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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD RAY RICHBURG,

PETITIONER

APPELLATE CASE NO. 2019-001007

Opinion No. 2022-UP-118

PETITION FOR REHEARING

On March 23, 2022, this Court affirmed the trial judge's decision to allow the state to introduce a video recording of Petitioner's arrest and prohibiting defense counsel from cross-examining the lead investigator on certain statements made by Petitioner during the course of the investigation. State v. Richburg, Op. No. 2022-UP-118 (S.C. Ct. App. Filed March 23, 2022). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

Video of Petitioner's Arrest

In affirming Petitioner's convictions, this Court held that a jury could infer that the video recording of Petitioner's arrest showed that he had knowledge of the warrants for his arrest and was attempting to avoid apprehension. Therefore, this Court concluded that the video recording was admissible as evidence of flight. However, this Court neglected to address the extreme danger of unfair prejudice that the video carried with it. Respectfully, this Court may have overlooked or misapprehended the very basis for Petitioner's objection.

"Flight evidence is relevant when there is a nexus between the flight and the offense charged." State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). However, under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

The objection made by Petitioner was not to evidence of flight. The objection was to a video of his arrest which contained extremely prejudicial information regarding the arrest of his girlfriend and the placing of his child into DSS custody. R. 24, l. 19 – 26, l. 2. There was no contention by the defense that the state could not present testimony regarding Petitioner's evasive behavior after warrants were issued for his arrest. However, the state cannot introduce evidence where the probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

In affirming Petitioner's convictions this Court neglected to consider State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), where this Court held that the defendant's statements to law enforcement were involuntarily made and inadmissible. The reason this Court found the defendant's statements to be inadmissible in Corns was because his statements were made in response to the officers threatening to arrest his wife and take his children to DSS. Id. at 552, 426 S.E.2d at 327. This Court determined that the threats made against the defendant's wife and children amounted to improper influence rendering his confession involuntary. Id.

Although Corns dealt with the admissibility of a defendant's statement, the opinion highlights the problematic nature of officers making threats against a defendant's family. To the extent that a threat against a defendant's family may render his statements in response to such a threat inadmissible, so to should a video recording showing these threats being made be closely scrutinized under Rule 403, SCRE. While Petitioner did not make any incriminating statements on the video, he did apparently heed the officer's demands only in response to those threats being made to him. See State's Ex. 7.

While our Courts have held that evidence of flight may be admissible to show a guilty conscience, it is not necessarily always admissible. See State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) (recognizing that evidence of flight may be used to show a guilty conscience but holding that defendant's failure to stop for a blue light was inadmissible because it was not motivated by the outstanding murder charge); State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013) (evidence that Martin gave false information to police was inadmissible because there was no nexus between the false information and the charged crime).

The extremely prejudicial nature of the content of the video lies primarily in the insinuation that Petitioner was abandoning his son and girlfriend. The jury could view the video as showing

Petitioner to be a bad father and boyfriend which was, of course, not a proper consideration for the jury. The video was wholly unnecessary and a gratuitous attack on Petitioner's character while providing minimal probative value. It showed that Petitioner was willing to allow his girlfriend to be arrested and his child taken into DSS custody instead of surrendering to the police himself.

The question before the jury was whether Petitioner knowingly participated in the shooting of the Brinson's house. The jury did not need to consider whether Petitioner was a "good" or "bad" father to his child, or significant other to his girlfriend. However, the video introduced this exact consideration into the jury's deliberations by showing the presence of Petitioner's child and the officer's threatening to take the child into DSS custody. The trial judge erred in admitting the body camera footage of Petitioner's arrest because its probative value was substantially outweighed by the danger of unfair prejudice.

Limiting Defense Counsel's Cross-examination

This Court found that Petitioner's argument on appeal regarding the cross-examination of the lead investigator was different from the argument advanced at trial and was therefore not preserved for appellate review. Because this Court found the issue unpreserved, it did not reach the merits.

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). "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." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). "A party need not use the exact name of a legal doctrine in order for the issue to

be preserved, but it must be clear the argument has been presented on that ground." State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010).

The four basic requirements for issue preservation are: "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)). Further, a party cannot make a different argument on appeal than the argument made at trial. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). If a party fails to raise an issue at trial, then the issue is waived on appeal. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

However, "issue preservation is not a 'gotcha' game" and that "[i]nstead of being hyper-technical, [appellate courts] approach preservation with a practical eye." State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019); see also State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (holding that hearsay objection was preserved where the basis for the objection was apparent from the context and it was clear that both the state and trial judge understood the objection to have been based on hearsay).

In viewing defense counsel's argument at trial with a practical eye and in fairness to the trial judge, counsel's request to cross-examine the lead investigator about Petitioner's prior statements to law enforcement was reasonably understood by the trial judge as a request to admit the evidence under Rule 106, SCRE.

This issue was initially raised by the state in which it objected to the admission of the prior statement under Rule 106, SCRE. Furthermore, the state cited to State v. Tennant, 383 SC 245, 678 S.E.2d 812 (Ct. App. 2009) and State v. Oglesby, 384 SC 289, 681 S.E.2d 620 (Ct. App. 2009)

for support – both Rule 106, SCRE cases. R. 216, l. 11 – 219, l. 16. Therefore, the issue was raised to the trial judge as a Rule 106, SCRE issue. The state also argued that the statement was self-serving hearsay.

Defense counsel responded to the state's contentions by arguing that Petitioner's second statement was not self-serving. However, counsel also argued that the second statement was necessary to complete the jury's understanding of the case. Counsel argued:

> I also think[] there's a context – there has been some discussing that [Petitioner] attempted to give an alibi prior to his arrest. I think this circles back on that and says he abandoned that and ... he admitted to being there. Because I think that, you know, - I don't have to diffuse that I'm putting up an alibi defense because I'm not. I think that this – in no terms is this a self-serving statement for me to merely ask Investigator Stewart, Did he later admit to being there, without, you know, having to say, Did you do an interview, Was it recorded, anything like that.
>
> That would just be my contention. This is not a self-serving statement *and it is kind of required to kind of put to bed that this is not an alibi situation.*

R. 220, ll. 5 – 18 (emphasis added).

In Petitioner's first statement, he stated that he had been with Smith earlier in the day but was not with Smith at the time of the shooting. R. 299. In Petitioner's second statement, he told the investigator that he was present with Smith at the time of the shooting but did not know that Smith was going to shoot at the Brinson's house. See State's Ex. 6. In other words, Petitioner's first statement was that of an alibi defense whereas his second statement was a mere presence defense. The state only introduced Petitioner's first statement. R. 210, l. 5 – 211, l. 11. Defense counsel's argument was reasonably understood in the context it was made as an argument that the second statement was necessary to complete the context of the first statement.

In the specific context of this case, where defense counsel was responding to the state's Rule 106, SCRE argument by indicating that the second statement was necessary to show that Petitioner abandoned his defense of alibi, counsel was arguing for the admission of the statement

pursuant to Rule 106, SCRE. This is the same argument that was made on appeal and this Court should reconsider its holding that this issue was unpreserved for appellate review. This Court should further rule on the merits of Petitioner's second issue as fully argued in the final briefs. Based upon the specific points overlooked and/or misapprehended by this Court in its opinion discussed above, Petitioner requests this Court to rehear the matter.

Respectfully Submitted,

ADAM SINCLAIR RUFFIN
Appellate Defender

This 31st day of March, 2022.

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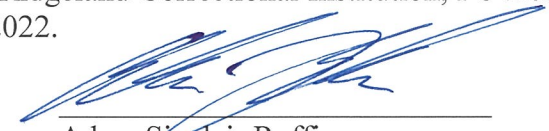
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Donald Ray Richburg, #340617, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 31st day of March, 2022.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER