ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Marion County
The Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2017-002393

The State,

Respondent,

v.

Russell Levon Johnson,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly admitted evidence of Appellant's actions toward the Victim during the continuing course of a kidnapping that began in Marion County, continued through Dillon and Marlboro Counties, and ended at a motel in Marion County, where Appellant attempted to break the Victim's neck, because the actions in Dillon and Marlboro Counties were part of the res gestate of the kidnapping offense, and went to the issue of the Victim's state of mind and why she did not attempt to escape from Appellant..

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In February 2017, the Marion County Grand Jury indicted Appellant Russell Levon Johnson on one count of first degree domestic violence and one count of kidnapping, arising from incidents occurring on or about September 15, 2016. The matter was called for a jury trial on November 13, 2017, before the Honorable William H. Seals, Circuit Court Judge.

The Victim resided with Appellant approximately four years prior to August 2016, when they separated and she moved to a new home with her children. At approximately 2:00 p.m. on September 15, 2016, Appellant picked the Victim up at her new home in Marion County purportedly to go to the store and talk. Shortly after they drove away, the Victim's cellphone rang, Appellant grabbed it and removed the battery, and said no one was going to call either him or her. Appellant did not drive to the store, but continued driving toward Dillon County until the Victim did not know where they were, and asked Appellant to take her home, but Appellant kept driving away from Marion County and told the Victim they were just going to sit and talk. Appellant eventually stopped the car in some woods, and they stood beside the car talking. When the Victim asked him what he wanted to talk about, Appellant accused her of stealing from him and cheating on him, which she denied. (Trial Transcript [TT], pp. 66-69; Record on Appeal [R.], pp. 29-32).

When they got back in the car, Appellant drove to a store, where he purchased a beer. Appellant then continued driving until they reached another wooded area around Clio, South Carolina, in Marlboro County. He stopped the car, and got a metal object out of the trunk, which he used to stab the Victim in the chest. After stabbing the Victim, Appellant pulled her out of the car, threw her on the ground and started kicking and punching her side and face. Appellant

then hit the back of the Victim's head with a small hammer he got out of the trunk. (TT, pp. 69-74; R., pp. 32-37).

The Victim asked Appellant why he was hitting her, and told him she never stole from him or cheated on him. Appellant picked the Victim up and put her back in the car, and started driving again. He eventually returned to Marion County, where he got a motel room. After they got inside the room, the Victim asked Appellant to help her clean the blood off her, but he refused, stating it was going to be her last night. He went out to his car and came back to the room with a bottle of Windex and some blue gloves. When the Victim stood up, Appellant got behind her, wrapped his arms around her neck, and "tried to pop" it. He told the Victim he was going to kill her and then kill himself. (TT, pp. 74-77; R., pp. 37-40).

When Appellant eventually fell asleep on the bed, the Victim ran outside and went to the room next door. After seeing the blood on the Victim's shirt and face, the people said they were going to call the police and the Victim ran away. While she was walking on the side of the road, the Victim met a police officer and told her what happened. (TT, pp. 77-80; R., pp. 40-43).

Before the jury was sworn, Appellant moved to exclude any evidence regarding the events occurring in Dillon and Marlboro counties, arguing the circuit court did not have jurisdiction over events occurring in other counties. The State argued the evidence regarding those events was part of the kidnapping charge's *res gestae*, and as such, it was necessary to provide the jury a complete picture of what happened, particularly why the Victim did not attempt to escape when she was left alone in the car. The court raised the possibility of a limiting instruction to the jury regarding acts occurring outside Marion County, but took the matter under advisement until the testimony was offered. (TT, pp. 41-53; R., pp. 5-17).

The Victim testified about the events of September 15, 2016, after Appellant picked her up at her home. When she started to testify about what happened in the woods near Clio, Appellant objected on the ground the event occurred in another county. Outside the presence of the jury, the court ruled it would allow testimony regarding the events in other counties as proof relating to the kidnapping charge, but stated the jury would be given a limiting charge. (TT, pp. 64-72; R., pp. 27-35).

The Victim then testified that after stopping in the woods near Clio, Appellant stabbed, kicked and punched her, and hit her in the back of the head with a hammer.. She stated she did not attempt to escape when the Appellant stopped and left her in the car alone, because she did not know where they were when he stopped, and she was frightened because he had threatened and beat her. On cross-examination, Appellant questioned the Victim extensively about her failure to attempt an escape, as well as her statements to law enforcement about the events. (TT, pp. 72-99; R., pp. 35-62.

After the State rested its case, Appellant moved for a directed verdict due to a lack of evidence. Prior to ruling on the motion, the court rescinded its previous ruling regarding the admissibility and use of evidence about the events in Dillon and Marlboro counties, finding relevant case and statutory law indicated venue was proper in Marion County, and then denied the directed verdict motion. Appellant argued the statutes cited by the court only applied to death penalty cases, and renewed his previous motion to exclude the evidence. (TT, pp. 144-145; R., pp. 107-108).

During closing argument, the State referenced the events in Dillon and Marlboro counties, stating the events were "important not because they're domestic violence," but to show the jury "why [the Victim] became compliant." As to the domestic violence charge, the State

argued the Victim "told you he put his arms around her neck like this and he tried to pop it." (TT, pp. 151-157; R., pp. 112-118). In his closing argument, Appellant stressed the fact the Victim did not try to escape even when Appellant left her alone in the car. (TT, pp. 157-162; R., pp. 118-123).

After charging the jury on the law regarding kidnapping and first degree domestic violence, without a limiting instruction regarding use of the evidence relating to events in other counties, the court asked if the State or Appellant had any objections to the charge. Appellant stated: "No objection, Your Honor." (TT, pp. 162-174; R., pp. 123-135).

The jury deliberated over an hour, and then indicated it had reached a verdict on the first degree domestic violence charge, but were divided on the kidnapping charge. The court then gave the jury an Allen[1] charge, and sent the jury back for further deliberations. Approximately fifteen minutes later, the jury returned with a verdict of acquittal on the kidnapping charge, but convicted Appellant on the first degree domestic violence charge. (TT, pp. 174-179; R., pp. 135-140).

Appellant renewed all previous motions, which the circuit court denied, and then sentenced Appellant to ten years incarceration, with credit for 416 days in detention on the charges. (TT, pp. 179-180; R., pp. 140-141). This appeal followed.

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[1]Allen v. United States, 164 U.S. 492 (1869).

STANDARD OF REVIEW

"'The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling [on such] will be disturbed only upon a showing of an abuse of discretion.'" State v. Washington, 424 S.C. 374, 818 S.E.2d 459, 475 (Ct. App. 2018). (*quoting* State v. Shuler, 353 S.C. 176, 577 S.E.2d 438, 442 [2003]); *see also* State v. Winkler, 388 S.C. 574, 698 S.E.2d 596, 601 (2010) (same). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or they are controlled by an error of law. Washington, 818 S.E.2d at 469.

ARGUMENT

The circuit court properly admitted evidence of Appellant's actions toward the Victim during the continuing course of a kidnapping that began in Marion County, continued through Dillon and Marlboro Counties, and ended at a motel in Marion County, where Appellant attempted to break the Victim's neck, because the actions in Dillon and Marlboro Counties were part of the *res gestate* of the kidnapping offense, and went to the Victim's state of mind and why she did not attempt to escape from Appellant.

At trial, Appellant moved to exclude evidence regarding Appellant's acts of violence against the Victim in Dillon and Marlboro Counties on the ground the circuit court did not have "jurisdiction" to hear domestic abuse allegations occurring outside Marion County. He then argued the jurors would be unable to separate the incidents occurring outside Marion County from the evidence regarding abuse allegations occurring inside Marion County, for purposes of deliberating on the Marion County charges before them.

On appeal, Appellant argues the circuit court "confused" the basis of his objection to the evidence at issue by erroneously overruling his objection to the evidence on the ground Marion County was the proper venue to hear the allegations, and in failing to give a limiting instruction to the jury regarding its consideration of the evidence. He further contends the evidence was more prejudicial than probative because the jury could not separate the alleged acts of domestic violence in Dillon and Marlboro Counties from the alleged acts in Marion County.

As to the circuit court's purported error in failing to exclude the evidence as unduly prejudicial, arguably ths issue is not preserved for appellate review. "An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Carlson, 363 S.C. 586, 611 S.E.2d 283, 287 (Ct. App. 2005), (*quoting* State v. Nichols, 325 S.C. 111, 481 S.E.2d 118, 123 [1997]). In order to preserve an issue for review, the party must make a contemporaneous objection and the ground therefore, and absent

such, there is no basis for appellate review. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); Carlson, 611 S.E.2d at 287 (same); State v. Morris, 307 S.C. 480, 415 S.E.2d 819, 823 (Ct.App.1991) (same). A party cannot argue one ground below and then argue another ground on appeal. State v. Byram, 326 S.C. 107, 485 S.E.2d 360, 363 (1997) (*citing* State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 [1995]).

Nothing in the record indicates Appellant argued the circuit court "confused" Appellant's objection to admission of the evidence by basing its ruling on venue. After the circuit court found venue was appropriate in Marion County, and rescinded its previous ruling regarding the necessity of a limiting instruction to the jury, Appellant merely argued the statutes cited by the court for venue purposes did not apply because they related to death penalty cases. Appellant did **not** contend venue was not the basis of his previous objections, which was the sole grounds argued during the pre-trial motion and when the evidence was offered during the Victim's testimony. In addition, Appellant never indicated the court "confused" the basis of his objection, or sought a ruling on whether the evidence was unduly prejudicial, which would have afforded the circuit court the opportunity to address the issue.. (TT, pp. 144-145; R., pp. 144-145).

Further, when given an opportunity to state objections to the jury charges as given, which did not include a limiting instruction, Appellant stated: "No objection, Your Honor." (TT, pp. 162-174; R., pp. 123-135). Therefore, Appellant accepted the court's ruling, and effectively waived the lack of a limiting instruction for appellate purposes.

Even if the issues Appellant raises are preserved for appeal, the evidence regarding incidents occurring between the time Appellant picked the Victim up from her home in Marion County and returned her to Marion County were admissible as part of the *res gestae* of the kidnapping and domestic violence charges set forth in the indictment. They were part of on-

going criminal acts, which the State contended commenced in Marion County, and continued through Dillon and Marlboro counties, and provided context for the Victim's testimony regarding the kidnapping charge.

The offense of kidnapping commences when someone is wrongfully and unlawfully deprived of his freedom, and continues until freedom is restored. State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182, 184–85 (1979) (*citing* 1 Am.Jur.2d Abduction and Kidnapping §10), *overruled on other grounds by* Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002), and State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002). Evidence of what occurs while a person is deprived of his freedom is relevant in a kidnapping charge. *Id.* "If one were kidnapped in the United States and taken into Mexico, evidence relative to that which took place in Mexico, before freedom was restored, would be proper for presentation to a jury, even though, obviously, one could not be convicted in the United States for a kidnapping in Mexico." *Id.* (emphasis added).

"Although evidence of other criminal acts by a defendant is generally not admissible to prove the defendant's propensity to commit the crime with which he has been charged, such evidence may be admitted to prove motive, intent, identity of the perpetrator, lack of accident or mistake, or common scheme or plan." State v. Ford, 334 S.C. 444, 513 S.E.2d 385, 388–89 (Ct. App. 1999). In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014), the Supreme Court held evidence of the defendant's cocaine use immediately prior to the alleged robbery, which was relevant to his motive, was properly admitted as part of the *res gestae* of the crimes for which the defendant was tried. Citing United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980), the Court noted evidence of other crimes is admissible when it provides part of the crime's context, is necessary for a full presentation of the case, or is so much a part of the case's setting that its proof is

appropriate to provide the immediate context or *res gestae* of the crime on trial. *Id.* at 370-71. When evidence is admissible to provide a full presentation of the offense, "'[t]here is no reason to fragmentize the event under inquiry'" by suppressing parts of the *res gestae*. *Id.*; *see also* State v. King, 334 S.C. 504, 514 S.E.2d 578, 582–83 (1999)(same).

In this case, the State alleged the kidnapping commenced in Marion County, continued through Dillon and Marlboro counties, and ended only when the Victim was able to escape while Appellant slept in the motel room. In response to Appellant's motion to exclude all evidence of what occurred in Dillon and Marlboro counties, the State argued the *res gestae* of the kidnapping charge included the incidents in Dillon and Marlboro counties, and was necessary to explain and provide context for why the Victim stayed in Appellant's car, even when he left her alone in the car, rather than attempt an escape. (TT, pp. 41-52; R. pp., 5-16).

The Victim testified Appellant picked her up at her home, stating he was going to the store and wanted to talk to her. Shortly after driving away from the Victim's home, Appellant grabbed her cellphone and removed the battery. Appellant drove to an area the Victim was not familiar with, he stopped and went into a store, and then drove to a wooded area, where he attacked the Victim with a metal rod, pulled her out of the car to the ground, proceeded to kick and punch her side and face while she was on the ground, and then hit her on the back of the head with a hammer. After putting the Victim back in the car, Appellant drove away from the wooded area. He stopped and went inside another store, before driving back to Marion County and checking into a local hotel. Throughout the ordeal, the Victim continuously asked Appellant to take her home to her children, but he refused, instead telling her he was going to kill her. (TT, pp. 65-80; R., pp. 28-43).

During Appellant's cross-examination of the Victim, he questioned her extensively about every time Appellant stopped the car and she did not attempt to escape, as well as the Victim's various statements to police after she fled from the motel room. The Victim again stated she did not attempt to escape because Appellant drove her to an area she did not know, and he repeatedly threatened her while they were riding in the car and then at the motel room, where he attempted to "pop" her neck. (TT, pp. 81-98; R., pp. 44-61_).

During closing arguments, the State told the jury the first degree domestic violence charge before it was based on what Appellant did to the Victim in the Marion County motel room, not what had happened in other locations. The State further argued evidence of incidents in other counties was presented for purposes of the kidnapping charge to explain that the Victim did not try to escape from Appellant because he had beaten and threatened her. (TT, pp. 149-156; R., pp. 110-117). Appellant argued the Victim's failure to flee even though she was left alone in the car several times indicated she was not held against her will for purposes of the kidnapping charge, and the lack of medical testimony regarding the extent of the Victim's injuries created reasonable doubt on the first degree domestic violence charge. (TT, pp. 157-161; R., pp. 118-122).

Appellant's cross-examination and argument regarding the Victim's failure to escape amply demonstrate the importance of the Victim's testimony about the incidents in Dillon and Marlboro counties. The evidence was critical and necessary for a full presentation of the State's case on the kidnapping charge, because it went directly to the question of whether the Victim was unlawfully confined against her will, and why she did not attempt to escape from Appellant

when he left her alone in the car.[2] Without the evidence, the jury would hear only that the Victim got into Appellant's car voluntarily (which was undisputed), rode around with him for hours, and never tried to escape when Appellant left her in the car while he went into some stores and went to rent the motel room. The only way to show the jury why the Victim did not try to escape was through the evidence of what Appellant did and said to her in the car, and his actions in Dillon and Marlboro counties during those hours clearly indicated to the Victim that he was more than capable of carrying out his threats if she tried to escape the car, especially since Appellant drove them to areas the Victim did not know.

As to the first degree domestic violence charge, there was ample evidence indicating Appellant inflicted, or attempted to inflict, great bodily injury to the Victim inside the Marion County motel room. While in the room, Appellant threatened to break the Victim's neck, and actually put his arms around her neck.

Domestic violence is the unlawful infliction of physical harm or injury to a household member, or the offer or attempt to cause physical harm or injury to a household member with apparent present ability under circumstances reasonably creating fear of imminent peril.[3] S.C. Code Ann. §16-25-20(A) (2017). First degree domestic violence is the infliction of great bodily injury to a household member results, or the act is done by means likely to result in great bodily injury to the person's own household member. S.C. Code Ann. §16-25-20(B) (2017).

Photographs of the motel room showed bloody wash cloths and sheets, and blood splatter on the bed. (State's Exhibit 6 [4 Sheets of Photos]; R., pp. 148-151. In addition, the Victim

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[2]Significantly, the jury acquitted Appellant on the kidnapping charge, demonstrating the jury's ability to sort through the evidence and focus on what happened in Marion County.

[3]It is undisputed the Victim met the statutory definition of "household member."

testified that after they entered the motel room, Appellant went back out to his car and retrieved a bottle of Windex and blue gloves. After he returned to the room with those items, Appellant wrapped his arms around the Victim's neck from behind and "tried to pop" her neck, stating he was going to kill her and then kill himself. (TT, pp. 76-78; R., pp. 39-41). This evidence established Appellant's intent to inflict, or attempt to inflict, great bodily harm (death) to the Victim inside the Marion County motel room. Appellant was much larger than the Victim, he clearly had the ability to carry out his threat to kill the Victim by breaking her neck, she had every reason to believe he would carry out that threat, and his effort to "pop" her neck was likely to result, at a minimum, in great bodily injury to the Victim.[4]

The circuit court properly ruled evidence of the events occurring in Dillon and Marlboro counties was admissible. The evidence was part of the *res gestae* of the kidnapping offense, and necessary to provide a full presentation of the kidnapping charge, especially the Victim's state of mind. The State itself made it clear to the jury during its closing argument that the evidence was presented only to show why the Victim did not attempt to escape from Appellant during the hours he had her in the car. The circuit court did not abuse its discretion by admitting the evidence, particularly on the venue issue, which was the basis of Appellant's motion to exclude it.

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[4]Fortunately, by the time they got to the motel room, Appellant was drunk and high, which probably saved the Victim's life because his attempt to break the Victim's neck was unsuccessful.

CONCLUSION

Based on the foregoing, the State respectfully submits the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 14, 2014, order from the South Carolina Supreme Court entitled, Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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