

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2018-001673
State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018)

The State, Respondent-Petitioner,

v.

Preston Shands, Jr., Petitioner-Respondent.

**REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF *CERTIORARI*
BY PETITIONER-RESPONDENT PRESTON SHANDS, JR.**

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ARGUMENTS

- I. Did the Court of Appeals err when it applied the third step of *Batson's* comparative juror analysis and concluded a female juror with a criminal conviction seated by the Solicitor was not similarly situated to three male jurors with criminal convictions struck by the Solicitor, when the Solicitor's sole basis for striking these jurors was criminal convictions?**

The State's Return to Mr. Shand's Petition for Writ of *Certiorari* ("State's Return"), at 8-9, acknowledges the prosecution did not strike a female juror that was similarly situated to male jurors that the prosecutor did strike but argues "the prosecutor's explanation was reasonable." As argued in Mr. Shand's Petition for Writ of *Certiorari* ("Cert Petition"), at 6-7, pretext "generally is established by showing the party did not strike a similarly-situated member of another race or gender," *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015), and the prosecution "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. The State's return never addressed *Stewart*. The Court of Appeals opinion in Mr. Shands' case conflicts with *Stewart*. This Court's intervention is needed to resolve the conflict.

This Court's intervention is also needed in order to provide the bench and bar guidance for when the State selectively uses criminal history to strike similarly situated jurors, particularly in situations where our state's limited *voir dire* procedure yields limited information for parties to consider when exercising preemptory strikes.

- II. Did the Court of Appeals err by affirming the trial court judge not quashing the indictments because the grand jury presentment process in Laurens County, including in Preston Shands Jr.'s case, violates state law and Equal Protection?**

The State's Return ignores the Solicitor's custom and practice of not keeping records of witnesses testifying before the grand jury. As a result, no one accused of a

crime in the Eighth Judicial Circuit will ever be able to meet the unreasonable burden required by the court below. This Court's guidance is needed to ensure grand juries in this judicial circuit do not become "a prosecutor's plaything." *State v. Capps*, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981) (Lewis, C.J., Dissenting); *see also State v. Davis*, 420 S.C. 50, 61, 800 S.E.2d 138, 143 (Ct. App. 2017) (same). This Court should grant the writ, consider the issue, and provide guidance to the bench and bar about the proper procedures for a grand jury presentment.

III. Did the Court of Appeals err when it held Preston Shands, Jr. opened to the door to the Solicitor questioning him about his forty-year-old felony convictions that were inadmissible under Rule 609, SCRE, when he was on trial for multiple violent felony charges?

The State's Return, at 12-13, argues Mr. "Shands' prior conviction was within the limits of Rule 609 because Shands was on parole under the State's supervision at the time of the assault." The Court of Appeals rejected this argument, holding South Carolina "follow[s] the majority of jurisdictions in holding that probation and parole do not constitute 'confinement' for the purposes of Rule 609(b); confinement ends when a defendant is released from actual imprisonment." *State v. Shands* ___ S.C. ___, ___, 817 S.E.2d 524, 533 (2018).

The Court of Appeals ultimately held, "[T]he trial court did not err in admitting Shands's prior conviction because Shands opened the door to such evidence" by "elicit[ing] testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before." *Id.* Mr. Shands merely asked his wife, children, and neighbors whether they had ever seen him act in this manner to support his involuntary intoxication defense. None had. The court below thus 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.

As pointed out in his Cert Petition, at 12-13, admission of his prior record prejudiced Mr. Shands and was not harmless beyond a reasonable doubt because his credibility was at issue in the case. This Court's guidance is needed regarding the admissibility of remote convictions.

IV. Did the Court of Appeals err when it affirmed the trial judge not instructing the jurors about the law of involuntary intoxication when Preston Shands Jr.'s testimony supported providing the instruction?

The trial judge's instructions to the jurors could not have been more confusing. Initially, the trial judge incorrectly instructed Mr. Shands' jurors, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." R. 245. Mr. Shands objected based on the Court of Appeals holding in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *affirmed as modified*, *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). R. 256-58. The trial judge re-instructed the jurors. R. 259-60. Initially, the trial judge instructed the jurors about the elements of common law assault and battery of a high and aggravated nature. R.245-47. The trial judge recharged the jurors after both parties objected. R. 253-55, 258-60. As pointed out in Mr. Shands' Return to the State's Petition for a Writ of *Certiorari*, the Court of appeals agreed with Mr. Shands that the trial judge violated *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) by instructing the jurors they could infer malice from the use of a deadly weapon, which Mr. Shands contends was a comment on the facts in violation of S.C. Const. art. V, § 21.

It is against this backdrop that this Court should consider the trial judge's decision not to instruct involuntary intoxication. "The law to be charged to the jury is determined by the evidence presented at trial. . . . , [and] a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). Here, an instruction on "involuntary intoxication" was necessary to aid the jurors in their deliberations. Instructing on "voluntary intoxication," while omitting an instruction on "involuntary intoxication," had the effect of the judge expressing an opinion on Mr. Shands' testimony and defense in violation of Art. V, Section 21 of the South Carolina Constitution.

This Court should grant the writ, consider the issue, and provide guidance for when the defense of involuntary intoxication is raised by the evidence. This Court's guidance is also needed to assist the bench and bar in understanding when a jury instruction becomes an improper comment on the facts, even though the instruction is a correct statement of the law.

V. Did the Court of Appeals err when it held the Solicitor's improper closing argument was supported by the evidence, even though the trial judge had sustained Preston Shands, Jr.'s objection, instructed the Solicitor to "keep it to the facts," but refused to strike the argument from the record?

As discussed in Mr. Shands's Cert Petition, at 15-17, the trial judge sustained Mr. Shands' objection to the prosecutor's improper closing argument. The State's Return, at 21, however, continues to argue "the trial court's warning to 'keep it to the facts' was likely not sustaining the objection." This Court should grant the writ, consider the issue,

and provide the bench and bar guidance about limiting the closing argument to the evidence in the case and not seeking a conviction based on other considerations.

VI. Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument, meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

The State argues:

Shands claims the trial judge should have created a new rule of procedure and forced the State to open on the law and facts, and be allowed only a reply argument to defense counsel's closing argument. In criminal trials in South Carolina, a solicitor is entitled to open and close the closing arguments to the jury unless the defendant has not offered any evidence.

State's Return at 21 (internal citations omitted).

This argument mischaracterizes Mr. Shands position; he does not contend the State was not entitled to open and close the closing arguments. Mr. Shands merely asked the trial judge to exercise the discretion this Court recognized trial courts already possess, to wit: "In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing." *State v. Beaty*, 423 S.C. 26, 46, 813 S.E.2d 502, 512-13 (2018). The trial judge did not exercise this discretion. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)).

This Court should grant the writ, consider the issue, and answer the question left unanswered in the *Beaty* opinion, to wit: Does Due Process confer a right for an accused to have a full and fair opportunity to respond to the prosecution's best closing argument,

meaning the State must open in full on the facts and the law and restrict its reply argument to matters raised by the defense in closing?

VII. Did the trial judge err by denying Preston Shands Jr.'s 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?

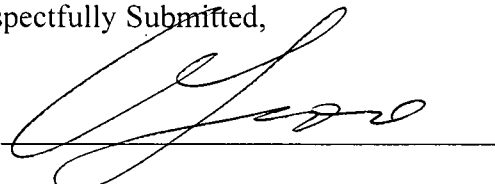
As argued in Mr. Shands' Cert Petition, at 22-25, if the testimony in this case is construed to constitute a kidnapping, then § 16-3-910 is not constitutional. The State did not present evidence of kidnapping beyond what was alleged in the assaults. If this Court allows Mr. Shands' kidnapping conviction to stand, then every assault offense involving attempt to grab or hold the other person would also support a kidnapping conviction. This Court should grant the writ and provide guidance on this issue.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By



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October 29, 2018.

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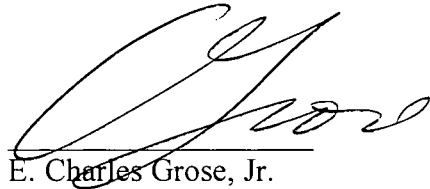
v.

Preston Shands, Jr., Petitioner-Respondent.

PROOF OF SERVICE

I certify that I have served Mr. Shands' Reply to the State's Return to his Petition for Writ of *Certiorari* on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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