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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE 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.

RESPONDENT'S PETITION FOR REHEARING

By opinion filed January 13, 2021, the Court reversed Appellant's conviction and remanded the case for a new trial on the ground the trial court erred by failing to give a limiting instruction regarding the jury's consideration of bad act evidence involving other counties. The State hereby submits the Court misapprehended or misconstrued various aspects of the issue before it, and petitions for rehearing on the following grounds:

1. Rule 208(B), SCACR, provides "no point will be considered which is not set forth in the statement of issues on appeal." Pursuant to Rule 220(b), SCACR, the appellate court's decision must reflect "every point distinctly stated in the case which is necessary to the decision of the appeal and **fairly arising upon the record of the court.**" In this case, venue was the **only** issue "fairly arising upon the record of the court."

2. The Statement of Issue on Appeal in Appellant's brief states:

The trial judge abused his discretion by admitting evidence of unindicted domestic violence that occurred in Dillon and Marlboro Counties as proof of the first degree domestic violence offense for which Appellant was indicted and tried in Marion County, particularly where the trial judge failed to give a limiting instruction to the jury that it could only consider this evidence as proof of kidnapping, and where Appellant was undoubtedly prejudiced because it is unclear from the record whether the jury found Appellant guilty based on the indicted conduct which occurred in Marion County or the unindicted conduct which occurred in Dillon and Marlboro Counties.

(Final Brief of Appellant, p. 1). The same issue is set forth in the Argument portion of Appellant's Brief. (Final Brief of Appellant, p. 7). The trial judge's failure to give a limiting instruction was referenced only as a consequence of admitting the Dillon and Marlboro Counties evidence. In addition, the Standard of Review set forth in Appellant's Brief only references the standard of review applicable to the admission of evidence, and does not mention the standard of review regarding jury instructions. (Final Brief of Appellant, p. 3).

Therefore, the only issue raised in this appeal and fairly arising from the record, and before this Court for consideration, was the general admissibility of evidence about what occurred in Dillon and Marlboro Counties. Consequently, the State only addressed the general admissibility issue in its responsive brief.

3. The Court, by way of footnote, asserts Appellant's appeal "initially alleged the circuit court abused its discretion by admitting evidence of unindicted domestic violence in counties other than Marion County *and* by failing to give a jury instruction that only evidence of domestic violence in Marion County could be considered to prove the domestic violence charge." (Emphasis in original). In light of Appellant's concession that the evidence was admissible for purposes of the kidnapping charge, the Court then "only address[ed] the circuit court's ruling as to the jury charge." In short, the Court essentially created a non-existent appeal issue because Appellant conceded the only issue legitimately before the Court.

4. At the very beginning of his “discussion” regarding the purported error below, Appellant framed the issue as follows: “The trial judge abused his discretion by admitting evidence of alleged acts of domestic violence which occurred in Dillon and Marlboro Counties because these acts fell outside the scope of the indictment.” Appellant then asserted “[t]he trial judge ultimately confused the objection to the admission of this evidence and based his ruling on whether venue was proper.” (Final Brief of Appellant, p. 11). Nothing in the record, however, reflects, or even intimates, Appellant argued his objection was **not** based on venue. Further, when the trial judge specifically found venue was proper, Appellant did **not** advise, or even attempt to advise, the trial judge that venue was not the basis for his objection, even though he had ample opportunity to do so. (R., pp. 107-108).

In spite of the absence of anything in the record that would have afforded the trial judge an opportunity to address any other basis for Appellant’s objection, or even any other basis for a limiting instruction Appellant never requested, this Court found the trial judge somehow intuitively knew venue was not the basis for Appellant’s objection. In so finding, and then reversing the trial judge, this Court decided the case on an issue that was never presented to the trial judge, or even on appeal. *See State v. Harrison*, ___ S.C. ___, ___ S.E.2d ___. 2021 WL 193122, *7 (S.C. Sup. Ct., filed January 20, 2021) (“Courts do not give advisory opinions or answer questions that are not asked.”); *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487, 489 (2007) (“If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.”); *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) (“[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.”).

5. This Court determined State v. Zeigler, 274 S.C. 6, 260 S.E.2d 182 (1979), controlled the outcome in this case. In Zeigler, the defendant contended the circuit court did not have jurisdiction over criminal actions occurring on Fort Jackson property, but the circuit court overruled the objection, and the defendant was convicted of kidnapping and sexual assault. The Supreme Court reversed, holding there were separate sexual assaults – one occurring in Richland County and one occurring on Fort Jackson, and the Richland County circuit court did not have jurisdiction to hear charges occurring on federal property, and finding it was impossible to determine whether the jury convicted on the basis of events in Richland County or on Fort Jackson. *Id.* at 184-185.

There are significant distinctions between Zeigler and this case. As a threshold matter, unlike the jurisdiction to hear cases arising on federal property issue at the heart of the Zeigler decision, under South Carolina's unified court system, circuit courts have subject matter jurisdiction to hear all General Sessions cases throughout the state. Thus, the basis premise of the Zeigler holding, jurisdiction to hear the particular cases, does not apply to this case.

Further, the defendant in Zeigler was actually indicted in Richland County for the sexual assault occurring on Fort Jackson, so the indictment presented to the jury included the Fort Jackson allegations. In this case, however, the indictment clearly included only the alleged crimes occurring in Marion County – a fact Appellant acknowledges in his Statement of Issue on Appeal, and the jury had the Marion County kidnapping and domestic violence indictment before it, as well as the solicitor's clear statements, in both opening and closing, that Appellant was only being tried for what occurred in Marion County, and not for anything that happened in Dillon and Marlboro counties. (R., pp. 19, 22, 111-112, 153).

5. As discussed above, the only objection before the trial court was whether evidence of bad acts committed in Dillon and Marlboro counties was admissible “because this court doesn’t have jurisdiction to hear allegations of domestic violence that occurred outside of the county (Marion).” (R., p. 5). While counsel did express concern about the jury’s ability to separate the incidents of domestic violence in other counties from the alleged domestic violence occurring in Marion county, that comment was still in the context of the circuit court’s jurisdiction and venue. The trial judge’s understanding of the objection as a venue matter is amply demonstrated by the trial judge’s subsequent summary of Appellant’s argument: “He’s saying that it happened in another county, period. . . . And it may have happened here too, but he wants the other county incidents excluded.” (R., pp. 7-15).

The **trial judge** mentioned the possibility of a limiting instruction to the jury to the effect that both the kidnapping and domestic violence had to have **occurred in Marion County**. (R., p. 16). This suggestion further indicates the trial judge considered the issue to be venue, and Appellant never even attempted to advise the trial judge the objection was anything other than an objection to venue.

Thereafter, Appellant objected to the victim’s testimony about the Dillon and Marlboro incidents “based on my previous motion and objection.” At that time, the trial judge ruled the evidence of events occurring outside of Marion County was admissible “only to prove kidnapping,” and again indicated he would give a limiting instruction to the jury that proof of the domestic violence charge before the jury must be from evidence of events happening in Marion County, but stated “I’ll flesh that out in much greater detail before we charge.” (R., p. 34).

At the close of the State’s case, the trial judge rescinded his previous ruling regarding the necessity of a limiting instruction. In explaining the reason for rescinding the ruling, the trial

judge cited statutes and case law regarding **venue** in death penalty cases, and stated: “In this case, we have domestic violence and kidnapping in Marion and possibly Dillon and Marlboro. **So I think venue is proper in Marion.**” (R., p. 107) (emphasis added). The trial judge’s reference to “venue” renders his understanding of the objection as one regarding venue indisputable, and his ruling on the venue issue rendered the previously discussed limiting jury instruction regarding consideration of the evidence from other counties unnecessary. Again, Appellant never advised the trial judge his motion involved anything other than venue, and did not object to the trial judge’s ruling or the proposed jury instructions, which did not include a limiting instruction.

4. This Court characterizes Appellant’s trial objection as “a motion in limine to exclude testimony and evidence related to conduct occurring outside Marion County,” but never addresses the specific basis for the objection, which was whether the circuit court had jurisdiction to hear evidence regarding what happened in other counties (venue). This characterization significantly and improperly expands the scope of the issue **arising fairly from the record** before the Court. It is abundantly clear from the record that the trial judge considered and ruled on the issue of **venue**, which was the **only** issue before him based on Appellant’s stated objection.

5. The Court then indicates that **after** the trial judge “determined the entirety of the events of that night were integral to proving the charge of kidnapping and would be admissible,” Appellant advised the trial judge “if the evidence were admitted, he would request a charge limiting its applicability to the kidnapping charge and not the domestic violence charge.” The record reflects, however, Appellant merely stated **pre-trial** he would request “a charge” if the evidence was allowed, which was well before the trial judge actually ruled on the issue when the

matter arose during the victim's testimony. (R., pp. 16, 34). When the trial judge cited the death penalty statutes and cases, Appellant argued they only applied to cases where death occurred, and therefore, did not apply in this case, and did not argue they were inapplicable because venue was not the basis for his objection. Appellant never proposed any language for such a charge, and did not base his comment on the ground the evidence would be prejudicial. Disregarding what the record clearly reflects does not change what is, or is not, clearly in the record.

Further, Appellant conceded the evidence of the incidents in Dillon and Marlboro was relevant to the Marion County kidnapping charge. The evidence from other counties gave context to the victim's conduct, and presented a basis for her failure to flee from Appellant, which was Appellant's primary argument on the kidnapping charge.

For much the same reasons, that evidence was relevant to the Marion County domestic violence charge. 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. S.C. Code Ann. §16-25-20(A) (2017) (emphasis added). Appellant's threats to, and beatings of, the victim in Dillon and Marlboro counties gave context to the victim's state of mind in the Marion County motel room, and "reasonably creat[ed] fear of imminent peril" when Appellant told her he was going to kill her, put his arm around her neck, and attempted to snap it. The importance of that context is amply demonstrated by this Court's reference to the Marion County domestic violence evidence as "significantly weaker." (Discussed below).

6. In summarily dismissing the State's preservation argument, the Court states, by way of footnote (n. 5), the trial judge knew and understood the nature of Appellant's objection from the beginning of the trial, and the trial judge himself "injected the venue statute into the

discussion." The State agrees the trial judge knew and understood the nature of Appellant's objection – jurisdiction/venue - from the beginning of the trial, and the trial judge's reliance on statutory and case law regarding venue amply demonstrates that understanding, which was never challenged by Appellant.

As to the jury instruction preservation argument, the Court's reliance on State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998), and Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999), is misplaced. In those cases, the parties made specific objections to a jury charge, or the failure to give a requested charge, which were ruled on by the trial courts. In this case, however, Appellant never requested a specific jury charge, or objected when a limiting charge was not included in the trial judge's proposed jury charges. Thus, the trial judge never had an objection regarding the jury charges before him, and as a result, was not afforded an opportunity to rule on the issue.

Further, and significantly, Appellant did not make any argument in his brief, or cite any case law, regarding failure to give a requested jury charge. He failed to do so because the issue was not before the trial judge or this Court.

7. After dismissing the preservation issue, this Court concludes Appellant was prejudiced because it is not possible to determine if the jury considered the evidence regarding domestic violence in other counties in convicting Appellant of domestic violence in Marion County. In reaching this conclusion, the Court overlooks the jury's acquittal on the kidnapping charge. In rendering that verdict, the jury necessarily considered only what occurred in Marion County because the evidence of kidnapping in the other counties was virtually indisputable, and Appellant argued the victim entered his car voluntarily in Marion County. If the jury could separate the evidence regarding events in other counties for purposes of the kidnapping charge, it

was certainly capable of separating the evidence regarding events in other counties for purposes of the domestic violence charge.

8. This Court's reference to the Marion County evidence of domestic violence as "significantly weaker" than the evidence of domestic violence in the other counties indicates the Court weighed the evidence itself, found it lacking, and applied its own interpretation of the evidence as a whole. Appellate courts cannot weigh the evidence when reviewing criminal cases. *See State v. Cherry*, 348, S.C. 281, 559 S.E.2d 297, 300 (Ct. App. 2001) (appellate court cannot weigh the evidence in a criminal case "any more than it can make a crab walk straight or smooth the rough spikes of the hedgehog") (Goolsby, J. concurring) (internal quotes and citations omitted). While this Court may consider efforts to break a person's neck and threats to kill that person as "weak," those actions can clearly support a guilty verdict on a domestic violence charge in Marion County.

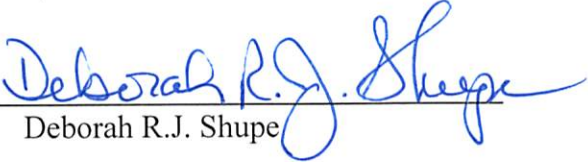
Based on the foregoing and the arguments in the Final Brief of Respondent, the State respectfully submits the Court should grant the Petition for Rehearing, vacate its opinion, and affirm the judgment and conviction of the lower court.

Respectfully submitted,

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February 12, 2021

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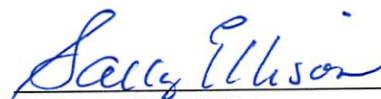
PROOF OF SERVICE

I, Sally Ellison, certify I served Respondent's Petition for Rehearing on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

Lara M. Caudy
Assistant Appellate Defender
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 12th day of February, 2021.



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From: Sally Ellison
Sent: Friday, February 12, 2021 12:19 PM
To: 'lcaudy@sccid.sc.gov'; Matthews, Lindsey
Cc: William Blich; Deborah Shupe; Sally Ellison; Victim Services
Subject: The State v. Russell Levon Johnson Appellate Case No. 2017-002393
Attachments: Johnson Russell Levon Letter Serving Respondent's Petition for Rehearing (02489522xD2C78).pdf; Johnson Russell Levon Respondent's Petition for Rehearing (Appellate Case No. 2017-002393 (02489380xD2C78).pdf

Good Afternoon:

Attached are the State's cover letter and Respondent's Petition for Rehearing in the above-referenced appeal. This cover letter and Petition will be filed with the Court of Appeals today through the AIS One Drive System. Copies of the Petition will be provided pursuant to the Proof of Service. Please confirm receipt of the attached. Thank you.

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