STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2018-001556
Unpublished Opinion No. 2021-UP-275

THE STATE,.....RESPONDENT

v.

MARION C. WILKES,.....APPELLANT

RETURN TO PETITION FOR REHEARING

On July 14, 2021, this court issued an unpublished opinion affirming the decision of the trial judge regarding issues raised by the Appellant. Pursuant to rule 221(a) of the South Carolina Appellant Court rules the Appellant filed a petition for rehearing on July 28, 2021. On November 22, 2021, this Court issued an order that the Respondent file a return no later than ten (10) days from the date of the order.

Within this petition for rehearing Appellant argues that this Court erred in determining he failed to preserve the issue concerning whether the trial court should have viewed the first thirty-five minutes of the movie "Where the Lillies Bloom." Appellant also argues that this Court erred in determining the Appellant did not preserve their argument on the trial court's decision based on Rule 402. The Appellant also argues that this Court erred in determining that the implied malice instruction given by the trial court was made in error but that error was harmless. The Respondent

would respectfully argue that the decision of this court was proper, lawful and not done in error. The Respondent would request this Court deny this petition for rehearing and allow the decision stand.

ARGUMENTS

1. **The Appellant failed to object to the fact the trial judge refused to view the requested portion of the film, so this issue was not preserved for appeal. This court was correct in ruling that since it was not preserved this issue cannot be considered.**

Within his petition for rehearing the Appellant argues that the court should have been aware that the trial court's refusal to watch the movie was an issue that was preserved for appeal. According to the law any issue not raised during trial is not preserved and is not subject to being considered during an appeal.

During trial the Appellant moved to publish to the jury the first thirty-five minutes of the movie. The trial judge ruled, "Since it's a favorite movie of the family, but it's not directly probative of the events, I'm not going not to allow it. But you can crave [sic] reference to it, the story line or whatever, just as you've done. I'm not going to allow it. Number 7 will not be admitted." R. p. 422 l. 9-13. At the conclusion of the trial court's decision all that was said by Appellant counsel was, "Thank you, Your Honor." R. p. 422 l. 15. The Appellant failed to object nor make a request that the trial judge review the movie himself. Since he never offered for the court to view that portion of the movie this issue was not preserved. This Court made the correct decision regarding the Appellant's failure to preserve this issue for appeal.

It was incumbent on the Appellant to explain to the court the specific relevance, and as to why this portion of the movie should be viewed by the trial court prior to making a ruling. If he refused an objection to this decision it must be placed on the record in order for it to be preserved for appeal. "The objection should be addressed to the trial court in a sufficiently specific manner

that brings attention to the exact error." *State v. Johnson,* 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005).

The Appellant argues that since this issue was raised and the trial court ruled on its lack of admissibility twice, that was sufficient to preserve this particular issue for appeal. However, that is not how it works, it is "axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). This law exists due to the fact no appellant court can make a ruling on the possible error of the trial court if the issue was not raised before the court in the first place. Imposing such a requirement on the appellant, "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Had the Appellant raised to the trial court that he should view the video before his ruling, it is possible he might have considered watching at least the requested thirty-five minutes. However, this was never raised by the Appellant so no ruling was ever made. This Court cannot rule on any possible error that has not been preserved. The decision by this Court regarding the lack of preserving this issue was correct.

The Respondent will also reiterate that the trial judge was well within his right to decide on the movie's inadmissibility without viewing the film. "A trial judge is vested with a wide discretion in the conduct of a trial, He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to that end that the time of the court be preserved." *State v. DeBerry,* 250 S.C. 314, 322, 157 S.E.2d 637 (1967). Even in accepting the

Appellant's argument that this was the victim's favorite movie and she wished to have a natural burial, the facts of the movie were not in any way close to the facts of this case. This movie was not relevant and the trial court was correct in its ruling.

Within their petition for rehearing the Appellant once again relies on the South Carolina Supreme Court decision of *State v. Goss,* 425 S.C. 101, 830 S.E.2d 373 (2018). This reliance on *Goss* is in error. In *Goss,* the PCR judge was tasked with making credibility findings concerning witnesses the court decided not to hear, but they took judicial notice of their testimony. The Supreme Court decided that the PCR judge's actions "diluted the process" of its fact findings. *Goss,* 425 S.C. at 108, 820 S.E.2d at 376. In *Goss,* the Supreme Court found actual fault in the PCR judge's factual findings, which it is obligated to do pursuant to the PCR statutes.[1] However, in a criminal trial the judge is not a fact finder, just the gatekeeper of evidence presented to the jury who ultimately are the fact finders. In the role of gatekeeper the trial judge must frequently exercise his discretion in the midst of trial to determine whether evidence is properly admissible.

2. Trial court acted within its discretion when they made the decision to find the movie, "Where the lilies bloom" irrelevant and therefore inadmissible, since the movie had no relationship to the actual facts of the trial, it was proper for this Court to affirm the decision of the trial judge.

The Appellant argues that this Court erred in ruling that Appellant counsel failed to preserve any argument as to the movie's admissibility pursuant to Rule 402 of the South Carolina Rules of Evidence. The Appellant argues that this Court erred because the State first objected to this evidence being allowed pursuant to rule 403.[2] However, the trial court correctly deemed this

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[1] "The Court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. §17-27-80 (2020).

[2] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403 SCRE.

evidence as not relevant pursuant to rule 402.[3] The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. *State v. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 848-849 (2006). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder,* 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009). The trial judge was within his right to exclude this evidence under rule 402. The fact the Appellant failed to address this ruling is not the fault of the court nor the State. Appellant made the decision not to address the ruling of the trial judge, therefore, not preserving this issue for appeal. The decision by this court was proper and should not be reconsidered.

3. **Though the decision of the trial court to charge the jury on implied malice was done in error, this Court was correct to determine that this error was harmless.**

At the conclusion of the evidence and final arguments the trial judge offered jury instructions. One of these instructions was that malice may be inferred from the use of a deadly weapon. In *State v. Burdette,* 427 S.C. 490, 832 S.E.2d 575 (2019) the South Carolina Supreme Court decided that charging the jury that malice may be inferred from the use of a deadly weapon is in error regardless of the evidence presented at trial. *Burdette,* 427 S.C. at 504-505, 832 S.E.2d at 583. However, though it was an error to make this charge to the jury this did not affect the

[3] All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible. Rule 402 SCRE.

outcome of the trial so this Court was correct in considering this mistake as harmless. In *State v. Kerr,* this Court made this determination regarding harmless error in jury instructions.

> "Jury instructions must be considered as a whole, and if as a whole, they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. When reviewing a trial judge's instruction for error, this court must consider the instructions in their entirety. **In order to find the error harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."** *State v. Kerr,* 330 S.C. 132, 144, 498 S.E.2d 212, 218 (1998)(emphasis added).

In reviewing the facts of the case and the testimony of the Appellant, the jury only had two possible outcomes, either the victim killed herself, or she was murdered by the Appellant. So offering the jury instruction of implied malice had no bearing on the outcome of this trial. If the jury believed that the Appellant killed his wife, there is obvious malice in stabbing someone and beating her on the head. The error made by the trial judge in making this charge to the jury was harmless. In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. *Id.,* 330 S.C. at 145, 498 S.E.2d at 218.

There was also overwhelming evidence provided by the State revealing malice. The victim had multiple blunt force injuries to her head and one stab wound to the torso, just below the chest. R. p. 231 l. 14-22. The victim had at least five injuries that caused lacerations on her skin, and she had an underlying fracture to the skull. R. p. 232 l. 1-4. Appellant sought no medical treatment for the victim despite the close proximity to the hospital. There was no evidence ever submitted mitigating the murder charge to voluntary or involuntary manslaughter, accident or self-defense. It was clear by testimony and evidence the only two choices available to the jury, was murder or suicide. The element of malice was not an issue, the jury did not believe the Appellant's version of the facts which he gave during his testimony so he was convicted of murder. The jury instruction

did not contribute to his verdict it was the jury not believing his story and the mounting evidence brought by the State against him. It is clear that the jury charge given may have been done in error, but that error was completely harmless. The ruling by this Court was correct and should not be subject to a rehearing.

CONCLUSION

The Respondent believes that the decision of this court was correct and followed current South Carolina law. The Appellant has revealed nothing that was overlooked or misapprehended by this Court. Therefore, this petition for rehearing should be dismissed.

Respectfully submitted,

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December 1, 2021

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CERTIFICATE OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service have been forwarded to Appellant's counsel, Colin T.L. Spangler, Esq., via email today, December 1, 2021 to colin@spanglerlawoffice.com.

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

This 1st day of December, 2021.

Donna D'Alessio

Donna D'Alessio, Legal Assistant to
Tommy Evans, Jr.,
Assistant Attorney General

Donna D'Alessio

From: Donna D'Alessio
Sent: Wednesday, December 1, 2021 4:55 PM
To: 'colin@spanglerlawoffice.com'
Subject: Wilkes, Marion C. - Appellate Case No. 2018-001556 - Return to Petition for Rehearing
Attachments: Wilkes, Marion C. - Appellate Case No. 2018-001556 - Return to Petition for Rehearing 12-1-21 (02835932xD2C78).pdf

Dear Mr. Spangler:

Attached is a scanned copy of the Respondent's Return to Petition for Rehearing regarding the above matter. The Return to Petition for Rehearing and Certificate of Service are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

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