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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Sumter County
Hon. George M. McFaddin, Circuit Court Judge
Appellate Case No. 2019-001007

The State, Respondent,

v.

Donald Ray Richburg, Appellant.

RETURN TO PETITION FOR REHEARING

On March 23, 2022, this Court affirmed the trial court's decision to allow the State to introduce a video of Petitioner's arrest to demonstrate his knowledge law enforcement was seeking him and his flight from law enforcement. Additionally, this Court found unpreserved an issue raised by Appellant regarding the cross-examination of the lead investigator related to a second statement given by Appellant pursuant to Rule 106, SCRE. Appellant has not demonstrated any issue or facts overlooked or misapprehended by this Court. Accordingly, pursuant to Rule 221(a), SCACR, the Court should deny the petition for rehearing.

In his Petition for Rehearing, as in his Brief, Appellant does not contest the probative value of the video in demonstrating the circumstances surrounding Appellant's flight from law enforcement. Instead, he merely argues the Court should have come to a different conclusion regarding its analysis of prejudice pursuant to Rule 403, SCRE. This Court acknowledged the need to conduct the analysis pursuant to Rule 403 and the consideration of the totality of the evidence as it applies to both relevance and probative value through its citation of State v.

Martin, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013) ("This totality test and its components assist the trial court in determining the *relevance* of evidence of evasive conduct, as well as in weighing the *probative value* of that evidence against its prejudicial effect." (emphases added) (citing Rules 401 and Rule 403, SCRE)). Additionally, as discussed in the State's Brief, there is ample evidence supporting the trial court's decision to admit the video recording and finding it was not unduly prejudicial. As a result, this Court should deny the Petition for Rehearing as to this issue and affirm Appellant's convictions and sentences.

As to the ability to cross-examine regarding the second statement, this Court correctly determined the issue was not raised to the trial court on the basis of completeness under Rule 106. Nothing in his argument to the court indicated a belief the prior admission by the State was incomplete or that the second statement given by Appellant was required to complete the jury's understanding of the first statement. This Court correctly cited to case law indicating a party may not raise one issue at trial and another on appeal. See State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Sheppard, 391 S.C. 415, 423, 706 S.E.2d 16, 20 (2011) ("Our law is clear than an issue may not be raised for the first time on appeal.").

To the extent Appellant argues the issue was raised by the State because it cited to Rule 106 and several cases related to Rule 106, this is not sufficient to preserve the issue for review. In response to the State's discussion of Rule 106, counsel for Appellant never argued the State's interpretation of the rule prohibiting the admission on that ground was incorrect, he instead argued that it should be allowed so he could tell the jury that he was not seeking to establish an alibi defense. He never asserted that Rule 106 allowed the admission. As a result, he cannot piggyback on the State's discussion of the issue, especially when he failed to contest the State's

argument that Rule 106 did not apply. See, e.g., Brock v. Bd. of Adjustment & Appeals of City of Rock Hill, 308 S.C. 539, 543, 419 S.E.2d 773, 776 (1992) (finding an issue is not preserved when it is not raised by the appellant at trial); Tupper v. Dorchester Cty., 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) (finding appellant "cannot bootstrap an issue for appeal by way of a codefendant's objection"); State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977) (finding issue not preserved because "appellant may not utilize the objection of another defendant to gain review").

On the merits, this issue fails for the reasons set forth in the State's Brief. The second statement was not a continuation or a clarification of the first. It was an entirely separate, free-standing statement that was not needed for an understanding of the first statement. It was given significantly after the first statement, served as a retraction of Appellant's statements to Investigator Stewart, and attempted to mitigate his potential punishment for his involvement in the drive-by shooting. Significantly, counsel indicated he had no desire to offer the second statement into evidence—which is what is allowed if Rule 106 applied. Instead, he argued he should be entitled to ask the investigator about the contents of the statement without ever offering it into evidence. This Court correctly determined it was not preserved for review, but nonetheless, should affirm even if considered on the merits. As a result, this Court should deny the petition for rehearing as to this issue.

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny the petition for rehearing and affirm Appellant's convictions and sentences.

Respectfully submitted,

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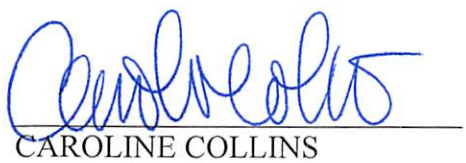
PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to the Petition for Rehearing by emailing a copy to Appellant's counsel of record, Adam S. Ruffin, at his primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 11th day of April, 2022.



CAROLINE COLLINS
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Caroline Collins

From: Caroline Collins
Sent: Monday, April 11, 2022 2:13 PM
To: 'aruffin@sccid.sc.gov'
Cc: 'Leverett, Scott'; William Blitch
Subject: The State v. Donald Ray Richburg (2019-001007)
Attachments: RICHBURG Donald - Return to Petition for Rehearing - 2019-001007 (02948622xD2C78).PDF

Good Afternoon Mr. Ruffin,

Attached please find the Return to Petition for Rehearing in The State v. Donald Ray Richburg (2019-001007). This return will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
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