

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY  
Court of General Sessions  
Edward W. Miller, Circuit Court Judge

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Court of Appeals Case No. 2015-001199

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RECEIVED

JUN 28 2018

SC Court of Appeals

The State, ..... Respondent

v.

Preston Shands, Jr., ..... Appellant.

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**Petition for Rehearing**

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Pursuant to Rule 221, SCACR, Preston Shands, Jr. petitions for rehearing because this Court overlooked or misapprehended the following points.

**I. Batson Challenge.**

This Court agreed with Mr. Shands that the trial judge did not “properly apply the third step of the *Batson* comparative juror analysis.” This Court, however, disagreed with Mr. Shands that the State violated *Batson*. In reaching this conclusion, this Court applied two lines of reasoning. First, this Court held, “It is understandable that the State would want to strike potential jurors who had convictions for CDV because Shands was being tried for attempting to kills his wife.” Second, this Court held that the female juror with a fraudulent check conviction was not similarly situated the make juror with “convictions for violating the lottery law” because it “agree[d] with the State that having multiple convictions is different than having only one conviction that is over a decade old.” Slip

Op. at 3-5. The opinion in this case conflicts with this Court's opinion in *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015), which Mr. Shands relied upon in his Brief, at 5-9, and Reply Brief, at 1. Mr. Shands, in fact, argued:

*Stewart* is instructive for two reasons. First, much like this case, *Stewart* reviewed the trial court's error by not correctly applying the third step of *Batson*. Second, *Stewart* involved a prosecutor attempting to justify preemptory strikes based on jurors' criminal history. In *Stewart*, the State struck African-American jurors with prior involvement with law enforcement while seating Caucasian jurors that also had prior involvement with law enforcement. The Court of Appeals held, "[E]ven though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors." *Stewart*, 413 S.C. at 317, 775 S.E.2d at 421. See *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."); *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated). Just as it did in *Stewart*, the State in this case negated the gender-neutral reason for striking three men by seating a similarly situated female juror.

Final Brief of Appellant at 8-9. As Mr. Shands pointed out during the oral argument, the State's argument would have been more persuasive if the prosecutors had limited their strikes, purportedly based on criminal history, to the two male jurors with CDV convictions. The State "negated" the use of criminal history when it struck the male juror with lottery law convictions and sat the female juror with a fraudulent check conviction.

Additionally, this Court failed to examine the totality of the circumstances. Mr. Shands argued:

[I]n addition to seating a similarly situated female juror, the totality of the circumstances militates in favor of ordering a new trial. See *State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.") (citing *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). During jury

selection in this case, the Solicitor had twenty-seven decisions on whether to exercise one of her preemptory strikes. She struck three of the nine men (33%) presented to her. She struck just one of the eighteen women (about 5.5%) presented to her. The Solicitor, therefore, was six times more likely to strike men than women. As ... seen in Question V, ..., the Solicitor directed her closing argument towards the female jurors, including arguing that Mr. Shands considered his wife property.

Final Brief of Appellant at 9.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 5-9, and reply brief, at 1.

## **II. Grand Jury Process.**

This Court held that Mr. "Shands did not present clear and convincing evidence that there was an abuse of the grand jury proceedings in his case." Slip Op. at 5. This Court overlooked the Deputy Solicitor's admission that Laurens County has a pattern and practice that does not comply with S.C. Code Ann § 14-7-1550 and the standard instructions provided to the grand jurors at the beginning of every year. See Rule 406, SCRE. Mr. Shands, accordingly proved an abuse of the grand jury process in *every* case indicted in Laurens County.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 9-19, and reply brief, at 1-2.

## **III. Prior Conviction.**

This Court agreed with Mr. Shands that his prior conviction was not admissible under Rule 609, SCRE because (1) Mr. Shands had been released from confinement for more than ten years and (2) "the State did not present sufficient evidence to show the probative value of Shand's conviction *substantially* outweighed its prejudicial effect." Slip Op. at 8-9 (emphasis supplied by this Court). This Court, however, held, "[T]he trial

court did not err in admitting Shand's prior conviction because Shands opened the door to such evidence" by asking whether they had ever witnessed Mr. Shands commit an act of violence. Slip Op. at 9. This Court, however, never identified the court rule under which the evidence was admissible. It appears this Court conflated the analysis under Rule 609, SCRE with the analysis under Rule 404(a), SCRE or Rule 404(b), SCRE. The prosecution tacitly acknowledged Mr. Shand's conviction was not admissible under Rule 404, SCRE as its only theory at trial for admitting the conviction was under Rule 609, SCRE.

This Court, essentially, adopted a rule allowing the prosecution to introduce an otherwise inadmissible prior conviction to impeach an accused's cross-examination of witnesses that gave truthful answers about issues relevant in the case. In future trials, an accused will have to choose between cross-examining witnesses or testifying.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 19-23, and reply brief, at 2-3.

#### **IV. Voluntary Intoxication.**

This Court held, "[T]he trial court did not err in refusing to charge involuntary intoxication because Shands voluntarily consumed an illegal intoxicant." Slip Op. at 10. This Court, however, overlooked the testimony that the drink was "spiked with something other than alcohol." In doing so, this Court encroaches on the role of the jurors as the fact finders.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 23-25, and reply brief, at 4.

**V. Comments During the State’s Closing Argument.**

This Court held, “[T]he trial court did not abuse its discretion in denying Shand’s motions to strike because the State’s comments were not outside the evidence.” Slip Op. at 12. As pointed out in Mr. Shand’s reply brief, at 4-5, the prosecutor’s statement, “[T]his is a jealous, controlling husband who was not going to let *his property* leave that house,’ is highly inflammatory and not based on evidence.” This Court never addressed this argument. Additionally, this Court overlooked the procedural posture of this issue. The trial judge very clearly sustained the objection and admonished the prosecutor to confine her arguments to the evidence. This Court, accordingly, was reviewing whether it was error not to provide a curative instruction and not whether the prosecutor’s comments were improper.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand’s brief, at 25-26, and reply brief, at 4-5.

**VI. Inferred Malice Jury Instruction.**

Mr. Shands agrees with this section of this Court’s opinion.

**VII. Closing Argument Procedure.**

Neither this Court’s opinion in this case nor our Supreme Court’s opinion in *State v. Beaty*, \_\_\_ S.C. \_\_\_ 813 S.E.2d 502 (2018) answers the question of whether due process requires the accused to have an opportunity to respond to the prosecution’s best closing argument.<sup>1</sup> Mr. Shands believes it is fundamentally unfair to allow the State to withhold its theory of the case until after it hears the accused’s closing argument. This

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<sup>1</sup> Mr. Beaty’s petition for rehearing raised this issue in our Supreme Court.

Court's focus on the argument in this particular case overlooks the larger due process issue.

Additionally, this Court cited *Beatty* for a four-part test to determine whether the state's closing argument violated the accused's due process rights. Our Supreme Court's opinion in *Beatty*, however, did not adopt a rigid four-part test. Rather, our Supreme Court wanted trial judges—and appellate courts—to exercise sound discretion in deciding whether a prosecutor's closing argument violated due process. Under the test adopted by this Court, an accused could never establish a violation. For example, if the prosecutor completely sandbags and reveals nothing about its theory in its initial closing argument, then anything the prosecutor argues in “reply” would be “‘arguably a proper response’ to the defendant’s closing argument.” Slip op. at 18.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand's brief, at 29-35, and reply brief, at 6-7.

#### **VIII. Directed Verdict & Unconstitutionality of the Kidnapping Statute.**

This Court held, “We find Shand's argument regarding the constitutionality of the kidnapping statute is without merit because our supreme court has already held the kidnapping statute is not unconstitutionally vague.” Slip Op. at 20. Mr. Shands takes this opportunity to remind this Court that he petitioned this Court to transfer his appeal to the Supreme Court because this Court lacked the authority to overrule precedent.

Additionally, the precise issue Mr. Shands appealed to this Court was:

Did the trial judge err by denying Mr. Shands' motion for a directed verdict on the kidnapping charge because the kidnapping statute, as applied to Mr. Shands, is unconstitutionally vague and overbroad because it did not put him on notice of what conduct is prohibited?

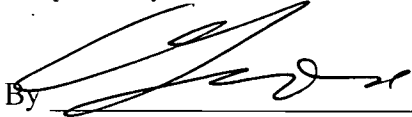
Final Brief of Appellant at 35. This Court never addressed the “as applied” challenge to the statute.

This Court should rehear this appeal and grant relief for the reasons set forth in Mr. Shand’s brief, at 35-38, and reply brief, at 7-8.

**Conclusion**

For the foregoing reasons, and for the reasons set forth in Mr. Shands’ Final Brief and Final Reply Brief, this Court should rehear this appeal and grant him a new trial.

Respectfully Submitted

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June 27, 2018  
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PROOF OF SERVICE

I certify that I have served this pleading on the State, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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