

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2019-000535
Case No. 2013-CP-23-6522

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 BRIEF OF PETITIONER

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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, as the Personal Representative of the Estate of Lilia Lorena Blandin ("Rivero"), has again "re-stated" the "Questions Presented" by entirely eliminating the first issue that was presented by Sheriff Loftis for review and on which this Court has granted a writ of certiorari. 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 legal issues raised by the first question for review.

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 final 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).

Rivero, nonetheless, does 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 normally appeal that ruling; however, in this case, Rivero did not take the position in the lower court that the voir dire question was ambiguous. No contemporaneous objection was made by Rivero to that effect at the time of the voir dire. In addition, Rivero’s counsel never argued in the lower court that the voir dire question was ambiguous. Thus, for that reason, Sheriff Loftis submits 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.

It is quite telling that Rivero cites only to a case that *pre-dates* the adoption of the South Carolina Rules of Appellate Procedure for the proposition that “a right decision based on a wrong ground will be affirmed.” *State v. Goodstein*, 278 S.C. 125, 292 S.E.2d 791, 793 (1982). That case includes no discussion of the “law of the case” doctrine and does not stand for the proposition that an appellate court can affirm a decision by first reversing an unappealed final ruling of the trial court. Instead, that case simply points out that there may be an alternative ground for

affirmance. In other words, where the trial court's reasoning is incorrect, the appellate court may rely on an alternative correct basis appearing in the record. But that alternative basis cannot be premised on the *reversal of an unappealed final ruling* -- that is the clear distinction that Rivero and the Court of Appeals have overlooked.

Finally, it is important to note 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. 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, which it was not.¹

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.

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.” *See*, Respondent’s Brief, p. 8. 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).

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 ultimate issue that should be decided on appeal.²

² In addressing the trial court’s error in requiring Sheriff Loftis to prove the “fact of disqualification” which is not a required showing under the test from *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), Rivero suggests that “disqualification” has some different meaning and “does not mean that the juror was disqualified as a matter of law.” *See*, Respondent’s Brief, p. 8. Suffice it to say, the Court of Appeals “acknowledge[d] the merit of this argument” (App. 3), and Rivero’s attempt to redefine the word “disqualification” in some unstated way does not justify or explain away the error that was made.

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. 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).

Moreover, as Sheriff Loftis has argued, this Court’s definition of intentional concealment in *Woods* has both objective and subjective components. Yet, Rivero asserts there is only an objective component -- a test that considers the actions of an “average juror” only. However, as discussed at length in the Sheriff’s opening brief, there has also been recognition that the *Woods*’ definition of intentional concealment “suggests an objective component to the analysis, which is 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.” *State v. Miller*, 398 S.C. 47, 727 S.E.2d 32, 36 (Ct. App. 2012), *vacated as moot*, 409 S.C. 312, 762 S.E.2d 394 (2014). Thus, contrary to Rivero’s position, the *Woods* test does

have a substantial subjective component that requires the testimony of the juror to be taken when that juror is readily available, which Juror Burns was in this case. That is a logical conclusion given this Court's explanation in *Woods* that "[n]ecessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." *Woods*, 550 S.E.2d at 284. Likewise, it is clear that the trial judge was looking to apply a subjective component to the test given his ruling that "there is no evidence that Ms. Burns, either objectively or *subjectively*, concealed information." (R. 6). (Emphasis added). The trial judge's error, however, was denying Sheriff Loftis the ability to establish evidence of the juror's subjective intent and understanding by his ultimate refusal to hold an evidentiary hearing.

In sum, it logically follows that "intentional concealment" under these circumstances cannot be determined without the testimony of the juror. 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. Likewise, it may not be determined why Juror Burns did not respond to a voir dire inquiry when she has not been asked that question. Thus, an evidentiary hearing where Juror Burns is 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.

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.

In this Court, Rivero argues for the first time that the proximate cause issue on which this Court has granted a writ of certiorari and which was fully briefed and adjudicated in the Court of Appeals is not preserved for appellate review. Significantly, 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). In short, the preservation defense is without merit and, at any rate, should be deemed waived by Rivero’s failure to assert it in the Court of Appeals.

As to the merits of the proximate cause issue, it is interesting that Rivero now argues that she cannot be expected to “produce evidence that is impossible to

obtain.” See, Respondent’s Brief, p. 16. In effect, Rivero is suggesting that a relaxed standard for assessing causation in fact is appropriate for a failure to arrest case. That argument should be soundly rejected.

There is absolutely no basis in the law for a relaxed standard in failure to arrest cases, and not surprisingly, Rivero has cited no case from any jurisdiction applying a relaxed causation standard. In addition, this same argument has been 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 dubious given the *Sherer* decision. In short, as was done in *Sherer*, this Court should reject the notion that a failure to arrest case permits a relaxed standard of proof of proximate cause. Borrowing the language from *Sherer*, a plaintiff in a

failure to arrest case should be held to a standard of proof “equally as stringent as that required of plaintiffs in other negligence actions.” There is no basis for carving out an exception for various types of negligence claims.³

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 whatsoever. Instead, Rivero, argues in a conclusory fashion that “there is a reasonable inference [Avery Blandin] would have been in jail on December 10th and would not have the ability to murder his wife.” *See*, Respondent’s Brief, p. 17. However, that does not negate or overcome the clear testimony that Blandin would have bonded out within days -- if not on December 10th then shortly thereafter -- and would have had the same motive and intent to harm his wife, if not more so. The expert witnesses are in agreement on that point. Jack Ryan, the Sheriff’s law enforcement expert, explained that Avery

³ Rivero cites to two cases from other jurisdictions what were not previously cited in the Court of Appeals, *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.

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. (R. 781-782). 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).⁴

In short, 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 Blandin 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,

⁴ Rivero also argues that Avery Blandin "was already on bond for a prior CDV arrest." *See*, Respondent's Brief, p. 17. She cites no evidence in the record to support that point, and the Court of Appeals even noted the absence of evidence in that regard: "The record does not indicate the ultimate outcome of the CDV charge or whether the December 5 hearing on the charge occurred as scheduled. Therefore, there is a question as to the continuing viability of the bond conditions after December 5." (App. 8).

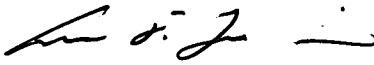
and that is not legally sufficient to uphold the jury's verdict. Accordingly, Sheriff Loftis is entitled to a directed verdict and JNOV on the causation in fact issue.

CONCLUSION

Based on the foregoing discussion and analysis, the Petitioner Steve Loftis, in his official capacity as Greenville County Sheriff, respectfully renews his request that this Court reverse the decision of the South Carolina Court of Appeals. Sheriff Loftis further requests that the Court reverse the Orders of the trial court and remand for entry of a directed verdict and/or judgment as a matter of law in favor of Sheriff Loftis. In the alternative, Sheriff Loftis respectfully requests that the Court remand for a new trial absolute or, at a minimum, remand for an evidentiary hearing to be held on the issue of juror concealment by Juror Robin Burns.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Petitioner, does hereby certify that service of the **Reply Brief of Petitioner** 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 9th day of October 2019 addressed as follows:

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