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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marion County
The Honorable William H. Seals, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 5788 (S.C. Ct. App. Filed January 13, 2021
Court of Appeals Appellate Case No. 2017-002393

The State, Petitioner,

v.

Russell Levon Johnson,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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TABLE OF CONTENTS

CERTIFICATE OF COUNSEL 1

STATEMENT OF QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 8

CONCLUSION 17

CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals and denied by Order filed March 25, 2021.

STATEMENT OF QUESTION PRESENTED

In reversing Respondent's conviction and remanding the case to the circuit court for a new trial, did the Court of Appeals improperly rule on an issue that was not preserved for appellate review, and then greatly expand the issue beyond the issue that was actually before, and ruled on by, the circuit court?

STATEMENT OF THE CASE

On December 23, 2014, Respondent Russell Levon Johnson was convicted on one count of first degree criminal domestic violence after a jury trial in Marion County, and sentenced to ten years incarceration. (Record on Appeal [R.], pp. 135-141). This appeal followed.

In an opinion filed January 13, 2021, the Court of Appeals reversed Respondent's conviction and remanded the case for a new trial. (Appendix, pp. 1-8). Petitioner State of South Carolina filed a Petition for Rehearing, which the Court of Appeals denied by Order filed March 25, 2021. (Appendix, pp. 9-20).

STATEMENT OF FACTS

In February 2017, the Marion County Grand Jury indicted Respondent 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 Respondent 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, Respondent 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, Respondent grabbed it and removed the battery, and said no one was going to call either him or her. Respondent did not drive to the store, but continued driving toward Dillon County until the Victim did not know where they were. She asked Respondent to take her home, but he kept driving away from Marion County, telling the Victim they were just going to sit and talk. Respondent 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, Respondent accused her of stealing from him and cheating on him, which she denied. (R., pp. 29-32).

When they got back in the car, Respondent drove to a store, where he purchased a beer. Respondent 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, Respondent pulled her out of the car, threw her on the ground and started kicking and punching her side and face. Respondent then hit the back of the Victim's head with a small hammer he got out of the trunk. (R., pp. 32-37).

The Victim asked Respondent why he was hitting her, and told him she never stole from him or cheated on him. Respondent 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 Respondent 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, Respondent 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. (R., pp. 37-40).

When Respondent 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 in the room 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. (R., pp. 40-43).

Before the jury was sworn, Respondent 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. (R., pp. 5-17).

The Victim testified about the events of September 15, 2016, after Respondent picked her up at her home. When she started to testify about what happened in the woods near Clio, Respondent 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 the jury would be given a limiting charge. (R., pp. 27-35).

The Victim then testified that after stopping in the woods near Clio, Respondent 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 Respondent 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, Respondent questioned the Victim extensively about her failure to attempt an escape, as well as her statements to law enforcement about the events. (R., pp. 35-62.

After the State rested its case, Respondent 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. The court then denied the directed verdict motion. Respondent argued the statutes cited by the court only applied to death penalty cases, and renewed his previous motion to exclude the evidence. (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." (R., pp. 112-118). In his closing argument, Respondent stressed the fact the Victim did not try to escape even when Respondent left her alone in the car. (R., pp. 118-123).

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

The jury deliberated over an hour, and then indicated it had reached a verdict on the first degree criminal 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 Respondent on the first degree criminal domestic violence charge. (R., pp. 135-140).

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

By opinion filed January 13, 2021, the Court of Appeals reversed Respondent's conviction and remanded the case for a new trial, holding the circuit court erred by failing to give a limiting instruction regarding the jury's consideration of bad act evidence involving other counties. (Appendix, pp. 1-8). Pursuant to Rule 221 of the South Carolina Appellate Court Rules, the State petitioned for rehearing, which the court denied by Order filed March 25, 2021. (Appendix, pp. 9-20). Pursuant to Rule 242 of the South Carolina Appellate Court Rules, the State hereby petitions for a writ of certiorari for this Court to review the Court of Appeals decision.

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[1]Allen v. United States, 164 U.S. 492 (1860).

ARGUMENT

The Court of Appeals erred in reversing Respondent's conviction and remanding the case for a new trial by basing its opinion on an issue that was not preserved for appellate review, and then greatly expanding the issue beyond the issue that was actually before, and ruled on by, the circuit court.

The State submits the Court of Appeals erred by basing the reversal of Respondent's conviction on an issue that was not preserved for appellate review. The court then compounded its error by greatly expanding the issue beyond the issue that was before, and ruled on by, the circuit court.

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."

The Statement of Issue on Appeal in Respondent's brief before the Court of Appeals 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 Respondent 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 Respondent was undoubtedly prejudiced because it is unclear from the record whether the jury found Respondent 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 Respondent, p. 1). The same issue is set forth in the Argument portion of Respondent's Brief. (Final Brief of Respondent, p. 7). The circuit court'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 Respondent'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 Respondent, p. 3).

Therefore, the **only** issue raised in this appeal, and fairly arising from the record before the Court of Appeals, 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.

By way of footnote (n. 3) in its opinion, the Court of Appeals asserted Respondent'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 Respondent's concession 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 Respondent conceded the **only** issue legitimately before the court.

At the very beginning of his "discussion" regarding the purported error below, Respondent 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." Respondent 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 Respondent, p. 11). Nothing in the record, however, reflects, or even intimates, Respondent argued his objection

was **not** based on venue. Further, when the circuit court specifically found venue was proper, Respondent did not advise, or even attempt to advise, the circuit court 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 affording the circuit court an opportunity to address any other basis for Respondent's objection, or even any other basis for a limiting instruction Respondent never requested, the Court of Appeals found the circuit court somehow intuitively knew venue was not the basis for Respondent's objection. In so finding, and then reversing the circuit court, the court decided the case on an issue that was never presented to the circuit court, or even on appeal. *See* State v. Harrison, 432 S.C.448, 854 S.E.2d 468, 476 (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.").

The Court of Appeals 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. The Court found 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 basic premise of the Zeigler holding - jurisdiction to hear the particular case - 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 Respondent acknowledged in his Statement of Issue on Appeal. In addition, the jury had the Marion County kidnapping and criminal domestic violence indictment before it, as well as the solicitor's clear statements, in both opening and closing, that Respondent 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).

As discussed above, the only objection before the circuit 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) (emphasis added). While counsel did express concern about the jury's ability to separate the incidents of domestic violence in other counties from the alleged criminal domestic violence occurring in Marion county, that comment was still in the context of the circuit court's jurisdiction and venue. The circuit

court's understanding of the objection as a venue matter is amply demonstrated by the court's subsequent summary of Respondent'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 **circuit court** 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 circuit court considered the issue to be venue, and Respondent never even attempted to advise the circuit court the objection was anything other than an objection to venue.

Thereafter, Respondent objected to the Victim's testimony about the Dillon and Marlboro incidents "based on my previous motion and objection." At that time, the circuit court 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 criminal 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 circuit court rescinded its previous ruling regarding the necessity of a limiting instruction. In explaining the reason for rescinding the previous ruling, the court 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).

Contrary to the Court of Appeals' analysis, the circuit court's reference to "venue" renders its understanding of the objection as one regarding venue indisputable, and its ruling on the venue issue rendered the previously discussed limiting jury instruction regarding consideration of the evidence from other counties unnecessary. Again, Respondent never advised the circuit court his motion involved anything other than venue, and did not object to the circuit court's ruling or the proposed jury instructions, which did not include a limiting instruction.

The Court of Appeals characterized Respondent's trial objection as "a motion in limine to exclude testimony and evidence related to conduct occurring outside Marion County," but never addressed 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 expanded the scope of the issue **arising fairly from the record** before the court. It is abundantly clear from the record that the circuit court considered and ruled on the issue of **venue,** which was the **only** issue before it based on Respondent's stated objection.

The Court of Appeals then indicated that **after** the circuit court "determined the entirety of the events of that night were integral to proving the charge of kidnapping and would be admissible," Respondent advised the circuit court that if the evidence was admitted, he "would request a charge limiting its applicability to the kidnapping charge and not the domestic violence charge." Contrary to the Court of Appeals' timeline of events, however, the record reflects Respondent merely stated **pre-trial** he "would request a charge" if the evidence was allowed, which was well before the circuit court actually ruled on the issue when the matter arose during the Victim's testimony.

After ruling during trial that the evidence was admissible for purposes of the kidnapping charge, the circuit court specifically stated it would "flesh [a possible limiting charge] out in much greater detail before we charge." (R., pp. 16, 34). In spite of the circuit court's reference to fleshing out the charge later, Respondent never submitted a proposed charge, or pursued the limiting charge issue at all.

When the circuit court cited the death penalty statutes and cases regarding venue as the basis for rescinding the previous ruling regarding a limiting instruction, Respondent argued the statutes only applied to cases where death occurred, and therefore, did not apply in this case. He did **not** argue they were inapplicable because venue was not the basis for his objection. Respondent never proposed any language for a jury charge, and did not base his comments on the ground the evidence would be unduly prejudicial. Disregarding what the record clearly reflects does not change what is, or is not, clearly in the record.

Further, Respondent conceded 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 Respondent, which was Respondent's primary argument on the kidnapping charge.

For much the same reasons, that same evidence was relevant to the Marion County criminal domestic violence charge. Criminal 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). Respondent'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 Respondent 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 the Court of Appeals' reference to the Marion County domestic violence evidence as "significantly weaker." (Discussed below).

In summarily dismissing the State's preservation argument, the Court of Appeals stated, again by way of footnote (n. 5), the circuit court knew and understood the nature of Respondent's objection from the beginning of the trial, and the circuit court itself "injected the venue statute into the discussion." The State agrees the circuit court knew and understood the nature of Respondent's objection - jurisdiction/venue - from the beginning of the trial, and the circuit court's reliance on statutory and case law regarding jurisdiction/venue amply demonstrates that understanding, which Respondent never challenged.

As to the jury instruction preservation argument, the Court of Appeals' 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), was 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, Respondent never requested a specific jury charge, or objected when a limiting charge was not included in the circuit court's proposed jury charges. Thus, the circuit court never had an objection regarding the jury charges before it, and as a result, was not afforded an opportunity to rule on the issue.

Further, and significantly, Respondent did not make any argument in his brief, or cite any case law, regarding failure to give a requested jury charge. Quite simply, he failed to do so because the issue was not before the circuit court or the Court of Appeals.

After dismissing the preservation issue, the Court of Appeals concluded Respondent was prejudiced because it is not possible to determine if the jury considered the evidence regarding domestic violence in other counties in convicting Respondent of criminal domestic violence in Marion County. In reaching this conclusion, the court completely overlooked 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 Respondent vigorously 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 Marion County criminal domestic violence charge.

Finally, the Court of Appeals' reference to the Marion County evidence of domestic violence as "significantly weaker" than the evidence of domestic violence in the other counties expressly indicates the court weighed the evidence itself, found it lacking, and applied its own interpretation of the evidence. 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) (Goolsby, J. concurring) (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") (internal quotes and citations omitted). While the Court of Appeals may consider threats to kill a person and efforts to break that person's neck (all occurring in Marion County) as "weak," those actions can clearly support a guilty verdict on a criminal domestic violence charge in Marion County.

CONCLUSION

Based on the foregoing, and the arguments in the Petition for Rehearing and the Final Brief of Respondent, the State respectfully submits the Court should issue a writ of certiorari to the Court of Appeals to review that court's decision, ultimately vacate the court's opinion and affirm Respondent's conviction.

Respectfully submitted,

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