RECEIVED
Apr 26 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marion County
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.

APPENDIX

LAURA MARY CAUDY
Appellate Defender

South Carolina Commission on
Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Asst. Deputy Attorney General
Rembert Dennis Building
1000 Assembly St. Room 519
Columbia, SC 29201

ATTORNEY FOR RESPONDENT

INDEX

INDEX i

OPINION NO. 5788 (JANUARY 13, 2021) 1

PETITION FOR REHEARING (FEBRUARY 21, 2021)....................................9

ORDER DENYING PETITION FOR REHEARING 20

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Russell Levon Johnson, Appellant.

Appellate Case No. 2017-002393

Appeal From Marion County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5788
Heard October 13, 2020 – Filed January 13, 2021

REVERSED AND REMANDED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

KONDUROS, J.: Russell Levon Johnson was charged with kidnapping and first-degree domestic violence. A jury convicted Johnson of the domestic violence charge but acquitted him of kidnapping. Johnson appeals his conviction, arguing the circuit court erred in admitting evidence of conduct in other jurisdictions without instructing the jury that the domestic violence charge had to be supported by evidence within the jurisdiction. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Tonya Richburg and Johnson had lived together in Longs, South Carolina, for approximately four years prior to the incident in this case. Richburg moved to Mullins, located in Marion County, in the summer of 2016 and lived there in a hotel for approximately a month before securing housing. Johnson went to Richburg's home on September 15, 2016, and persuaded her to ride to the store with him so they could talk about their relationship and his impression that she was "moving on." A mentor to one of Richburg's children was visiting, so Richburg told Johnson she could go with him but they could not be away too long. The mentor called Richburg's cell phone to see when the pair would return, and according to Richburg, Johnson took her cell phone, removed the battery, and stated nobody would be getting in touch with her.

Johnson continued driving and told Richburg they were going to Dillon[1] so he could buy some wine and they could talk. Richburg continued telling Johnson she needed to go home, but he kept driving, eventually stopping in a wooded area with which Richburg was unfamiliar. The pair talked and Johnson accused Richburg of having stolen money from him and having cheated on him. Johnson then drove to a store and purchased a beer, and he continued driving to Clio, South Carolina, located in Marlboro County, where he went to another wooded area. As all this was transpiring, Johnson was drinking and using cocaine. Once they stopped in the wooded area, Johnson went to the trunk of the car; retrieved a long, sharp, metal object; and stabbed Richburg in the chest. He pulled her out of the car and kicked and punched her all the while accusing her of cheating and stealing. Finally, he took a hammer and hit Richburg in the head and stated no one would ever find her or him. In an effort to calm him, Richburg told Johnson she would not do anything to hurt him again. At that point, he stopped his attack and helped Richburg back into the car.

The pair drove through Dillon at which time Johnson stopped to let Richburg use the bathroom outside a small church. They drove back to Mullins, and Johnson went into a store to purchase beer. Richburg stated she did not run away because she did not know where she was, she was scared, it was dark, and she just wanted to get home. Johnson stopped at another store and purchased a black t-shirt to hide the blood on Richburg's clothing, and the pair finally arrived at the Imperial Motel. Once there, Johnson told Richburg this would be her last night and he was going to

---

[1] Dillon is located in Dillon County, which is between Marion and Marlboro Counties.

kill himself after he killed her. Johnson retrieved rubber gloves and Windex from his vehicle and then tried to "pop her neck." According to Richburg, Johnson was continuing to snort a white substance and eventually fell asleep on the bed. At that time, she ran next door and asked for help. The people next door called the police. Richburg fled because she did not want Johnson to go to jail, but she was intercepted by a police officer as she was walking down the side of the road.

Johnson was indicted for kidnapping and first-degree domestic violence by a Marion County grand jury. Johnson made a motion in limine to exclude testimony and evidence related to conduct occurring outside Marion County. The circuit court determined the entirety of the events of that night were integral to proving the charge of kidnapping and would be admissible. Johnson did not withdraw his objection but added that if the evidence were admitted, he would request a charge limiting its applicability to the kidnapping charge and not the domestic violence charge. The court indicated it would consider how to best fashion a solution.

The trial proceeded with Richburg as the first witness. As her testimony moved toward the events that occurred outside Marion County, Johnson objected and the circuit court held a conference outside the presence of the jury. The circuit court indicated it would allow the testimony but would "give a clear charge that to prove domestic violence in this case it must come from evidence that happened in Marion County." At the conclusion of the State's case, the circuit court changed its position, "res[ci]nding its prior ruling." In reliance on section 17-21-20 of the South Carolina Code,[2] regarding venue in murder cases, the court determined "we have domestic violence and kidnapping in Marion and possibly Dillon and possibly Marlboro. So I think venue is proper here in Marion." Johnson noted he had read the statute at issue, did not believe it was applicable, and renewed his objection. The defense rested, the parties reviewed the charge and the verdict form, and closing arguments proceeded. The jury acquitted Johnson of kidnapping but convicted him of first-degree domestic violence. He was sentenced to ten years' imprisonment. This appeal followed.[3]

---

[2] Sections 17-21-10 and -20 of the South Carolina Code (2014) address proper venue in cases when a victim is wounded in the state but dies elsewhere or is wounded in one county and dies in another, respectively.

[3] Johnson'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. At oral argument, Johnson conceded the evidence of domestic violence in

LAW/ANALYSIS

Johnson contends the circuit court erred in failing to give a jury charge instructing that only evidence of domestic violence occurring in Marion County could be used to prove the domestic violence charge. We agree.

As an initial matter, the State maintains this issue is not preserved because Johnson failed to object to the circuit court's jury charge when asked whether there were any exceptions thereto. As previously described, the circuit court had ruled it would allow testimony regarding the events in Marlboro and Dillon counties but would "give a clear charge that to prove domestic violence in this case it must come from evidence that happened in Marion County." However, the circuit court rescinded its prior ruling and deemed the admission of evidence in other counties appropriate for both charges based on section 17-21-10, thereby eliminating the need for a limiting instruction. Johnson objected to the decision, stating,

> Your Honor, I actually read these venue statutes before I made that motion this morning. And the way I read it is [sections] 17-21-10 and -20 . . . apply to cases where death actually occurs. I don't think either one of those statutes [ap]ply to this situation that we have here in this case and so I would just renew my objection.

After this discussion, Johnson was advised of his constitutional rights relating to his decision not to testify and the defense rested.[4] The parties quickly reviewed the circuit court's proposed charge without objection and then gave closing arguments. The judge charged the jury and neither party took exception to the charge after it was given.

When "a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *State v. Johnson*, 333

Dillon and Marlboro was admissible as it was relevant to the kidnapping charge in the case. Consequently, we only address the circuit court's ruling as to the jury instruction.

[4] The colloquy between Johnson and the circuit court is not contained in the record but appears to have constituted approximately two pages of the trial transcript.

S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998); *see also Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 494-95, 514 S.E.2d 570, 573-74 (1999) (holding a plaintiff's on the record explanation of his objection to a jury charge along with the court's ruling on that issue was sufficient to preserve the objection). In this case, the issue regarding the limiting instruction was clearly before the circuit court and was finally ruled upon on the record. Furthermore, nothing had occurred between the circuit court's final ruling and the charge that could have affected the court's decision. Therefore, we find the State's preservation argument unavailing.[5]

Turning to the merits, the case of *State v. Ziegler*, 274 S.C. 6, 260 S.E.2d 182 (1979), *overruled on other grounds by State v. Parker*, 351 S.C. 567, 571 S.E.2d 288 (2002), is controlling. In *Ziegler*, the victim was kidnapped in Richland County and then transported to Fort Jackson, a federal installation. *Id.* at 9, 260 S.E.2d at 184. According to the evidence, the defendant stole personal property from the victim in Richland County or possibly at Fort Jackson. *Id.* In any event, the robbery continued onto the base because the victim's items were never again under his dominion or control. *Id.* However, the events providing the basis for the third charge, sexual assault, were viewed by the court as two separate and distinct acts—one having occurred in Richland County and the other on the base. *Id.* at 12, 260 S.E.2d at 185. As to the sexual assault charge, the court stated:

> [W]e conclude that the likelihood of prejudice as relates to the sexual misconduct charge is sufficient to warrant a new trial on this count. There is evidence of two separate incidents of sexual misconduct, one on the fort property, and one off the fort property. We cannot ascertain from the record which of the incidents was charged in the

[5] The State also maintains Johnson is arguing on appeal for the first time that the circuit court "confused" his argument as relating to venue. The State's preservation argument in this instance is simply without merit. The circuit court knew and understood the nature of Johnson's objection from the beginning of trial. Once the circuit court injected the venue statute into the discussion, Johnson renewed his objection and stated he believed the relied-upon statutes were inapplicable to the case. The matter on appeal was clearly before the circuit court and is preserved. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.").

> indictment and accepted by the jury as a basis for conviction. Accordingly, a new trial should be held on this count, but the kidnapping conviction and the armed robbery conviction and the sentences are affirmed.

Id.

In this case, the circuit court originally ruled it would follow the rationale set forth in *Ziegler* but would eliminate the prejudice discussed in the previous passage by giving a limiting instruction. The circuit court then turned to the venue statutes regarding kidnapping and murder cases; however, these sections are inapplicable. First, Richburg did not die from her injuries. Second, Johnson never contested venue in Marion County—he contested the admissibility of acts of domestic violence outside Marion County.

In an effort to analogize sections 17-21-10 and -20 to the present case, the circuit court relied upon two cases, *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds by State v. Evans*, 307 S.C. 477, 415 S.E.2d 816 (1992), and *State v. Gethers*, 269 S.C. 105, 236 S.E.2d 419 (1977). In *Allen*, the victim was kidnapped and murdered, and evidence in the record established she could have been murdered in either Florence County or neighboring Darlington County. 266 S.C. at 480, 224 S.E.2d at 885. The court concluded venue in Florence County was proper. *Id.* In *Gethers*, the victim was kidnapped from Charleston County, taken to Berkeley County and raped, and returned to Charleston County. 269 S.C. at 106, 236 S.E.2d at 419. The defendant was tried in Berkeley County for kidnapping and rape, and the court determined venue was proper. *Id.* at 107, 236 S.E.2d at 419. Neither case is analogous to Johnson's. In the present case, no evidence was presented to suggest Johnson's attack in the woods happened anywhere other than Marlboro County. Furthermore, in *Gethers*, the single instance of rape was prosecuted in the county where it occurred.

This case aligns with *Ziegler* wherein certain criminal acts were continuing but the assaults were separate and distinct. Johnson attacked Richburg in the woods in Marlboro County, stabbing her and hitting her with a hammer. Sometime later, he attempted to "pop" her neck in Marion County—two separate acts much like the sexual assaults in *Ziegler*. In sum, the circuit court erred in not giving a limiting instruction to mitigate the prejudice to Johnson and ensure the jury found Johnson's conduct in Marion County established his guilt on the domestic violence charge.

Nevertheless, because the charge was not given, we proceed to a harmless error analysis. *See State v. Battle*, 408 S.C. 109, 121-22, 757 S.E.2d 737, 743-44 (Ct. App. 2014) (conducting a harmless error analysis when the circuit court erred in failing to give the requested involuntary manslaughter charge). "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447, 447-48, 710 S.E.2d 55, 60 (2011). "Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 448, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990)).

The State suggests the solicitor's own comments about the domestic violence in other counties render the circuit court's denial of a limiting charge harmless.

In closing argument, the solicitor stated:

> [W]hat I noticed is that when people go through stressful situations, they respond by not being a hundred percent. And what I bring to th[o]se two events that happened in other counties up before the stabbing and beating with the hammer, they are important not because they're domestic violence I'm here to prosecute. I'm here to prosecute what happened in that hotel room, but they're here to show you why she became compliant.

The solicitor went on to describe the acts constituting domestic violence in this case.

> In her own words, and [Richburg] told you he put his arms around her neck like this and he tried to pop it. Well, you can see not only is he larger, but he's physically stronger I believe when the optics tell us all and he tried to pop my neck. So how do we know that he intended to cause bodily injury at that time? Well, what else do the photograph[s tell] us[?] She told us that he walked in with some gloves and a bottle of Windex. Now, I seriously doubt that he brought those gloves in because he was going to work on her wounds.

While these comments demonstrate the solicitor's own understanding about the limitations on the evidence in this case, these comments are insufficient to render the lack of a clear and unequivocal limiting instruction from the circuit court

harmless error. The jury heard testimony about Johnson stabbing Richburg and hitting her in the head with a hammer. They saw photographs of Richburg after the attack, bloody and battered, and they saw photographs of the bloody hotel room. The evidence in the case that clearly established domestic violence relates to the abuse in Marlboro County. The evidence of domestic violence in Marion County is significantly weaker, and we cannot be certain the jury did not consider the precluded evidence in reaching its decision. Therefore, the ruling of the circuit court denying the limiting instruction constitutes reversible error and Johnson's conviction for first-degree domestic violence is

REVERSED AND REMANDED.

LOCKEMY, C.J., and MCDONALD, J., concur.

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.

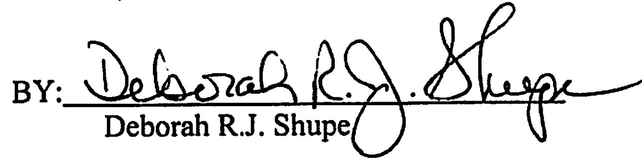
Based on the foregoing and the arguments in the Final Brief of Respondent, the State respectfully submits the Court should grant the Petition for Rehearing, vacate its opinion, and affirm the judgment and conviction of the lower court.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

E. L. Clements, III
Solicitor, Twelfth Judicial Circuit



BY: Deborah R.J. Shupe

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

ATTORNEYS FOR RESPONDENT

February 12, 2021

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.

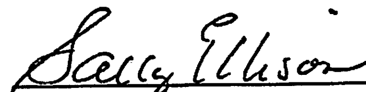
PROOF OF SERVICE

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
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 12th day of February, 2021.



SALLY ELLISON
Legal Assistant

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

The South Carolina Court of Appeals

The State, Respondent,

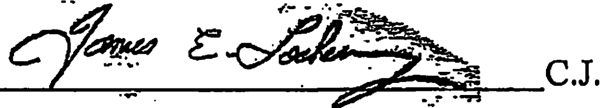
v.

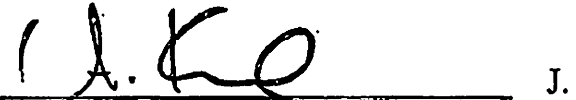
Russell Levon Johnson, Appellant.

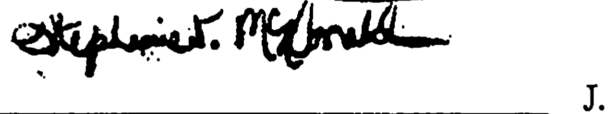
Appellate Case No. 2017-002393

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.


J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Lara Mary Caudy, Esquire
Deborah R.J. Shupe, Esquire
Edgar Lewis Clements, III, Esquire
The Honorable William H. Seals, Jr.

FILED
Mar 25 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marion County
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.

APPENDIX

LAURA MARY CAUDY
Appellate Defender

South Carolina Commission on
Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Asst. Deputy Attorney General
Rembert Dennis Building
1000 Assembly St. Room 519
Columbia, SC 29201

ATTORNEY FOR RESPONDENT

INDEX

INDEX i

OPINION NO. 5788 (JANUARY 13, 2021) 1

PETITION FOR REHEARING (FEBRUARY 21, 2021)......................................9

ORDER DENYING PETITION FOR REHEARING 20

RECEIVED
Apr 26 2021
SC Court of Appeals

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.

Appellate Case No. 2017-002393

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Appendix on Respondent by email and by depositing two copies of the same in the United States Mail, postage prepaid, addressed to the attorney of record,

Laura M. Caudy
Appellate Defender
South Carolina Commission on
Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served

This 26th day of April, 2021.

Sally Ellison
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
803-734-3727