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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Marion County
Honorable William H. Seals, Circuit Court Judge

THE STATE,

PETITIONER,

V.

RUSSELL LEVON JOHNSON,

RESPONDENT.

APPELLATE CASE NO. 2021-000425

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Did the Court of Appeals correctly hold Respondent's argument that the trial judge erred in admitting evidence of unindicted domestic violence, which occurred in Dillon and Marlboro Counties, without instructing the jury that the domestic violence charge had to be supported by evidence that occurred within Marion County was preserved for appellate review, and further that the judge erred by failing to give such an instruction because it is unclear from the record whether the jury found Respondent guilty based on the indicted conduct which occurred in Marion County or the unindicted conduct which occurred in other jurisdictions?

STATEMENT OF THE CASE

A Marion County Grand Jury indicted Respondent on February 9, 2017 for first degree domestic violence and kidnapping. R. 152-153. His case was called to trial on November 13, 2017 before the Honorable William H. Seals, Jr., and a jury. R. 1. Assistant Solicitors John Holt and Patti Parker represented the state. R. 1. Scott Floyd represented Respondent. R. 1. The jury acquitted Respondent of kidnapping but found him guilty of first degree domestic violence. R. 136, l. 9 – 139, l. 25. He was sentenced to ten years imprisonment. R. 142, ll. 12-13.

By opinion filed January 13, 2021, the Court of Appeals reversed Respondent's conviction and sentence. State v. Johnson, 432 S.C. 652, 855 S.E.2d 305 (Ct. App. 2021). The state filed a petition for rehearing on February 12, 2021. App. 9-19. By order filed March 25, 2021, the Court of Appeals denied the petition for rehearing. App. 20. On April 26, 2021, the state filed a petition for writ of certiorari with this Court. Respondent filed a return to the petition for writ of certiorari on May 25, 2021.

By order dated February 1, 2022, this Court granted the petition for writ of certiorari and ordered further briefing. The state filed a brief of petitioner on March 3, 2022.

This brief of respondent follows.

STATEMENT OF FACTS

Respondent and Tonya Richburg, who knew each other since high school, lived together in Longs for four years. Around August 2016, the pair separated, and Richburg ultimately moved to Mullins in Marion County with her children. R. 28, l. 4 – 30, l. 1; R. 88, ll. 13-23. On September 15, 2016, Respondent showed up at Richburg's new house and asked her to ride to the store with him so the two could talk. Richburg agreed. In the car, Respondent told Richburg that he heard she was "moving on" and accused her of cheating on him and stealing money from him. R. 30, ll. 2-25.

As they were driving, Richburg asked Respondent to take her home so she could get her children. However, according to Richburg, Respondent refused. Richburg claimed Respondent grabbed her phone and took the battery out. He also took the battery out of his phone and told Richburg, "[N]obody's gone get in contact with you or me." R. 31, ll. 4-21.

Respondent then drove Richburg to a wooded area in Dillon County. They stood outside and talked. Respondent continued to accuse Richburg of cheating on him and stealing money from him. R. 31, l. 15 – 32, l. 15. After stopping in Dillon, Respondent drove to a store and bought a beer. Richburg claimed Respondent then drove her "down some back roads" and "a long dirt road" to another wooded area in Clio, which is in Marlboro County. R. 32, l. 21 – 33, l. 5; R. 35, l. 20 – 36, l. 7.

Respondent "made his own path through" the woods with the car and parked. Richburg claimed Respondent then got out of the car, walked to the trunk, and grabbed "a long metal stick" with a sharp end. She alleged Respondent stabbed her in the chest with this metal object as she was sitting in the car. R. 36, ll. 7-13. According to Richburg, Respondent then pulled her out of the car and onto the ground where he kicked and punched her in the face and on her side.

Once she was on the ground, Respondent grabbed a hammer from the trunk and struck her in the back of the head twice. He continued to accuse her of cheating on him and stealing money from him. R. 36, l. 13 – 37, l. 9.

Despite allegedly telling Richburg that "nobody would ever find" her in the woods, Respondent eventually helped Richburg get back in the car and drove her back to Mullins. R. 36, l. 18 – 37, l. 1; R. 38, ll. 1-12. On the way, the two stopped at a church where Richburg went the bathroom outside and a store where Respondent bought another beer. R. 38, l. 11 – 39, l. 20. During these stops, Richburg never tried to run away or find help. R. 39, ll. 21-25. Respondent even offered to take Richburg to the hospital. However, Richburg refused the offer because she "didn't want to get him in trouble." R. 57, l. 20 – 58, l. 7.

The pair eventually arrived at the Imperial Motel in Mullins, which is in Marion County, where Respondent rented a room. R. 40, ll. 4-8. Once in the room, Richburg claimed Respondent stood behind her and "tried to pop my neck." He allegedly told her, "[T]onight is going to be your last night here. And when I kill you, I gone turn around and kill myself." R. 40, ll. 18-25.

Respondent ultimately laid down on the bed and fell asleep. When Richburg noticed Respondent was sleeping, she ran out of the room and knocked on the door of the nearest room. She asked the occupants to take her home. However, once they saw her condition, they said they were going to call the police and Richburg ran from them. R. 41, ll. 1-6. She said she ran because she "didn't want to get him [Respondent] in trouble" and "didn't want him to go to jail." R. 41, ll. 8-11. Finally, Richburg ran into a police officer that was at a store nearby. She was taken to the hospital by ambulance. R. 41, ll. 6-15.

The state failed to present any evidence from the medical professionals who treated Richburg that morning and in the subsequent days regarding the extent of her injuries and any

necessary treatment. Richburg claimed her arm was broken in two places and that she received stitches to treat a wound on her arm. R. 42, ll. 1-18.

Respondent gave a statement to law enforcement after his arrest in which he admitted to picking Richburg up in his car that day and to being in the motel room with her. However, he "said he did not know how her injuries happened." R. 105, ll. 14-23.

The jury struggled to reach a verdict. Minutes after the trial judge gave the jury an Allen[1] charge, it returned with a verdict acquitting Respondent of kidnapping, but finding him guilty of first degree domestic violence. R. 136, l. 9 – 139, l. 25.

Motion and Ruling Below

Respondent moved pretrial to exclude any evidence of domestic violence that allegedly occurred in counties other than Marion County where Respondent was indicted and tried. Defense counsel explained that Richburg alleged Respondent committed acts of domestic violence in Dillon and Marlboro Counties in addition to Marion County where he was indicted. Specifically, counsel moved to "limit any testimony about any domestic type abuse that she [Richburg] alleges occurred in those counties because this court doesn't have jurisdiction to hear allegations of domestic violence that occurred outside of the county." R. 5, ll. 13-25.

Citing State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979), the assistant solicitor argued kidnapping is a continuing offense and that the evidence of domestic violence that allegedly occurred in Dillon and Marlboro Counties was admissible as evidence of kidnapping. R. 6, ll. 2-9. He argued, "And the State feels that the jury cannot get a full and fair accurate view of what happened if we can't present evidence to show why she did not want to get away from this gentleman." R. 6, ll. 9-13. The solicitor clarified that Respondent was only being prosecuted for

[1] Allen v. United States, 164 U.S. 492 (1896).

the acts of domestic violence that allegedly occurred in the room at the Imperial Motel in Marion County, but the state sought to admit the other evidence of domestic violence that took place in Dillon and Marlboro Counties *to prove kidnapping*. R. 6, ll. 13-21 (emphasis added). He also argued this evidence was part of the *res gestae* of the crime. R. 6, ll. 17-21.

Defense counsel then clarified his objection. He asserted, "There's two separate counts on this indictment (domestic violence first degree and kidnapping). And what my concern is, Your Honor, is if they're [the witnesses are] allowed to testify about acts of domestic violence that occurred in another jurisdiction, I don't know how they're [the jurors are] going to separate that out when they come to deliberate on whether or not he [Respondent] committed domestic violence here in Marion County." R. 7, ll. 10-21.

The trial judge took a short break to read State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979), which was cited by the state. R. 8. ll. 23-25. In Ziegler, the defendant was indicted and tried for kidnapping, first degree criminal sexual conduct, and armed robbery for conduct that allegedly took place in Richland County and on Fort Jackson. Ziegler, 274 S.C. at 8, 260 S.E.2d at 183. On appeal, Ziegler argued the Court of General Sessions in Richland County did not have jurisdiction over criminal actions that took place on Fort Jackson, which was owned by the federal government. Id. This Court agreed. It held "the lower court was without jurisdiction to try offenses within the boundaries of Fort Jackson." Id. at 9-10, 260 S.E.2d at 184. In so holding, the Court emphasized, "[W]e have evidence of a kidnapping taking place off the fort and continuing onto the fort property. We also have evidence of sexual misconduct and of armed robbery both off and on the fort premises." Id. at 9, 260 S.E.2d at 182. The Court concluded its holding did not warrant a new trial on the kidnapping or armed robbery convictions because kidnapping is a continuing offense and because "the robbery of some, if not all, of the items

alleged to have been taken, was complete while the parties were in Richland County outside the fort." Id. at 10-11, 260 S.E.2d at 184-185. However, the Court asserted, "At the same time, we 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 indictment and accepted by the jury as a basis for conviction*." Id. at 12, 260 S.E.2d at 185 (emphasis added).

After reviewing Ziegler, the trial judge expressed his concern with the admission of the unindicted acts of domestic violence. R. 8, l. 23 – 9, l. 20. While noting this Court in Ziegler held kidnapping was a continuing offense, the judge also emphasized the last paragraph of the opinion concerning the prejudice as relates to the sexual misconduct conviction. R. 9, ll. 7-17. He stated, "That would lead me to believe that they're trying to isolate the CSC to Richland County as opposed to the fort, even though they allowed the kidnapping to go around." R. 10, ll. 17-20.

The assistant solicitor continued to assert that the state only sought to introduce the evidence of unindicted acts of domestic violence to prove kidnapping, not as substantive evidence of first degree domestic violence for which Respondent was indicted. The solicitor suggested the trial judge give the jury a limiting instruction explaining that evidence of the unindicted acts of domestic violence can only be considered by the jury as proof of kidnapping. R. 10, ll. 4-16.

When asked by the trial judge about a limiting instruction, Respondent's counsel continued to object to the admission of the alleged acts of domestic violence that occurred in other counties. He asserted, "[B]ack to my original point, I don't think there's any way for the

jury to separate all this out of their minds . . .” R. 12, l. 20 – 13, l. 3. However, counsel later made clear that if the judge chose to admit the evidence, he “certainly . . . would request a charge [limiting instruction].” R. 16, ll. 20-22. The solicitor continued to assert that a limiting instruction “could fix” any concerns related to prejudice caused by the admission of “other crimes that happened in other jurisdictions.” R. 16, l. 23 – 17, l. 3.

The trial judge ultimately took the matter under advisement. R. 17, ll. 4-6. During Richburg’s testimony, the judge ruled that evidence of the unindicted acts of domestic violence which allegedly occurred in Dillon and Marlboro Counties was admissible. He stated, “What I’m going to do is I’m going to allow events that happened in other counties in this trial. The State v. Ziegler allows that in regard to the kidnapping anyway. Furthermore, in regards to domestic violence, I’m going to allow events that happened in other counties only to prove kidnapping. Otherwise, I’m going to give a clear charge that to prove domestic violence in this case it must be from evidence that happened in Marion County. Any of the domestic violence acts that happened in another county can only pertain to the kidnapping and not domestic violence.” R. 34, ll. 9-20.

Richburg then testified as to the allegations of domestic violence that allegedly occurred in Dillon and Marlboro Counties in addition to what occurred in Marion County. Respondent’s counsel properly renewed his objection when the trial judge admitted State’s Exhibit Nos. 1-6, which were photographs that depicted injuries and conduct that occurred outside the indictment. R. 65, l. 17 – 66, l. 11; R. 68, l. 10 – 69, l. 5.

After the state rested, the trial judge unexpectedly rescinded his prior ruling and held the evidence of domestic violence that allegedly occurred in Dillon and Marlboro Counties was admissible outright and not limited to merely proof of kidnapping. R. 107, ll. 9-10. Citing to

S.C. Code Ann. §§ 17-21-10 and 17-21-20, which concern the proper venue for the prosecution of murder when the injury and death occur in different counties, the judge concluded "if the elements of the offense took place in more than one county [then] each county has concurrent jurisdiction." The judge also cited to State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976) and State v. Gethers, 269 S.C. 105, 236 S.E.2d 419 (1977) in support of his ruling. Confusing the nature of Respondent's objection to the admission of this evidence, the judge asserted, "In this case, we have domestic violence and kidnapping in Marion and possibly Dillon and possibly Marlboro. So I think venue is proper here in Marion." R. 107, ll. 9-23.

Respondent's counsel renewed his objection to the court's ruling. He argued S.C. Code Ann. §§ 17-21-10 and 17-21-20 do not apply in this case, particularly where those statutes deal with murder. R. 108, ll. 1-10.

Due to the trial judge's ultimate ruling, he never gave the jury a limiting instruction that evidence of domestic violence that allegedly occurred in Dillon and Marlboro Counties could only be considered by the jury to prove kidnapping. Consequently, the jury was permitted to consider the evidence of unindicted acts of domestic violence during its deliberations as proof of the first degree domestic violence offense for which Respondent was being tried.

Appeal

On appeal, Respondent argued the trial judge abused his discretion by admitting evidence of the unindicted acts of domestic violence that allegedly occurred in Dillon and Marlboro Counties as proof of the first degree domestic violence offense for which Respondent was indicted and tried in Marion County, particularly where the trial judge failed to give a limiting instruction to the jury that it could only consider this evidence as proof of kidnapping. Respondent further argued he was prejudiced since it is unclear from the record whether the jury

found him guilty based on the indicted conduct which allegedly occurred in Marion County or the unindicted conduct which occurred in Dillon and Marlboro Counties.

During oral argument before the Court of Appeals, Respondent agreed evidence of the alleged acts of domestic violence that occurred in Dillon and Marlboro Counties was admissible as to the kidnapping offense but continued to assert that the trial judge erred by failing to give a limiting instruction. See App. 3-4.

By opinion filed January 13, 2021, the Court of Appeals reversed Respondent's conviction and sentence holding the trial judge 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 for which Respondent was being tried. App. 1-8. Firstly, the court addressed the state's claim that the issue is not preserved because Respondent failed to object to the trial judge's jury charge when asked whether there were any exceptions thereto. App. 4. The court emphasized that Respondent objected to the judge's ultimate decision to admit evidence of the alleged acts of domestic violence from other counties as evidence of both the kidnapping and first degree domestic violence charges for which Respondent was being tried, thereby eliminating the need for a limiting instruction. App. 4. The court concluded, "[T]he 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 would have affected the court's decision." App. 5.

The Court of Appeals also addressed the state's claim that Respondent asserted on appeal for the first time that the trial judge "confused" his argument as relating to venue. App. 5. The court exclaimed, "The State's preservation argument in this instance is simply without merit. The circuit court knew and understood the nature of Johnson's [Respondent'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." App. 5.

As to the merits, the Court of Appeals determined this Court's opinion in State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979) controlled. App. 5. The court emphasized that the trial judge originally ruled he would follow the rationale set forth in Ziegler but would eliminate any prejudice by giving a limiting instruction. However, the judge then turned to the venue statutes regarding kidnapping and murder cases, which are inapplicable since (1) Richburg did not die from her injuries and (2) Respondent never contested venue in Marion County—he merely contested the admissibility of acts of domestic violence outside Marion County. App. 6.

The Court of Appeals held the case "aligned with Ziegler wherein certain criminal acts were continuing but the assaults were separate and distinct." App. 6. It emphasized that Respondent attacked Richburg in the woods in Marlboro County and sometime later he attempted to "pop" her neck in Marion County—two separate acts much like the sexual assaults in Ziegler. In sum, the court held the trial judge "erred in not giving a limiting instruction to mitigate the prejudice to Johnson [Respondent] and ensure the jury found Johnson's conduct in Marion County established his guilt on the domestic violence charge." App. 6.

The Court of Appeals further held the error was not harmless because the evidence in the case which clearly established domestic violence related to the abuse in Marlboro County while the evidence of domestic violence in Marion County was significantly weaker. The court could not be certain that the jury did not consider the precluded evidence in reaching its decision. App. 7-8.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting Pagan, 369 S.C. at 208, 631 S.E.2d at 265) (internal quotation marks omitted).

ARGUMENT

The Court of Appeals correctly held Respondent's argument that the trial judge erred in admitting evidence of unindicted domestic violence, which occurred in Dillon and Marlboro Counties, without instructing the jury that the domestic violence charge had to be supported by evidence that occurred within Marion County was preserved for appellate review, and further that the judge erred by failing to give such an instruction because it is unclear from the record whether the jury found Respondent guilty based on the indicted conduct which occurred in Marion County or the unindicted conduct which occurred in other jurisdictions.

Preservation

The state argued the Court of Appeals reversed Respondent's conviction based on an issue that was not preserved for appellate review. The state maintained "venue was the **only** issue 'fairly arising upon the record of the court.'" BOP at 7 (quoting Rule 220(b), SCACR) (emphasis in original). However, as the Court of Appeals found in its opinion, which is fully supported by the record below, Respondent "never contested venue in Marion County—he contested the admissibility of acts of domestic violence outside Marion County." App. 6. Specifically, Respondent moved pretrial to exclude any evidence of domestic violence that allegedly occurred in counties other than Marion County where Respondent was indicted and tried because the court "doesn't have jurisdiction to hear allegations of domestic violence that occurred outside of the county." R. 5, ll. 13-25.

Citing State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979), which was extensively relied upon by Respondent on appeal and by the Court of Appeals in reaching its decision, the assistant solicitor argued the evidence of domestic violence that allegedly occurred in Dillon and Marlboro Counties was admissible as evidence of kidnapping, a continuing offense. R. 6, ll. 2-9.

The solicitor indirectly acknowledged the evidence was not admissible as proof of the domestic violence charge for which Respondent was being tried.

Respondent's counsel then expanded upon his objection. He asserted, "There's two separate counts on this indictment (domestic violence first degree and kidnapping). And what my concern is, Your Honor, is *if they're [the witnesses are] allowed to testify about acts of domestic violence that occurred in another jurisdiction, I don't know how they're [the jurors are] going to separate that out when they come to deliberate on whether or not he [Respondent] committed domestic violence here in Marion County*." R. 7, ll. 10-21 (emphasis added).

After reviewing Ziegler, which the Court of Appeals later held was controlling, the trial judge expressed his concern with the admission of the unindicted acts of domestic violence. R. 8, l. 23 – 9, l. 20; See App. 5. While acknowledging the Court in Ziegler held kidnapping was a continuing offense, the judge emphasized the last paragraph of the opinion concerning the prejudice related to the sexual misconduct conviction. R. 9, ll. 7-17. He stated, "That would lead me to believe that they're trying to isolate the CSC to Richland County as opposed to the fort, even though they allowed the kidnapping to go around." R. 10, ll. 17-20.

After again asserting that the state only sought to introduce evidence of unindicted acts of domestic violence to prove kidnapping, the solicitor suggested the trial judge give the jury a limiting instruction explaining that evidence of domestic violence that occurred in Dillon and Marlboro Counties can only be considered by the jury as proof of kidnapping. R. 10, ll. 4-16. The solicitor stressed that a limiting instruction "could fix" any concerns related to prejudice caused by the admission of "other crimes that happened in other jurisdictions." R. 16, l. 23 – 17, l. 3.

When asked by the trial judge about a limiting instruction, Respondent's counsel continued to object to the admission of the alleged acts of domestic violence that occurred in other counties. R. 12, l. 20 – 13, l. 3. However, *counsel made clear that if the judge chose to admit the evidence, he "certainly . . . would request a charge [limiting instruction]*." R. 16, ll. 20-22 (emphasis added). Consequently, despite the state's argument to the contrary, Respondent unambiguously requested a limiting instruction. See BOP at 9.

During Richburg's testimony, the judge initially ruled that evidence of the unindicted acts of domestic violence which allegedly occurred in Dillon and Marlboro Counties was admissible as evidence of kidnapping pursuant to Ziegler. However, he stated he was going to "give a clear charge that to prove domestic violence in this case it must be from evidence that happened in Marion County. Any of the domestic violence acts that happened in another county can only pertain to the kidnapping and not domestic violence." R. 34, ll. 9-20.

After the state rested, the judge unexpectedly rescinded his prior ruling and found the evidence of domestic violence that occurred in other jurisdictions was admissible outright and not limited to merely proof of kidnapping based on S.C. Code Ann. §§ 17-21-10 and 17-21-20. R. 107, ll. 9-10. The judge's ruling eliminated the need for a limiting instruction. Respondent objected to the decision. He argued the venue statutes cited by the judge do not apply in this case. R. 108, ll. 1-10.

Based on this extensive review of the record below, it is obvious that the trial judge knew and understood the nature of Respondent's objection from the beginning of trial, particularly given the judge's thorough review of this Court's opinion in Ziegler. 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."). Moreover, the issue concerning the limiting instruction was clearly before the trial judge and was finally ruled upon on the record. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.); State v. Johnson, 333 S.C. 62, 64 n. 1., 508 S.E.2d 29, 30 n. 1. (1998) (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. Timmons, 327 S.C. 48, 54, 488 S.E.2d 323, 326 (1997) (holding it was clear the appellant wanted an instruction limiting the use of evidence and that a written request for a jury instruction is not required). Consequently, the matter on appeal is preserved.

Merits

Turning to the merits, the Court of Appeals correctly held that the trial judge erred by admitting evidence of the alleged acts of domestic violence that occurred in Dillon and Marlboro Counties, without instructing the jury that it could only consider this evidence as to kidnapping. As Respondent's counsel argued below, it was impossible for the jurors to separate the unindicted conduct "out when [it came time] to deliberate on whether or not he [Respondent] committed domestic violence here in Marion County" since the judge failed to give a limiting instruction. R. 7, ll. 10-21.

As discussed at trial and above, in Ziegler, the defendant was indicted and tried for kidnapping, first degree criminal sexual conduct, and armed robbery for conduct that allegedly took place in Richland County and on Fort Jackson. 274 S.C. at 8, 260 S.E.2d at 183. On appeal, Ziegler argued the Court of General Sessions in Richland County did not have jurisdiction over

criminal actions that took place on Fort Jackson, which was owned by the federal government. Id. This Court agreed. It held "the lower court was without jurisdiction to try offenses within the boundaries of Fort Jackson. Id. at 9-10, 260 S.E.2d at 184. In so holding, the Court emphasized, "[W]e have evidence of a kidnapping taking place off the fort and continuing onto the fort property. We also have evidence of sexual misconduct and of armed robbery both off and on the fort premises." Id. at 9, 260 S.E.2d at 182.

The Court concluded its holding did not warrant a new trial on the kidnapping or armed robbery convictions because kidnapping is a continuing offense and because "the robbery of some, if not all, of the items alleged to have been taken, was complete while the parties were in Richland County outside the fort." Id. at 10-11, 260 S.E.2d at 184-185. However, the Court asserted, "At the same time, we 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 indictment and accepted by the jury as a basis for conviction." Id. at 12, 260 S.E.2d at 185.

In this case, it is impossible to determine whether the jury found Respondent guilty for the conduct covered in the indictment, which allegedly occurred at the Imperial Motel in Marion County, or the unindicted conduct, which occurred in Dillon and Marlboro Counties. The trial judge erred by admitting this unindicted evidence without giving a limiting instruction to mitigate the prejudice to Respondent and ensure the jury found Respondent's conduct in Marion County established his guilt on the domestic violence charge.

"[E]vidence of other crimes or bad acts is generally inadmissible to prove the crime charged." State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998). However, that is precisely

what occurred in this case. The state was permitted to introduce evidence of uncharged conduct to prove the first degree domestic violence for which Respondent was indicted and tried.[2] Without a limiting instruction to the jury, it is certain the jury considered this evidence when it convicted Respondent.

Moreover, the trial judge's reliance on 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) was misplaced. 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. The single instance of rape was prosecuted in the county where it occurred, and as established, kidnapping is a continuous offense. In Allen, the victim was kidnapped and murdered, and the evidence 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 held venue in Florence County was proper.

Neither Gethers nor Allen is analogous to this case. Rather, as the Court of Appeals correctly held, it "aligns with Ziegler wherein certain criminal acts were continuing but the assaults were separate and distinct." App. 6. Here, there was evidence Respondent attacked Richburg in the woods in Marlboro County and then "tried to pop [her] neck" in Marion County—two distinct acts like the assaults in Ziegler. R. 40, ll. 18-25.

Accordingly, the trial judge abused his discretion by admitting evidence of unindicted acts of domestic violence without giving a limiting instruction. Respondent was undoubtedly

[2] The evidence of uncharged acts of domestic violence also should have been excluded pursuant to Rule 404(b), SCRE, State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and Rule 403, SCRE.

prejudiced because it is impossible to determine from the record whether the jury found Respondent guilty based solely on the conduct alleged in the indictment or for the uncharged acts of domestic violence that occurred in Dillon and Marlboro Counties, which fell outside the scope of the indictment. The trial judge's error requires reversal.

Respectfully, this Court should dismiss certiorari as improvidently granted. In the alternative, this Court should affirm the decision of the Court of Appeals reversing Respondent's conviction.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court dismiss certiorari as improvidently granted. In the alternative, Respondent requests this Court affirm the decision of the Court of Appeals reversing Respondent's conviction.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT

This 4th day of April, 2022.