RECEIVED

Mar 14 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM LEXINGTON COUNTY
Eugene C. Griffith, Jr. Circuit Court Judge

Opinion No. 2021-UP-275(S.C. Ct. App. filed July 14, 2021)

THE STATE,.....RESPONDENT

v.

MARION C. WILKES.....PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2018-001556

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282
P.O. Box 11549
Columbia, South Carolina 29211-1529
Phone No. (803) 734-6305

S.R. Hubbard III
Solicitor, Eleventh Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals correctly determined that the trial court erred in instructing the jury that malice may be inferred from the use of a deadly weapon but erroneously concluded the error was harmless?

2. Did the Court of Appeals err in concluding Petitioner did not properly preserve the issue that the trial court erred in failing to view a portion of the film *Where the Lilies Bloom* before ruling on its admissibility?

3. Did the Court of Appeals err in concluding the trial court's decision to exclude *Where the Lilies Bloom* was the law of the case because the overall context of the State's argument to the trial court was grounded on Rule 403, SCRE and the testimony reflected the alleged victim told Petitioner she wished to be buried in a manner consistent with the film and for her death to be concealed from the public?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining that the trial court erred in instructing the jury that malice can be inferred from the use of a deadly weapon, but since this did not affect the outcome of the trial it is considered harmless?

2. Did the Court of Appeals err in determining that since the Petitioner failed to raise an objection or request trial counsel to watch the movie *Where the Lilies Bloom,* this issue was not preserved for appeal?

3. Did the Court of Appeals err in deciding that since the Petitioner failed to address the trial court decision to exclude the film *Where the Lilies Bloom* into evidence pursuant to Rule 402 SCRE, but argued that the State was incorrect in their argument that this evidence should be excluded pursuant to Rule 403 SCRE, that their argument was not preserved for appeal?

STATEMENT OF THE CASE

On November 3, 2014, the Lexington County Grand Jury indicted the Petitioner for one count of murder. This case was called for trial on February 26, 2018 before the Honorable Eugene C. Griffith, Jr. appearing before the trial court was the Petitioner along with his counsels Wayne Floyd and Collin Spangler. Representing the State of South Carolina were Assistant Solicitor's Rhonda Patterson and Gill Bell of the Eleventh Circuit Solicitor's office.

After three days of testimony the Petitioner was found guilty by a jury of his peers for the offense of murder. (R. p. 233 lines 14-15). After the verdict, Petitioner appeared before the trial judge and was sentenced to a forty-five (45) year period of incarceration. (R. p. 234 lines 6-7). While serving his sentence the Petitioner filed a timely notice of appeal before the South Carolina Court of Appeals.

On June 9, 2021, all parties appeared before Judges H. Bruce Williams, Paula H. Thomas, and D. Garrison Hill of the South Carolina Court of Appeals. On July 14, 2021, the Court of Appeals filed an unpublished opinion unanimously affirming the decision of the trial court. *State v. Wilkes,* 2021 WL 2947789. Within this opinion the Court of Appeals decided to affirm the decision of the trial court. Before the Court of Appeals, Petitioner argued that the trial court erred by not accepting to view the film *Where the Lilies Bloom* prior to making his ruling on its relevance. The Court of Appeals decided that defense counsel failed to preserve this issue for appellate review. This issue was waived and therefore not be considered by the appellant court. The Court of Appeals also ruled that even though the State argued that the film violated Rule 403 SCRE, stating that the evidence was confusing or misleading to the jury, the trial court excluded the film from being introduced as evidence pursuant to Rule 402 SCRE, deciding that it should be excluded due to it not being relevant. The Court of Appeals found that Petitioner argued its

admissibility under Rule 403 but failed to raise an argument pursuant to Rule 402 which was the ruling of the trial court. The Court of Appeals however, did find that the trial court erred in charging the jury that malice can be inferred from the use of a deadly weapon. However, the Court of Appeals ruled that this error was harmless. Other than inferred malice charge, the remaining portion of the jury charge, "were a correct statement of the law." *Id,* at 2. The Court of Appeals concluded that the, "erroneous instruction did not contribute to the verdict because the State presented overwhelming evidence of malice." *Id,* at 2.

Petitioner now presents this petition for writ of certiorari seeking review from this Honorable Court. The Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court rule 242. The return presented by the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State,* 369 S.C. 213, 216, 631 S.E.2d 542 , 544 (2000). Pursuant to rule 242 of the South Carolina rules of the Appellate Court, "a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

Rule 242 SCACR.

In reviewing the present case none of these criteria applies. The Court of Appeals properly and unanimously affirmed the decision of the trial court. This decision should not be subject to any review.

There have been several Supreme Court decisions addressing harmless error and a failure to preserve an issue for appeal. The Court of Appeals was correct in ruling that the error of the trial judge was harmless. Due to the overwhelming evidence of guilt, this error had no effect on the final verdict. There are numerous South Carolina Supreme Court decisions that would allow the Court of Appeals to decide that error was harmless. There are also numerous decisions relating

to an Appellant's failure to preserve an issue of an appeal. It is clear an issue cannot be raised for the first time on appeal. *See, State v. Cope,* 405 S.C. 317, 748 S.E.2d 194 (2013); *Herron v. Century BMW,* 395 S.C. 461, 719 S.E.2d 640 (2011). So these issues are hardly novel questions of law.

There is also no Constitutional question, no dissenting opinion by any member of the Court of Appeals; and no federal question that is in conflict with a prior decision made by the United States Supreme Court. The Court of Appeals decision was lawful, so their opinion should not be subject to review.

STATEMENT OF FACTS

Marion Wilkes (Petitioner) reported his wife, Susan Wilkes (victim), missing on Saturday, June 14, 2014. Investigator Thomas Griffin was assigned to the missing person's case. (R. p. 18, line 22 – p. 19, line 15.) Upon receiving the report, Investigator Griffin went to the Wilkes home to interview the Petitioner along with his son, Joseph Wilkes. (R. p. 19, line 15 – p. 20, line 4.) Investigator Griffin was told the victim disappeared after going for a walk Thursday morning. The victim's cell phone, purse, and vehicle were left behind at the house. (R. p. 20, line 9 – p. 21, line 1.) Investigator Griffin reviewed the victim's phone and realized there was no activity after June 8, 2014. (R. p. 21, lines 3-11.)

Investigator Griffin also examined the victim's vehicle. When he opened the trunk, he noticed the carpet that would ordinarily cover the spare tire was missing. (R. p. 22, lines 1-7.) Investigator Griffin then requested assistance from other law enforcement agencies. They brought dogs to search the area where the Petitioner reported the victim's last known route. (R. p. 22, lines 11-24.) Investigator Griffin created a bulletin to disseminate to the media and other law enforcement agencies detailing the victim's disappearance. (R. p. 23, lines 14-20.)

On Sunday, June 15, Investigator Griffin returned to the Wilkes home to find Petitioner, Joseph, Susan's sisters, and local news outlets gathered. (R. p. 24, lines 11-21.) The victim's sister, Patti Smith, learned the victim was missing when the Petitioner called her Saturday morning. He asked her, "What's going on in the 'Boro?" he then explained about her sister's disappearance. (R. p. 10, line 19 –p. 11, line 8.) Smith said Petitioner did not seem concerned. (R. p. 11, lines 9-17.) Smith traveled to West Columbia in an effort to learn more information. She had trouble talking to Joseph without the Petitioner interrupting their conversation. (R. p. 12, lines 1 – 23.) When the television station arrived to do an interview concerning the victim, the Petitioner insisted he do all

the talking. (R. p. 4, line 19 – p. 5, line 18; p. 8, lines 8-12; p. 13, lines 2-15.) The reporter later testified she found the Petitioner's demeanor odd because he did not seem concerned about his wife. (R. p. 7, lines 2-10.)

The following day, on June 16, Investigator Griffin asked the Petitioner and his son to return for another interview, this interview took place at the South Carolina Law Enforcement Division (SLED). (R. p. 26, lines 17-25.) While Investigator Griffin transported them to SLED, other SLED agents executed a search warrant for the Petitioner's home. (R. p. 26, lines 4-15.) Agents found female walking shoes and a purse on top of a dresser in one bedroom. Inside the purse was the victim's wallet with her identification. (R p. 32, line 1 – p. 33, line 1.) Agents also discovered Susan's phone in a jewelry box on the dresser. (R. p. 33, lines 4-15.) A weekly medication container indicated pills that had been taken for days of Sunday through Wednesday, however, Thursday through Saturday's medications remained in the container. (R. p. 33, line 16 – p. 34, line 10.) The shower curtain from the Petitioner's bathroom was also missing. (R. p. 34, lines 16-18.) In the kitchen, there were blood stains on the door leading to the garage and on the kitchen floor. (R. p. 35, lines 14-23; p. 37, lines 9-18.) Agents also observed what appeared to be blood on the passenger side frame of the victim's car, which was parked in the garage. (R. p. 38, lines 10-21.) Several other bloodstains were found inside the car. (R. p. 172, lines 2-11.)

At SLED, Petitioner and Joseph were interviewed separately, they gave similar statements. After the interviews, agents placed the men together in the same room, law enforcement agents observed their interaction from behind a two way mirror.(R. p. 27, lines 3-22.) The Petitioner asked Joseph, "You didn't change up on me, did you?" he also commented that the police needed "physical evidence." (R. p. 28, lines 16-19.) Petitioner then said, "I ain't changing up." (R. p. 28, lines 18-21.)

On June 18, 2014, Patti Smith and Joseph Wilkes met at the police station to talk. Joseph then agreed to lead officers to the location of his mother's body. (R. p 29, lines 1-20.) Joseph told officers the body was in Little Mountain, South Carolina, about a thirty-five minute drive away. (R. p. 29, line 22 – p. 30, line 3.) Joseph led police to the burial site, which was in the back corner of a residential property owned by a man named Eric Bassett. (R. p. 30, lines 13-25.) After determining where the grave site was, the crime scene team began to remove the loose dirt from the area. (R. p. 43, lines 2-11.) The grave site was approximately three and one-half feet long by one and three-quarters feet wide by two feet deep. (R. p. 46, lines 21-23.) Under some of the dirt was a cement block, and below the block was the body of Susan Wilkes, wrapped in a comforter and a brown tarp. (R. p. 43, line 9 – p. 44, line 9.) The tarp was wrapped with duct tape, and inside the tarp, Susan's head was wrapped with a yellow towel. (R. p. 44, line 21 – p. 45, line 2.)

After Joseph revealed the death of his mother on June 18, Petitioner changed his story. He told investigators his wife committed suicide by stabbing herself in the heart. Petitioner claimed his wife wanted to be buried somewhere natural. (R. p. 120, lines 7-23.) He also claimed his wife had fallen and hit her head, which is why they wrapped her head in a towel. (R. p. 121, lines 2-4.)Petitioner claimed he and the victim had been to the place where he buried her body. There Susan told him it was a favorite place of hers, and that she wanted to be buried there. (R. p. 122, lines 1-21.) Petitioner said the victim stabbed herself in the chest with the knife, pulled the knife out, put it in the sink, then fell backward where she hit her head on the oven handle. After collapsing on the ground, Susan had a five minute conversation with the Petitioner. (R. p. 124, lines 8-22.) Petitioner claimed the victim told him to get a tarp from the backyard and bury her in it. (R. p. 125, lines 2-7.)

Dr. Janice Ross, the pathologist who performed the autopsy, found multiple blunt force injuries to the victim's head and one stab wound to the torso just below the chest. (R. p. 52, lines 14-22.) The victim had at least five injuries that caused lacerations on the skin, and an underlying skull fracture.(R. p. 53, lines 1-4.) The pathologist opined that a straight object, consistent with a frying pan could have caused the injuries. Dr. Ross also testified the injuries could not have been self-inflicted because of the number of the injuries and the location about the head. (R. p. 54, lines 4-20.)

The stab wound was just beneath the sternum. The wound continued upward and backward and penetrated the heart. (R. p. 55, lines 20-25.) The weapon that caused the wound would have been two to four inches long to travel into the heart. (R. p. 57, lines 5-10.) Dr. Ross examined the rest of the victim's body and found no evidence of damage to any other organs or damage resulting from any natural disease processes. (R. p. 58, line 11 – p. 59, line 3.) The cause of death was homicide due to exsanguination from the stab wound, contributed by the blunt force injury to the head. (R. p. 59, lines 21-25.)

After confirmation that the body was recovered, Investigator Griffin arrested the Petitioner and Joseph Wilkes for murder. (R. p. 31, lines 2-11.) After he was arrested and Mirandized, Petitioner changed his story again and gave a statement to police in which he confessed to killing his wife. (R. p. 102, line 11 – p. 107, line 1.) In his interview with police, Petitioner mentioned his wife's brokerage account worth approximately $120,000, of which he was the beneficiary, as well as a life insurance policy. (R. p. 107, lines 16-24.) Petitioner also described his wife as gaining weight, having an affair, and being an alcoholic. (R. p. 108, lines 3-5.) He also said there was a "confrontation" between him and his wife. (R. p. 120, lines 2-6.)

ARGUMENTS

1. **Although the Court of Appeals determined that the trial court erred in instructing the jury that malice can be inferred from the use of the deadly weapon, they correctly determined that this error was harmless due to an overwhelming evidence of guilt. This error never affected the outcome of this trial.**

The Petitioner raised that there was an error by the trial court to charge the jury that malice can be inferred by the use of a deadly weapon. The Court of Appeals ruled that this was done in error since there has been rulings by this Court that a jury cannot infer from the use of a deadly weapon that malice existed. However, the Court of Appeals correctly ruled that any error that the trial court might have was harmless.

It is clear from the evidence and the defenses raised by the Petitioner, the victim was either murdered or committed suicide. There was no lesser included offense charged, nor any allegation of self-defense, or a mistake or accident. So the only result possible is that the victim committed suicide, then no malice exist, or she was murdered which means she was stabbed and beaten which of course revealed malice.

So in light of the evidence presented even though the instruction was made in error, this error was harmless due to the overwhelming evidence of malice presented during trial. Since malice was not in dispute, the decision of the Court of Appeals should not be under review.

Standard of Review

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt,* 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). Error is harmless when it could not reasonably have affected the result of the trial. *State v. Simmons,* 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018). Erroneous jury instructions are subject to a harmless error analysis. *State v. Smith,* 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). When considering whether an error with respect to a jury instruction was

harmless, it must be determined beyond a reasonable doubt that the error complained of did not contribute to the verdict. *State v. Middleton,* 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

Analysis

During jury instructions the trial court made the following instruction, "Inferred malice may also arise when the deed is done with a deadly weapon." (R. p. 225 lines 6-7). In the case of *State v. Burdette,* the South Carolina Supreme Court decided that the trial court cannot instruct the jury that malice can be inferred from the use of a deadly weapon regardless of the evidence presented at trial. *State v. Burdette,* 427 S.C. 490, 504-505, 832 S.E.2d 575, 583 (2019). This jury instruction was brought to the attention of the Court of Appeals. As part of their opinion, the Court of Appeals correctly determined that the trial court erred in giving this jury instruction. However, the Court of Appeals also correctly ruled that this error was harmless due to the overwhelming evidence of malice presented to the jury.

An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Chavis,* 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). The Court of Appeals was correct in deciding that this error regarding the jury instruction was harmless. This is due to the fact that malice would not going to be inferred by the jury. The facts that was presented and the defense given allowed the jury to make only two determinations. Either the victim killed herself, or she was murdered by being beaten and stabbed by the Petitioner. If the jury believed she was murdered then malice definitely existed.

Within their petition the Petitioner argues that other than the weapon the record is scant with evidence of actual malice. This is a somewhat mild review of the evidence presented to the jury. There was evidence provided by the State that the victim had multiple blunt force injuries to her head and one stab wound to the torso, just below the chest. (R. p. 231 line 14-22). The victim

also had at least five injuries that caused lacerations to her skin, and she had an underlying fracture to the skull. (R. p. 232 lines 1-4). The Petitioner also failed to seek any medical treatment for the victim, even though they were in close proximity to the hospital.[1] These actions of the Petitioner were definitely examples of malice.[2]

It was clear by the testimony and evidence presented, it was either murder or suicide. There was no evidence nor any jury instruction given suggesting this could have been possibly the lesser included offense of voluntary manslaughter, self-defense, or a mistake or accident. The element of malice was not at issue during this trial. If the jury believed the Petitioner and it was a suicide, malice did not exist and the Petitioner is not guilty. If the jury did not believe the Petitioner (which they did not) then he committed murder, so malice definitely exist.

The jury instruction did not contribute to the verdict, it was the jury not believing the story presented by the Petitioner; and, the enormous amount of mounting evidence presented by the State. It is clear that the jury charge given may have been done in error, but that error was completely harmless. The ruling by the Court of Appeals was correct as it pertains to the jury instruction given by the trial court, and how it was harmless as to the verdict. The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual

---

[1] The Wilkes home was located approximately one-half mile from Lexington Hospital; and, typical emergency response time is two minutes or less from the time of the 911 call. (R. p. 220 lines 5-8).

[2] "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." "It is doing of a wrongful act intentionally and *without just cause of excuse.*" Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life.* In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies "a general malignant *recklessness of the live and safety of others,* or a condition of the mind [that] shows a heart regardless of social duty and fatality bent on mischief" *State v. Oates,* 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017)(emphasis in original), *quoting, In re Tracy,* 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010), *State v. Douglas,* 411 S.C. 307, 318, 768 S.E.2d 232, 238-39 (Ct. App. 2014).

question of the defendant's guilt or innocence ... and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986).

2. Since the Petitioner failed to raise an objection or request that trial court to watch the movie *Where the Lilies Bloom,* the Court of Appeals was correct in determining that the Petitioner failed to preserve this issue for appeal.

The Petitioner attempted to put into evidence a clip from the motion picture *Where the Lilies Bloom.* The Petitioner argued that the due to her interest in the film, the victim wanted a natural and secretive burial in the woods. The Petitioner testified that was a part of her loner personality.

During trial, Petitioner attempted to enter the first thirty-five (35) minutes of the movie into evidence. At the conclusion of the Petitioner's argument 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 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. (R. p. 148 line 9-13). After the trial court expressed his decision all Petitioner's counsel said was, "Thank you, Your Honor." (R. p. 148 line 15). Petitioner failed to object, or make a request to the trial judge to review the movie himself.

Standard of Review

"[T]he admission of evidence is within the discretion of the trial court and will not be reversed by this Court absent an abuse of discretion." *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 598, 601 (1999). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial

court. Issues not raised and ruled upon in the trial court will not be considered for appeal. *State v. King,* 424 S.C. 188, 198, 818 S.E.2d 204, 209 (2018).

Argument

It was incumbent on the Petitioner 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 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).

It was the Petitioner's obligation to raise an objection or request the trial court to view the film in order to preserve this issue for appeal. If they fail to accomplish neither this issue is not preserved. The Court of Appeals was correct in not reviewing this issue. This issue was raised for the first time on appeal. 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 exist due to the fact no appellant court can make a ruling on a possible error of the trial court if the issue was never raised before the trial 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 Petitioner raised to the trial court that he should view the film before his ruling, or even after the decision was made, it is possible the trial court would have considered watching at least

the requested first thirty-five minutes. However, this was never requested by the Petitioner so no ruling was ever made. The Court of Appeals cannot rule on any possible error that has not been preserved. The decision by the Court of Appeals regarding the failure by the Petitioner of preserving this issue for appeal was proper and should not be subject to review.

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).

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,* a PCR judge was tasked with making credibility findings concerning witnesses who the court decided not to hear, but 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.[3] 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.

[3] 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).

3. **The trial court decided to exclude the film from being introduced as evidence pursuant to Rule 402, the Court of Appeals was correct in ruling that Petitioner failed to address the trial court's decision by arguing that the State argument pursuant to Rule 403 was unlawful. Since Petitioner failed to argue the decision made by the trial court it was not preserved for appeal, the Court of Appeals was not in error in denying to address this issue.**

During trial the State argued that allowing the film into evidence would be a violation of Rule 403 of the South Carolina Rule of Evidence. Rule 403 specifically state,

> 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

The State argued that allowing this film into evidence would be cumulative, and misleading and confusing to the jury. In response, the Court decided that allowing the film into evidence would not be a violation of Rule 403 SCRE but a violation of Rule 402 SCRE. It was the trial court's position that this film is not relevant so it should not be allowed into evidence on those grounds. Rule 402 SCRE specifically state:

> 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.

The purpose of the Court of Appeals is to review the decisions of the lower courts.[4] The duty of the Court of Appeals is not to review decisions or arguments made by lawyers. That is the duty of

[4] The court has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission. S.C. Code Ann. §14-8-200 (2007).

the presiding judge. If an attorney makes an argument that is not lawful, the presiding will rule as to veracity of legality of that argument. That court's decision would be reviewed by the Court of Appeals or maybe ultimately the Supreme Court. However, that argument can only be made if it is objected and ruled upon by presiding judge, then presented to the Court of Appeals in their initial brief. If this is not done this issue is not preserved.

What the Petitioner has done in this matter is argued that the State made an incorrect argument regarding Rule 403 being violated as it pertains to the viewing of the film. However, that is not what is at issue before the Court of Appeals. What is at issue is the decision of the trial court, which is, that the film is not relevant pursuant to Rule 402. That argument was not made by the Petitioner until his reply brief, therefore, it is not preserved. Then it is too late so it was not preserved. An appellant cannot make new arguments for reversal in a reply brief. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993). An argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief. *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.* 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001).

It was the right of the trial court to exclude the evidence under rule 402. A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Mercer,* 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). The Petitioner argues that the Court of Appeals deciding this was not preserved because the court decision that Rule 402 applies which was never argued by the Petitioner, "enable the State to reap benefits of a ruling based on nothing the State presented to the court." (Petition pg. 17) The Court of Appeals has the ability to make a ruling on anything that has appeared in the record. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing

in the Record on Appeal. Rule 220(c) SCACR. The State made an argument regarding the accumulation or confusion this evidence can be for the jury pursuant to Rule 403. However, the Court made a decision on its relevance pursuant to Rule 402. The Court of Appeals has the ability to make the ruling they made because these arguments and ruling is in the record on appeal. Prior case law also supports this decision. Since the Petitioner made the error of not presenting this argument within their initial brief, it was waived and cannot be considered by the Court of Appeals. The Court of Appeals made the correct decision in this matter, as proven in prior case law, so this decision should not be subject to review by this Court.

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the questions presented warrants certiorari review. This Court should deny this petition for writ of certiorari and let stand the decision of the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS JR.
Assistant Attorney General
S.C. Bar No. 65282

S.R. HUBBARD, III
Solicitor Eleventh Judicial Circuit

By: *s/ Tommy Evans, Jr.*
TOMMY EVANS, JR.
S.C. Bar No. 65282
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR THE RESPONDENT

March 14, 2022