

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 08 2019

On Writ of Certiorari to the Court of Appeals S.C. SUPREME COURT
Appeal from Abbeville County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2016-001939

THE STATE,

Respondent,

vs.

JAMES SCOTT CROSS,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

Since the founding of our country, the separation-of-powers doctrine has served as the enduring foundational core of our system of government, and that is equally true of South Carolina's state system of government, which is made up of three distinct branches. See Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. 655, 663 (1874) ("The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers."); see also S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."). Under the system chosen by our citizenry, the legislature makes the laws, the executive branch carries the laws into effect,

and the judiciary interprets and declares the laws. State v. Langford, 400 S.C. 421, 434, 735 S.E.2d 431, 434 (2012). Critically, that system of divided power, checks, and balances serves to preserve and protect our democracy by preventing concentration of too much power in the hands of too few. South Carolina Pub. Interest Found. v. South Carolina Transp. Infrastructure Bank, 403 S.C. 640, 649, 744 S.E.2d 521, 525 (2013).

Through this Court's recent decision reversing Petitioner James Scott Cross's conviction for first-degree criminal sexual conduct with a minor and remanding the case for a new trial, a majority of this Court held the trial judge erred as a matter of law by not bifurcating the trial and applying a procedure that—by the Court's own admission—has *never* previously been followed or applied in a non-capital criminal trial at any point in the history of our state. To arrive at that holding, the majority relied upon Rule 611(a) of the South Carolina Rules of Evidence as authorizing—and, in effect, requiring—the trial judge to bifurcate the proceedings to prevent evidence of Cross's prior conviction from being introduced until after the jury deliberated and returned what amounts to a special verdict on the limited factual question of whether Cross had committed a sexual battery upon a victim under the age of sixteen, which constituted just a portion of the required elements of the offense for which Cross was indicted. S.C. Code Ann. § 16-3-655(A)(2). Critically, by reaching that particular conclusion, the majority's decision has collided with and broken through the limits of the authority granted to it by our constitution and has improperly circumvented one of the careful checks put into place by the citizens of our state to preserve the delicate balance of power at the heart of our divided system of government.

Specifically, as argued in Justice Few's well-articulated and well-reasoned dissent, this Court—despite its protestations to the contrary—has improperly adopted an unprecedented new procedure for criminal trials in South Carolina in a unilateral fashion through its decision in

Cross's case without the constitutional authority to do so and without the required approval of the legislature. See State v. Beaty, 423 S.C. 26, 46, 813 S.E.2d 502, 512 (2018) ("Article V, section 5 of the South Carolina Constitution limits this Court's authority to correcting errors of law and *does not empower us to promulgate a procedural rule for future cases by simply issuing an opinion*. Article V, section 4A, of the South Carolina Constitution prohibits this Court from adopting any rules of practice and procedure . . . without first going through the prescribed legislative process." (emphasis added)). Demonstrating that fact, our legislature has adopted and approved of a rule allowing for bifurcated proceedings in civil cases but has not yet done so in the context of non-capital criminal trials. See Rule 42(b), SCRCP ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State."); see also Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "). Similarly, our legislature has adopted and approved of a rule allowing for special fact-based verdicts in civil cases but has again not adopted a similar rule in the context of criminal procedure. See Rule 49(a), SCRCP ("The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact."). In light of the express existence of such rules in the civil context and the clear absence of such rules in the criminal context, the fact our legislature adopted Rule 611, which contained language that—when adopted as a state evidentiary rule intended to be identical to an existing federal rule—had *never* been interpreted to authorize bifurcated criminal trials, did not constitute the constitutionally-required

approval necessary before the procedure by which criminal trials are conducted in our state can be fundamentally altered. See S.C. Const. art. V, § 4A (mandating “[a]ll rules and amendments to rules governing practice and procedure in all courts” must be submitted to the General Assembly before they can become effective); S.C. Const. art. V, § 5 (“The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.”). Therefore, because Rule 611 was never intended to—and does not—permit bifurcated criminal trials as to the individual *elements* of a criminal offense and because no procedure has been adopted in South Carolina to permit special fact-based partial verdicts in a criminal case, this Court should grant rehearing, reconsider its decision, and ultimately decide Cross’s case without exceeding the limits of the authority granted to it by the citizens of our state. See *Marbury v. Madison*, 5 U.S. 137, 176-177 (1803) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”).

Perhaps the most troubling part of the majority’s decision, though, centers on the matter of how the basis upon which it is founded first arose in Cross’s case. Specifically, in reversing Cross’s conviction, the majority determined the trial judge did, in fact, have the authority to bifurcate Cross’s trial based on Rule 611. Notably though, Cross’s defense counsel did not argue to the trial judge Rule 611 provided him with authority to bifurcate the proceedings. (R. pp. 29-32; p. 134). Similarly, Cross’s appellate counsel did not argue to the Court of Appeals at any point Rule 611 authorized bifurcation. (Final App. Br. pp. 1-15; App’x pp. 3-12). Likewise,

Cross's appellate counsel did not argue to this Court in either his petition for a writ of certiorari or subsequent brief Rule 611 was a basis upon which the trial judge could have exercised authority to bifurcate the trial. (Pet. for Cert. pp. 1-18; Pet. Br. pp. 1-18). Instead, the issue of Rule 611 and its significance to Cross's case was first raised and advanced *by this Court itself* during the course of the oral argument before it.¹ South Carolina Supreme Court Archived Oral Argument Videos, <http://media.sccourts.org/videos/2016-001939.mp4>.

Because no argument was ever raised regarding Rule 611 at any stage prior to oral argument before this Court, the solicitor was not presented with a chance to determine whether the State should acquiesce to bifurcation in Cross's case in light of that rule, and the trial judge was wholly denied any opportunity to consider and rule upon the question of Rule 611's applicability. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing the imposition of issue preservation requirements is "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and *arguments*" (emphasis added)); see also State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is *well established* that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." (emphasis added)). Similarly, the Court of Appeals was denied any actual opportunity to consider or address the matter on appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of

¹ Significantly, during that same oral argument, Cross's appellate counsel—consistent with the arguments that had previously been advanced on Cross's behalf throughout the trial and appellate proceedings—identified *an entirely different evidentiary rule* as "the one court rule we have" touching on the potential propriety of bifurcation during a non-capital criminal trial. South Carolina Supreme Court Archived Oral Argument Videos, <http://media.sccourts.org/videos/2016-001939.mp4>.

Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved."); State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (recognizing the Court of Appeals will be reversed if it addresses unpreserved errors). Likewise, the State was denied—until this very petition for rehearing—any opportunity to respond with fair notice to the question of whether Rule 611 actually allows for bifurcation. See generally Payne v. Tennessee, 501 U.S. 808, 827 (1991) (“Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” (citation, brackets, and internal quotations omitted)).

Under circumstances such as those, our state's appellate courts have time and time again found arguments raised in similar fashion to have been barred from consideration on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); see also State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) (“It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief.”); Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) (“An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal.”). Critically, the reason our courts have consistently done so is it is manifestly unjust to fault a trial judge for failing to act on an argument that was simply never advanced during trial. See State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) (“Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. . . . *If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.*” (emphasis added)); see also I'On, 338 S.C. at 421-422, 526 S.E.2d at 724 (“An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and

then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372-373, 628 S.E.2d 902, 919 (Ct. App. 2006) (“The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” (citation omitted)). Therefore, the argument regarding Rule 611 upon which this Court decided the case simply cannot fairly serve as a proper basis upon which to reverse the trial judge’s ruling since neither he nor the State was ever given a legitimate opportunity to actually consider or address it. See State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) (“Only matter that has been ruled on below can be reviewed[.]”); cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton’s appellate challenge to the trial judge’s refusal to give a requested charge was not preserved for appellate review where Benton “argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)”). Moreover, that is particularly true where the argument this Court relied upon to reverse involves such a novel, inventive, and unprecedented interpretation of Rule 611 that it was not mentioned in Cross’s case until *this Court sua sponte* came up with it and advanced it. See Duncan v. Record Pub. Co., 145 S.C. 196, 143 S.E. 31, 74 (1927) (“We are only judges of the law. *We are not advocates of either of the parties to the cause.*” (emphasis added)); see also Econ. Folding Box Corp. v. Anchor Frozen

Foods Corp., 515 F.3d 718, 721 (7th Cir. 2008) (“It is not the court’s responsibility to research the law and construct the parties’ arguments for them.”); State v. Hill, 632 S.E.2d 777, 789 (N.C. Ct. App. 2006) (explaining it is “not the duty of the appellate courts to supplement an appellant’s brief with legal authority or arguments not contained therein”).

Undoubtedly, based on the dissemination of this Court’s decision in its current form, an argument regarding Rule 611 will be advanced by defense counsel in the future in a prosecution for first-degree criminal sexual conduct with a minor—and possibly in prosecutions for other crimes—even if this Court elects to grant rehearing, withdraw its prior opinion, and reconsider whether reversal is appropriate under the specific circumstances of—and in light of the arguments actually raised *by the parties* in—Cross’s case. In such a future case, the trial judge will be presented with a fair opportunity to consider and rule upon the matter, the solicitor will be presented with a chance to decide how to respond, and our appellate court will be properly presented with a Rule 611 issue on appeal that is actually appropriate for appellate consideration pursuant to our well-established procedural rules. However, those things did not occur in Cross’s case, and, thus, this Court should not use Cross’s case as a vehicle to address an argument that was never raised to or ruled upon by the trial judge and that is not yet properly before it. See State v. Slocumb, 426 S.C. 297, 314, 827 S.E.2d 148, 157 (2019) (recognizing “[t]he judicial role is limited to answering the narrow question raised”); see also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 331, n. 4, 730 S.E.2d 282, 286 (2012) (“For as former Chief Judge Alex Sanders famously wrote, ‘[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.’ ” (citation omitted and brackets in original)).

Meanwhile, by waiting for a case in which an argument regarding Rule 611 is actually raised, this Court can avoid the manifest unjustness of penalizing a trial judge for failing to apply an evidentiary rule he was never asked to apply in a manner in which it has never previously been applied in South Carolina or anywhere else in the country. See Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (“New rules of procedure . . . generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.”); cf. State v. LaRock, 470 S.E.2d 613, 633-634 (W. Va. 1996) (“[W]e hold that a trial court has discretionary authority to bifurcate a trial and sentencing in any case where the jury is required to make a finding as to mercy. . . . We refuse to apply this new interpretation of W.Va.Code, 62-3-15, retroactively to include the defendant. The trial court, prosecution, witnesses, and jury have a great deal invested in the trial. The judge did nothing wrong by following established precedent. This case is not a situation in which ‘error’ or an objection was brought to the judge’s attention, and, *in face of contrary law*, the judge went the wrong way.”). Furthermore, by exercising such restraint, this Court will prevent the victim, who is now approximately twenty-seven years old, from having to again confront the man she accused of raping her when she was just thirteen years old during a new trial solely based on this Court’s acceptance of an argument that was never actually advanced, considered, or addressed during the original trial and that did not even arise until this Court advocated it to itself at the appeal’s last stage. See S.C. Const. art. I, § 24 (recognizing crime victims in South Carolina have a constitutional right to justice, to due process, and to be treated with fairness throughout the criminal justice process); see also Calderon v. Coleman, 525 U.S. 141, 146 (1998) (recognizing the “social costs of retrial or resentencing are significant”); Adler v. Wal-Mart

Stores, Inc., 144 F.3d 664, 672 (10th Cir. 1998) (explaining appellate courts “have a limited and neutral role in the adversarial process” and should be “wary of becoming advocates” that “make a party’s case for it”).

Finally, beyond the need for reconsideration in light of those problematic issues with this Court’s decision in its current form, the decision in Cross’s case further warrants another look due to the majority’s failure to afford sufficient credit to and trust in the jurors, who—consistent with this Court’s earlier directives—were carefully and repeatedly instructed by the trial judge regarding the limited purpose for which they could consider the prior conviction evidence presented during the trial. Cf. State v. Benton, 338 S.C. 151, 156, 526 S.E.2d 228, 230-231 (2000) (“To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.”). Critically, the presumption jurors follow the instructions presented to them except in the most extraordinary of circumstances is a bedrock principle essential to the proper functioning of our judicial system. See Richardson v. Marsh, 481 U.S. 200, 211 (1987) (“The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”); United States v. Runyon, 707 F.3d 475, 497 (4th Cir. 2013) (“The assumption has become axiomatic because it is so essential to the efficient functioning of the criminal justice system.”). Due to its essential nature, that presumption has been embraced by and serves as the

underlying basis for Rule 105 of our state’s evidentiary rules, which—unlike Rule 611—does directly address the procedure to be followed when evidence of limited admissibility must be introduced. See Rule 105, SCRE (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”); see also Delaney v. First Fin. of Charleston, Inc., 426 S.C. 607, 614, 829 S.E.2d 249, 252 (2019) (recognizing the significance of the *basic principle* a more specific provision regarding a particular subject controls over a more generalized provision). Accordingly, this Court should apply the long-recognized jury presumption in Cross’s case and exhibit the faith the trial judge, who was able to personally observe and interact with the jury, held by trusting the jurors were sufficiently intelligent and impartial to follow the clear and unambiguous limiting instructions presented to them. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”); see also Orton v. United States, 221 F.2d 632, 635 (4th Cir. 1955) (“Jurors should be given credit for having ordinary intelligence[.]”). Supporting that pragmatic course of action, nothing occurred during Cross’s trial to suggest the jurors who decided the case failed to follow the limiting instructions presented to them, and this Court did not identify anything whatsoever suggesting the jurors failed to do so even though it ultimately reversed their verdict. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“The jury was instructed to determine petitioner’s guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, *without some showing the jurors disregarded these instructions*, this Court declines to presume prejudice.” (emphasis added and citations omitted)). In the absence of any such evidence, this Court should strongly reconsider whether reversal is truly warranted under the

circumstances of Cross's case. See United States v. Hager, 721 F.3d 167, 189 (4th Cir. 2013) ("Without any evidence to the contrary, we must assume that the jury followed the instructions given to it by the court."); cf. Richardson, 481 U.S. at 211 (holding the presumption the jury followed limiting instructions to be applicable outside of "the precise facts of Bruton").

Conclusion

Within the criminal justice system that has been established in our state, everyone involved has a distinct role to play and is bound by the limits of their role. That is true of the legislators who enact the criminal offenses and approve of the procedural rules, the trial attorneys who try the cases, and the trial judges who preside over the trials and rule on the issues raised to them by counsel. It is also true of the appellate advocates who represent the parties on appeal and present arguments to our appellate courts for consideration. It must also be true of this Court. Respectfully, for all the previously-stated reasons coupled with both the reasons already advanced by the State throughout the appellate process and the reasons contained within Justice Few's dissenting opinion, the State submits this Court has improperly stepped beyond its role and exceeded the limits of its authority through the unprecedented procedure-altering decision it reached in Cross's case. As a result, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision, vacate its previous opinion, and decide Cross's case based on the limited arguments that were actually properly before it on appeal. By doing so, this Court will be able to remain within the constitutional limits of its carefully-defined role as is essential to preservation of the delicate balance upon which our system of government rests. See S.C. Pub. Interest Found., 403 S.C. at 649, 744 S.E.2d at 525 ("The preservation of a separation of powers has been a basic tenet of democratic societies[.]"); see also Nat'l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134, 148, n. 10 (2011) ("The

premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” (citation and internal quotations omitted)).

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

August 8, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 08 2019

On Writ of Certiorari to the Court of Appeals S.C. SUPREME COURT
Appeal from Abbeville County
Honorable Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2016-001939

THE STATE,

Respondent,

vs.

JAMES SCOTT CROSS,

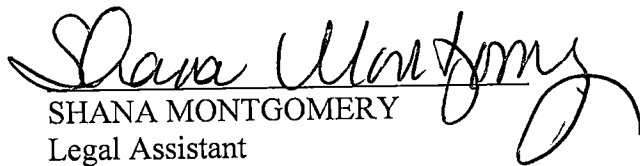
Petitioner.

PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Respondent's Petition for Rehearing on Petitioner by sending two copies of the same to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 8th day of August, 2019.



SHANA MONTGOMERY
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



RECEIVED

AUG 08 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 8, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State v. James Scott Cross – Appellate Case No. 2016-001939

Dear Mr. Shearouse:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Robert M. Dudek, Esquire
Victim Advocacy Division