claim Justice Cardozo writing for the majority of the United States Supreme Court stated that:

The Constitution and statutes and judicial decisions of the commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness.

Id.

In essence, whether or not a violation of due process has occurred will at some level be determined by the procedures established in the various states and the compliance there with. The statute regarding a jury view in Massachusetts did not require the presence of the accused. However, in *Snyder* various officer's of the court were present at the view, including the Trial Judge and counsel for the Defendant. The state of Massachusetts did not consider a jury view evidence warranting the right of confrontation. Accordingly, the Court found no error in the denial of the defendant's motion to be present at the view in question. *Id.*

Respondent's ignore that like Massachusetts, jury views in South Carolina are governed by statute. Before a view may be had, one party must move the Court for such a view and it may be had only after a finding that "such view is necessary to a just decision." *S.C. Code Ann.* §14-7-1320. The fact that the legislature set such a high standard cannot be ignored. A jury view is improper if it may help the jury reach a just decision. It is improper if will probably help the jury make a just decision. It may even be improper if it will certainly help the jury reach a just decision. It is only proper when necessary to a just decision. The high burden set by the statute

shows that the legislature intended to protect the jury system and recognize the fact that jury views in this state are disfavored. *Id.*

CONCLUSION

For the reasons stated in Mr. Gorny's Brief and this Reply Brief, this Court should reverse the denial of Mr. Gorny's Motion for a Change of Venue and remand for further proceedings consistent with this Court's ruling.

Respectfully Submitted,

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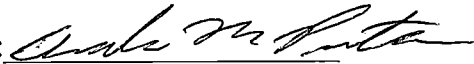
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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Reply Brief of Appellant** in the above referenced case has been served upon **Alan Wilson and Christina Catoe Bigelow**, Postoffice Box 11549, Columbia, SC 29211 and **William B. Rogers Jr.**, Post Office Box 616, Bennettsville, SC 29512, this **9th** day of **November, 2015**.

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November 9, 2015
SC Court of Appeals

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Appellate Case No.: 2014-002322

Dear Madam Clerk:

Enclosed please find one original and one copy of the following documents:
Reply Brief of Appellant and Proof of Service. Please file the originals and return the
copies in the self addressed stamped envelope provided. Should you have any
questions or need anything further please feel free to call.

Sincerely,



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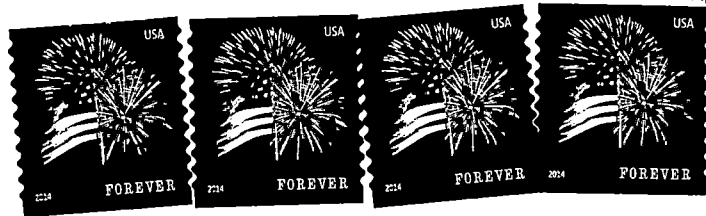
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