

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

Op. No. 2018-UP-340
(S.C. Ct. App. filed July 25, 2018)

RECEIVED
MAY 28 2019
S.C. SUPREME COURT

Madel C. Rivero, as Personal Representative for the
Estate of Lilia Lorena Blandin, Respondent,

v.

Sheriff Steve Loftis, in his capacity as
Sheriff of Greenville County, Petitioner.

**REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

Andrew F. Lindemann
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Russell W. Harter, Jr.
Carly H. Davis
CHAPMAN, HARTER & HARTER, P.A.
Post Office Box 10224
Greenville, South Carolina 29603
(864) 233-4500

Counsel for Petitioner

TABLE OF CONTENTS

Arguments.....	1
I. The Court of Appeals erred in relying on its authority pursuant to Rule 220(c), SCACR, to reverse an unappealed final ruling by the Circuit Court	1
II. The Court of Appeals erred in failing to reverse the Circuit Court on the juror concealment issues including the erroneous requirement of “proof of disqualification” and the denial of an evidentiary hearing to determine whether the juror intentionally concealed pertinent information during voir dire	3
III. The Court of Appeals erred in affirming the denial of directed verdict and JNOV motions on the proximate causation defense where there was no evidence presented to demonstrate causation in fact.....	6
Conclusion	9

ARGUMENTS

I. The Court of Appeals erred in relying on its authority pursuant to Rule 220(c), SCACR, to reverse an unappealed final ruling by the Circuit Court.

As an initial point, the Petitioner Sheriff Steve Loftis calls the Court's attention to the fact that the Respondent Madel C. Rivero has "re-stated" the "Questions Presented" by entirely eliminating the first issue that was presented by Sheriff Loftis for review. While Rule 242(f), SCACR, allows a respondent to include a "counter-statement" of the questions presented for review, it does not permit a respondent to exclude or refuse to address an issue properly raised. In addition to eliminating the first issue from the "Questions Presented," Rivero has largely ignored the real legal issues raised thereby, all of which provide a legitimate and worthy basis for a writ of certiorari to be granted.

Sheriff Loftis will not re-argue what has been previously presented. But he does wish to highlight that Rivero has failed to demonstrate that the Court of Appeals properly exercised its authority under Rule 220(c) to reverse the ruling made by Judge Robin Stilwell that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Rivero does argue that whether a *voir dire* question is ambiguous or not is a question of law rather than a question of fact. However, whether Rivero is correct on that is immaterial. It does not justify the Court of Appeals' use of Rule 220(c) to reverse a *ruling*. Rule 220(c) provides that "[t]he appellate court may affirm any *ruling*, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *See*, Rule 220(c), SCACR. (Emphasis added). Thus, even if a court's determination as to whether a *voir dire* question is ambiguous is a question of law, as Rivero argues, it is still a *ruling*. Rule 220(c) does not allow an appellate court to *reverse* an unappealed

ruling of the lower court regardless of whether that ruling is on an issue of fact or on an issue of law. Instead, it is well settled that “an unappealed ruling, right or wrong, is the law of the case.” *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012). The Court of Appeals, in fact, cited that well settled principle as recently as May 22, 2019 in its decision in *In Re Estate of Brown*, Op. No. 5651 (Ct. App. filed May 22, 2019).

Rivero, nonetheless, did not even discuss the “law of the case” issue and makes no attempt to demonstrate that the Court of Appeals’ use of Rule 220(c) is not at odds with the long established “law of the case” doctrine in our appellate jurisprudence. Instead, Rivero only argues that she was not an aggrieved party and thus was unable to appeal Judge Stilwell’s ruling that “[t]he question the court posed in *voir dire* was clear and unambiguous.” (R. 6). Sheriff Loftis disagrees in part. Under South Carolina appellate law, “[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest.” *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530, 532 (Ct. App. 2002). “The word ‘aggrieved’ refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Id.* Thus, a party that is adversely impacted by a lower court ruling is aggrieved and may appeal that ruling; however, in this case, Rivero did not take the position that the *voir dire* question was ambiguous in the lower court. No contemporaneous objection was made by Rivero to that effect at the time of the *voir dire*. In addition, Rivero did not argue that the *voir dire* question was ambiguous in the lower court. Thus, for that reason, Sheriff Loftis agrees that Rivero is not in a position to challenge Judge Stilwell’s ruling, and that ruling certainly should not have been subject to *reversal* by the Court of Appeals *sua sponte*. It should have been the “law of the case” for all parties to the appeal --

not just for the appealing party. There is no logic or authority for any contention that the “law of the case” is binding only on the appealing party and no one else.

Finally, it is worth noting that Rivero *still* cites to not a single case where this Court or the Court of Appeals has in the past used its Rule 220(c) authority to actually reverse an unappealed final ruling of the circuit court and then used that reversal as the basis for affirming the judgment entered below. The reason for that is clear – what the Court of Appeals did in this case is unprecedented and in error. In sum, this issue is worthy of the issuance of a writ of certiorari. Sheriff Loftis should not lose this appeal on the reversal of an unappealed final ruling of the trial judge that was never challenged by either party in the Circuit Court or in the Court of Appeals, but rather was challenged *sua sponte* by the Court of Appeals and is *now* being vigorously argued by Rivero as if that were her position all along.¹

II. The Court of Appeals erred in failing to reverse the Circuit Court on the juror concealment issues including the erroneous requirement of “proof of disqualification” and the denial of an evidentiary hearing to determine whether the juror intentionally concealed pertinent information during voir dire.

As indicated above, Rivero did not take the position in the Circuit Court that the voir dire question at issue was ambiguous or unclear in any respect. Rivero now claims that the voir dire question was “not a good question.” However, it is too late to take that position -- particularly when the trial judge -- without objection or opposition -- concluded that “[t]he question the court posed in *voir dire* was clear and unambiguous.” (R. 6).

¹ See, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). This rule should likewise apply to all litigants -- not just the appealing party.

Nonetheless, the Court of Appeals challenged that ruling *sua sponte* for the benefit of Rivero and determined that the concealment by Juror Robin Burns was unintentional because the question posed was indeed ambiguous. However, the Court of Appeals should have instead looked at whether an evidentiary hearing was necessary to determine whether intentional concealment occurred. That was the real issue properly on appeal.

On that issue, Rivero now argues that the Circuit Court did hold an “evidentiary hearing” because Judge Stilwell considered Juror Burns’ 911 call and the statements of the police officers who responded to Burns’ home on June 23, 2015.² However, in juror concealment and misconduct cases, evidentiary hearings are those where one or more jurors are summoned and questioned by the trial judge. That is the “evidentiary hearing” at issue -- where testimony is taken. *See e.g., State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001); *State v. Sparkman*, 358 S.C. 491, 595 S.E.2d 375 (2004); *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007).

This Court’s definition of intentional concealment in *Woods* has both objective and subjective components. That very point was made by the Court of Appeals in an opinion written by Justice Few in *State v. Miller*, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012). Justice Few wrote: [T]he trial court apparently believed the question of intentional concealment should be decided objectively, and the juror’s testimony was not necessary to either party’s position. We disagree.” 727 S.E.2d at 35. After citing the *Woods*’ definition of “intentional concealment,” Justice Few wrote: “This definition suggests an objective component to the analysis, which is

² The Court is advised that the date of Juror Burns’ call for police assistance was June 23, 2015, just three months prior to this trial where Burns acted as the foreperson and even attempted to ask questions of a witness during testimony. (R. 704). The date was incorrectly stated in one place in the Petition for Writ of Certiorari as a result of a typographical error.

not dependent on the juror's testimony. However, we interpret *Woods* to support a subjective analysis, in addition to an objective one, in which the trial court considers the testimony of the juror if it is reasonably available." 727 S.E.2d at 36. In citing the Court of Appeals' opinion in *Miller*, Sheriff Loftis acknowledges that that opinion was vacated by this Court when that case was rendered moot by the defendant's death. *See, State v. Miller*, 409 S.C. 312, 762 S.E.2d 394 (2014). However, a writ of certiorari had been granted in *Miller*, which signifies the importance of that issue and shows that that issue remains worthy of this Court's further consideration on certiorari in the case at bar.³

Interestingly, in the Court of Appeals, Rivero had stated the dispositive issue as being "whether Juror Burns would have understood that because of the 9-1-1 call she made on June 23, 2015 over her argument with her husband ... she would have thought to respond to the specific question she was asked about criminal domestic violence." *See, Rivero's Court of Appeals Brief*, p. 17. However, it logically follows that "intentional concealment" under these circumstances cannot be determined without the testimony of the juror. More specifically, it may not be determined what Juror Burns may nor may not have understood during voir dire when she has not been queried about her understanding. Similarly, it may not be determined

³ Rivero relies heavily on *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014), which was also written by Justice Few. *Lynch* is entirely inapposite and not controlling on the need for an evidentiary hearing because, as the trial court found, "none of the voir dire questions posed to the jury unambiguously called for this juror to disclose that her ex-husband was represented in divorce proceedings by another member of Lynch's attorney's law firm at some point in the past." 760 S.E.2d at 116. Moreover, the Court of Appeals in *Lynch* correctly determined that that finding -- that the juror was not expected to respond affirmatively to any of the questions posed -- "requires the conclusion that there was no intentional concealment," and as a result, "there was no reason for the trial court to engage in further inquiry." 760 S.E.2d at 118. The case at bar is different. Here, in contrast to *Lynch*, Judge Stilwell ruled that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Thus, further inquiry was needed in the present case to address the subjective component of the *Woods* analysis.

why Juror Burns did not respond to a voir dire inquiry when she has not been asked that question. In short, an evidentiary hearing where Juror Burns was questioned about her failure to respond to the voir dire question was needed to correctly apply the *Woods* test and to satisfy due process. The trial court erred in failing to hold such an evidentiary hearing, and the Court of Appeals erred in avoiding this issue by *sua sponte* reversing a ruling that had never been disputed in the Circuit Court or on appeal. Clearly, as occurred in *Miller*, a writ of certiorari to address these issues is warranted.

III. The Court of Appeals erred in affirming the denial of directed verdict and JNOV motions on the proximate causation defense where there was no evidence presented to demonstrate causation in fact.

On the proximate cause issue, it is interesting that Rivero now argues that criminal domestic violence statutes would be “not worth very much” if plaintiffs were required to meet the same standard of causation that applies to every other case of negligence or gross negligence. In effect, Rivero is asking for a relaxed standard for assessing causation in fact in failure to arrest cases. That argument should be soundly rejected.

There is absolutely no basis in the law for a relaxed standard in failure to arrest cases. In addition, this same argument was made in the context of medical malpractice cases where the Court of Appeals had allowed a plaintiff “to reach the jury by introducing evidence that the defendant’s negligence increased the risk of a particular harm.” *Sherer v. James*, 290 S.C. 404, 351 S.E.2d 148, 150 (1986). However, this Court in *Sherer* rejected a “relaxed” standard for proximate cause and ruled that “[a] defendant physician is entitled to put the medical malpractice plaintiff to proof equally as stringent as that required of plaintiffs in other negligence actions.” 351 S.E.2d at 151. Importantly, this Court in *Sherer* reversed such cases as *Clark v. Ross*, 284

S.C. 543, 329 S.E.2d 91 (Ct. App. 1985), which had relied on *Coleman v. Shaw*, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984), the very case cited by Rivero for a relaxed standard for proximate cause in the present case. The continued viability of cases like *Coleman* is very much in question. In short, this Court should grant a writ of certiorari to address this issue and reject the notion that a failure to arrest case permits a relaxed standard of proof of proximate cause.⁴

The proper approach, as Sheriff Loftis points out, is to require evidence showing to a reasonable level of probability that an arrest would prohibit any further opportunity to commit the crime. In this case, that required evidence that Avery Blandin would never have been released on bond or otherwise would no longer have had the motive and opportunity to murder his wife. There was no such evidence, and Rivero still points to none.⁵

Instead, Rivero, like the Court of Appeals, cites only to the testimony of Jack Ryan, who was the law enforcement expert witness called by Sheriff Loftis in his case-in-chief. This evidence was not in the record when the directed verdict was argued, and hence, serves no basis for upholding the denial of the directed verdict motion. At any rate, Ryan explained that Avery

⁴ Rivero cites to two cases from other jurisdictions what were not previously cited, *Washburn v. City of Federal Way*, 178 Wash.2d 732, 310 P.3d 1275 (2013) and *Calloway v. Kinkelaar*, 168 Ill.2d 312, 659 N.E.2d 1322 (1995). Neither of those cases addressed the issue of proximate cause. In *Washburn*, the dispositive issue asked whether the officer serving an anti-harassment order on the victim's boyfriend while the victim was in the same residence owed the victim a duty to protect in anticipation that the boyfriend could get violent. In *Calloway*, the dispositive issue was a public duty rule question, not one of proximate cause. These cases add nothing to the discussion in the present case.

⁵ Rivero has also argued for the first time that the proximate cause defense is not preserved for appellate review. That preservation argument was not raised in the Court of Appeals which addressed the issue in detail. Obviously, trial counsel for Rivero understood that a proximate cause defense was raised and argued at the directed verdict stage because he, in fact, argued as follows in opposition: "And the testimony has been that if Mr. Blandin had been arrested, he would most likely had been in jail. That he either would have not received a bond or received a significant bond that he would not made [sic]. And he would not be released or out to have been able to kill Mrs. Blandin the next day." (R. 684).

Blandin would have bonded out of jail although he may have received a higher bond than the previous occasion in October 2011, when his wife (the decedent) bonded him out. Mel Tucker, who was Rivero's law enforcement expert, also testified that Mr. Blandin would most probably have been released from jail on bond. (R. 609).

The Court of Appeals, in fact, focused on the no-contact condition of the previous bond, but the Court also noted "a question about the continuing viability of the bond conditions," but given the absence of evidence, the Court remarkably *assumed* that the no-contact condition was still in place. (App. 8). The Court of Appeals never considered the evidence that the Blandins had reconciled, and as a result, the no-contact condition was no longer enforceable, as Mel Tucker actually had conceded in his testimony. (R. 607-608).

At any rate, the undisputed evidence from all experts supported the conclusion that Avery Blandin would have been able to be released on bond. They could not say when -- whether it would have been on December 10, 2011, the date of the killing, or mere days later. The consensus was that he would be released within days of his arrest. But most critically, there is no evidence that Avery Blundin would not have carried out the crime upon his release. Likewise, there was no evidence that Avery would no longer have the motive and opportunity to murder his wife. At best, the evidence shows that the murder may have been delayed a day or two, but that evidence does not support a finding of proximate cause in a wrongful death case. Instead, as Sheriff Loftis has argued, the evidence upon which any finding of proximate cause is based is pure guess-work and speculation, and that is not legally sufficient to uphold the jury's verdict.


In short, this case presents the opportunity for this Court to address the issue of proximate cause in the context of a failure to arrest claim. That also is worthy of a writ of certiorari.

CONCLUSION

Based on the foregoing discussion, the Petitioner Sheriff Steve Loftis respectfully renews his request that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-and-

RUSSELL W. HARTER, JR. #2778
CARLY H. DAVIS #100112
CHAPMAN, HARTER
& HARTER, P.A.
Post Office Box 10224
Greenville, South Carolina 29603
(864) 233-4500

*Counsel for Petitioner
Sheriff Steve Loftis*

May 23, 2019

RECEIVED

MAY 28 2019

S.C. SUPREME COURT

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Petitioner, does hereby certify that service of the **Petitioner's Reply Respondent's Return to Petition for Writ of Certiorari** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 23rd day of May 2019 addressed as follows:

Daniel J. Farnsworth, Jr., Esquire
Brann W.M. Fowler, Esquire
Farnsworth Law Offices, LLC
Post Office Box 8719
Greenville, South Carolina 29604

Daniel W. Luginbill, Esquire
J. Christopher Wilson, Esquire
Wilson & Luginbill, LLC
Post Office Box 1150
Bamberg, South Carolina 29003

Blake A. Hewitt, Esquire
Bluestein Thompson Sullivan, LLC
Post Office Box 7965
Columbia, South Carolina 29202

Russell W. Harter, Jr., Esquire
Carly H. Davis, Esquire
Chapman, Harter & Harter, P.A.
Post Office Box 10224
Greenville, South Carolina 29603