RECEIVED
Oct 27 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. D. Morgan, Jr., Circuit Court Judge
Appellate Case No. 2022-001311

THE STATE,

Respondent,

vs.

JEFFERY KEYON TIMOTHY GRIFFIN,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville County Courthouse
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I.

"Whether the trial court reversibly erred by denying Appellant his right to self-representation at a hearing over six weeks prior to trial where Counsel joined Appellant's move to remove her from his case, where Appellant expressed his dissatisfaction with his attorney and indicated he would like to represent himself, yet where the court denied Appellant's motion without even discussing Faretta warnings?" (footnote omitted).

II.

"Whether the trial court reversibly erred by failing to direct a verdict of acquittal for resisting arrest where the only evidence produced and argued by the State was that Appellant ran away when police ordered him to stop, yet where Appellant ultimately stopped, laid on the ground, and did not resist once police placed their hands upon him?"

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Did either the pre-trial hearing judge or the trial judge violate Appellant's constitutional right to self-representation when: (1) Appellant did not clearly and unequivocally assert his right to self-representation during the pre-trial hearing; and (2) even if he somehow did through his rambling pre-trial remarks, Appellant nevertheless waived his right to self-representation by subsequently changing his mind by the time of trial and electing to go forward with defense counsel representing him?

II.

Were Appellant's appellate arguments challenging the trial judge's refusal to grant the directed verdict motion as to the resisting arrest charge properly preserved for appellate review when those arguments were neither raised to nor ruled upon by the trial judge, who was only presented with a general and groundless directed verdict motion that did not include any specific arguments concerning resisting arrest or any of Appellant's other distinct charges?

STATEMENT OF THE CASE

In November of 2018, Appellant Jeffery Keyon Timothy Griffin was arrested after he unsuccessfully attempted to flee from law enforcement officers who responded to a report of an armed robbery that had just been committed. In April of 2021, the Greenville County Grand Jury indicted Appellant for armed robbery, possession of a weapon during the commission of a violent crime, pointing and presenting a firearm, and resisting arrest. On September 6, 2021, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable G. D. Morgan, Jr., circuit court judge, presiding.[1] At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty years for armed robbery, five years for possession of a weapon during the commission of a violent crime, five years for pointing and presenting a firearm, and one year for resisting arrest. Appellant then timely filed a notice of appeal.

[1] By the time of trial, Appellant had multiple additional charges—including several more armed robbery charges—that were pending. (R. p. 11; p. 216).

STATEMENT OF FACTS

Around 6:53 a.m. on the rainy morning of November 24, 2018, a masked man wearing a blue tracksuit, yellow gloves, and a skull cap entered the 7-Eleven convenience store on Old Buncombe Road in Greenville, South Carolina. (R. pp. 52-54; p. 59; pp. 70-71). Upon entering the store, the masked man approached the two employees inside while holding a "shiny" revolver and a pillowcase. (R. p. 71; p. 76). He then brandished his gun, demanded all the store's money, and ordered the employees to hurry up in giving it to him. (R. p. 59; p. 71). In response, the employees quickly gave the masked man $156.06 in bills and loose change from the store's cash drawer. (R. p. 62; pp. 74-75). After that, the masked man fled from the store on foot with his pilfered loot and headed in the direction of a nearby grocery store. (R. p. 54; p. 59; p. 77).

Once the robber was gone, the store's employees called 911, and deputies from the Greenville County Sheriff's Office were rapidly dispatched to the scene. (R. pp. 51-52; pp. 95-96; p. 126). Deputy Javier Ochoa arrived at the store first and spoke with the employees about what had occurred. (R. pp. 52-54). Meanwhile, other deputies—including Deputy Jarred Greer and Deputy Corey Chadwick—began driving around the nearby area in their patrol vehicles with lights and sirens activated in an effort to locate the perpetrator before he got too far away. (R. pp. 95-97; pp. 126-128).

While scouring the area, several of the deputies spotted Appellant, who was wearing a blue tracksuit just like the robber's and had a pillowcase tied to his waistband, walking along Poinsett Highway at a location not far from the 7-Eleven.[2] (R. pp. 97-98; p. 102; p. 128; p. 137;

[2] At that time, Appellant was also wearing a "beanie" hat and had a black shirt tied around his neck. (R. pp. 147-148). Notably, the shirt appeared to be in a position so it could be pulled "up over [Appellant's] face to conceal his identity." (R. pp. 148-149).

p. 151). In response, the deputies began driving in Appellant's direction. (R. pp. 97-98; p. 128). As they neared, Appellant looked at them and then quickly began sprinting away at a rapid pace. (R. pp. 97-98; p. 128). At that point, Deputy Chadwick got out of his vehicle and began chasing after Appellant while Deputy Greer drove into a position to be able to cut off Appellant's escape. (R. pp. 98-100; p. 129).

During the pursuit, Deputy Chadwick ordered Appellant to stop and advised him he was under arrest. (R. p. 135). Undeterred, Appellant ignored the officer's commands, continued fleeing, and ran into a wooded area in an apparent effort to evade his pursuer. (R. pp. 134-135). However, as Appellant continued through the woods, he stumbled upon Deputy Greer, who had moved into a position on the other side of the wooded area from where Appellant had entered. (R. pp. 99-100). When Appellant unknowingly got close to Deputy Greer, the officer turned on his flashlight and ordered Appellant to the ground with his gun drawn. (R. p. 101). At that point, Appellant "immediately complied," got down onto the ground, and surrendered. (R. p. 101; p. 135).

Once Appellant was on the ground, the deputies swiftly moved toward him to place him in handcuffs. (R. pp. 135-136). As they did, Appellant pleaded with them not to shoot and advised them *his gun* was not loaded. (R. pp. 135-136). The deputies then took Appellant into custody. (R. pp. 135-136).

After he was secured, the deputies looked inside the pillowcase Appellant had tied to his waistband, and, inside, they found a silver pistol along with the exact quantity of cash that had just been stolen in the robbery. (R. p. 62; pp. 74-75; p. 136). Deputy Chadwick then advised Appellant of his rights, and Appellant candidly admitted his involvement in the incident. (R. pp. 137-138; pp. 142-143).

Subsequently, Appellant was indicted for numerous offenses—including resisting arrest—in connection to the 7-Eleven robbery, and he elected to proceed forward to trial. (R. pp. 30-31; pp. 231-236). During trial, testimony and evidence was presented detailing the robbery, the ensuing response to it by the deputies, Appellant's unsuccessful efforts to evade arrest, and his ensuing apprehension and confession. (R. pp. 51-79; pp. 84-103; pp. 126-155). In addition to that, Appellant testified on his own behalf, offered a contradictory version of events, and claimed he had simply stumbled upon the stolen money and gun instead of stealing the cash in the armed robbery. (R. pp. 163-173).

Ultimately, following the presentation of all that testimony and evidence, the case was submitted to the jury. (R. p. 206). After just over an hour of deliberations, the jury unanimously convicted Appellant of all his indicted charges. (R. p. 206; pp. 212-213).

ARGUMENT

I.

Neither the pre-trial hearing judge nor the trial judge violated Appellant's constitutional right to self-representation because: (1) Appellant did not clearly and unequivocally assert his right to self-representation during the pre-trial hearing; and (2) even if he somehow did through his rambling pre-trial remarks, Appellant nevertheless waived his right to self-representation by subsequently changing his mind by the time of trial and electing to go forward with defense counsel representing him.

Relevant Facts

In July of 2022, a virtual hearing was conducted to address Appellant's previously-communicated desire to relieve his defense counsel. (R. p. 3). During that hearing, Appellant addressed the court and alleged defense counsel had "failed to take a probable cause," was currently representing too many clients in his opinion, and supposedly was operating under some conflict of interest because she was also representing some of Appellant's cellmates at the detention center. (R. p. 4). Appellant further complained his case had already been reassigned several times and defense counsel had purportedly failed to file "proper motions to give [him] a bond." (R. p. 5). Based on all those reasons, Appellant explained he wanted defense counsel to be relieved *and* for him to receive "some type of equity relief to get a even handed deal with fairness to get probation or take this case to trial." (R. p. 5).

In response to those assertions, defense counsel noted Appellant had previously been released on bond but the bond was later revoked due to an issue. (R. p. 6). She further noted Appellant had previously failed to appear for court, which resulted in the issuance of a bench warrant. (R. p. 6). Based on those factors and because the case had been placed on the trial docket, defense counsel explained she was focused on trial preparation instead of bond issues at that time. (R. p. 6). Beyond that, defense counsel confirmed she was not aware of any actual conflicts of interest concerning her representation of Appellant. (R. p. 7).

Following those remarks, Appellant again addressed the court and reiterated it did not "quite sit right with" him that several of defense counsel's clients were housed at the detention center with him. (R. p. 7). Additionally, Appellant explained he was forced to receive in-patient mental health treatment at "Bull Street down in Columbia" but supposedly did not receive "proper help" from defense counsel because she did not help him get a place to stay even though he was homeless. (R. p. 8). He further complained defense counsel did not have his correct address, which he appeared to suggest resulted in some sort of issue or issues for him. (R. pp. 8-9). He then again lamented a lack of "proper help," which he appeared to identify as help getting into "some kind of program to get help" and help getting him "back and forth to work and stuff like that[.]" (R. p. 9).

At the conclusion of Appellant's remarks, the solicitor objected to defense counsel being relieved. (R. p. 10). In so objecting, the solicitor noted Appellant had not identified any actual grounds warranting defense counsel's removal. (R. p. 10). The solicitor further noted some of the delays that had occurred in Appellant's case resulted from Appellant absconding after he was last released on bond. (R. p. 10).

At that point, defense counsel indicated she now wished to join in Appellant's request to relieve her. (R. pp. 11-12). In doing so, she explained their relationship had broken down because Appellant seemed to be focused on "little" issues as opposed to the serious charges he was facing and did not appear to be happy with her. (R. pp. 11-12).

Following that, the pre-trial hearing judge gave Appellant one final opportunity to address the court. (R. p. 12). In response, Appellant expounded:

> Okay. I kept a job since I was eight years old. I had a tough living growing up. I've been in traumatizing situations that cause PTSD from injuries at work that has been overlooked without proper care or assistance to a better turning point, turn into drug use while

> trying to make the best choice. Meanwhile, keeping some type of sanity while facing the obstacles that life throw at me. Knowing the blessings made weak but my [audio distortion] to be greater than what some people think I would amount to has my spirit charred, which is why I'm still standing before you. This conspiracy that's made [audio distortion] and the flesh is made weak. So I'm here, you know, to -- to let you know that I would like to take the next step and as a self-representative because I wasn't assisted as I felt like I should haven been to get the help that I needed to really have a fighting chance with my case. And it caused a lot of turmoil in my life, you know. Me -- me walking back and forth to work, you know, off a eight hour shift. And I didn't -- like I said, I didn't get the assistance like I felt like she should have filed for me as being her client. And to really just help to me get in a better situation to really fight my case.

(R. pp. 12-13).

At the conclusion of those remarks, the pre-trial hearing judge—without addressing the issue of self-representation in any way—denied Appellant's motion to relieve counsel. (R. pp. 13-14). In doing so, he explained Appellant's remarks about the issues he experienced seemed to be relevant for sentencing purposes but no actual legal basis warranting defense counsel being relieved had been provided. (R. pp. 13-14). The pre-trial hearing judge further explained defense counsel was an excellent attorney who could potentially use the issues Appellant had identified to assist him with his case. (R. p. 14).

Following that ruling, neither defense counsel nor Appellant did anything to suggest the pre-trial hearing judge had failed to rule on an actual assertion of the right to self-representation, and they likewise did not ask the pre-trial hearing judge to take any further action or make any further rulings. (R. pp. 14-15). Instead, defense counsel simply thanked the pre-trial hearing judge, and Appellant asked when defense counsel was going to come speak with him. (R. pp. 14-15).

Thereafter, in September of 2022, Appellant's case was called to trial. (R. p. 20; pp. 30-31). At the outset of the trial proceedings, defense counsel indicated she had a witness present to testify on the issue of Appellant's competency. (R. p. 20). Dr. Donna Maddox then took the witness stand. (R. p. 21). During her ensuing testimony, Dr. Maddox explained Appellant was now much calmer than he been when she last saw him *in July* and had now been consistently taking his anti-psychotic medication. (R. p. 21; pp. 24-25). She further explained Appellant's condition had manifested in multiple psychotic episodes over the course of the last two years, including ones involving acts of self-mutilation. (R. p. 22). Nevertheless, Dr. Maddox opined Appellant was competent, and she noted he personally confirmed to her *that day* he wanted defense counsel to represent him.[3] (R. pp. 23-24). Following those remarks, the trial proceeded forward with defense counsel representing Appellant, and, despite being present throughout it and even electing to testify on his own behalf, he never said or did anything to suggest he wished to represent himself during the trial. (R. pp. 30-31).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Mazique, 419 S.C. 282, 288, 797 S.E.2d 730, 733 (Ct. App. 2016). When confronted with an issue regarding whether a criminal defendant validly invoked the right to self-representation and waived the right to counsel, an appellate court reviews such an issue, which involves a mixed question of law and fact, de novo as the defendant ordinarily has a constitutional right to insist upon self-representation unless he waited until after the trial had already begun to seek to invoke that right. State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018); see McCoy v. Louisiana, __

[3] Specifically, Dr. Maddox testified: "Now, last time I had spoken with him, he did not want [defense counsel] representing him, but today he said he would. He said at this point that he would." (R. pp. 23-24).

U.S. __, 138 S. Ct. 1500, 1507 (2018) ("[A]n accused may insist upon representing herself—however counterproductive that course may be[.]"). More specifically, an appellate court considering such an issue will review "a circuit judge's findings of historical fact for clear error" and "the denial of the right of self-representation based upon those findings of fact de novo." Samuel, 422 S.C. at 602, 813 S.E.2d at 490. And, "[i]n doing so, [the appellate court] must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request." Id.

Argument

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina "must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975); see U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both."). However, "[t]he right to defend is personal." Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state constitutions."). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant's choice to do so "must be honored out of 'that respect for the individual which is the lifeblood of the law.' " Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to invoke the right to self-representation, a defendant "must take affirmative steps" to advise the trial judge of his desire to proceed in that manner. Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008); see United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996) ("The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an *articulate and unmistakable* demand by the defendant to proceed pro se." (emphasis added)). Therefore, if a defendant actually wishes to proceed pro se during trial, the defendant must *clearly and unequivocally* make an assertion of the right to self-representation prior to trial. Mazique, 419 S.C. at 291, 797 S.E.2d at 734; see State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) ("The right to proceed pro se must be clearly asserted by the defendant prior to trial."). Significantly, the requirement for a clear and unequivocal assertion of the right to self-representation both "protect[s] against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation" and "prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." United States v. Frazier-El, 204 F.3d 553, 558-559 (4th Cir. 2000) (citations and internal quotations omitted).

If a criminal defendant in South Carolina makes a proper request to exercise his right to self-representation, the trial judge must take steps to ensure the defendant is knowingly, voluntarily, and intelligently waiving his right to counsel, including by advising the defendant of his right to counsel and adequately warning him of the dangers and disadvantages of self-representation. See Barnes, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta."); see also Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009) ("It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier [of the right to

counsel] by the accused." (citation omitted)); Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135 (explaining the preferred method for determining whether the defendant knowingly and voluntarily waived his right to counsel is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant). However, absent an unambiguous and timely assertion of the right to self-representation, the trial judge is under no obligation to conduct any inquiry on the matter. See United States v. Cromer, 389 F.3d 662, 682 (6th Cir. 2004) ("Faretta procedures are only required when a defendant has clearly and unequivocally asserted his right to proceed pro se."); see also Benitez, 521 F.3d at 632 (instructing the trial judge has a duty to determine the validity of an attempted waiver of the right to counsel *when the defendant has taken steps to communicate his desire for self-representation*).

In the case sub judice, Appellant contends the trial judge reversibly erred by purportedly denying him his constitutional right to self-representation. As support for that contention, Appellant maintains he informed the pre-trial hearing judge "in no uncertain terms" during the pre-trial hearing conducted over six weeks before his trial that he wanted to relieve defense counsel and represent himself. Appellant further maintains the pre-trial hearing judge denied his motion to relieve counsel while "refus[ing] to even acknowledge [his] assertion of his right to self-representation" and "foisted unwanted counsel upon him for trial" without conducting a Faretta colloquy as required.

To the contrary, Appellant's rambling statements during the pre-trial hearing on his motion to relieve counsel simply did not constitute a clear and unequivocal invocation of the right to self-representation. See City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017) (instructing the assertion of the right to self-representation must be, amongst

other things, clear and unequivocal in order to be effective). Instead, Appellant's remarks were primarily focused on his belief defense counsel did not provide him the "proper help" *he needed*, and the principal relief Appellant requested was not to be permitted to represent himself but was for defense counsel to be relieved *and* him to receive "some type of equity relief," such as a deal that would result in him only receiving a probationary sentence.[4] Cf. United States v. Callwood, 66 F.3d 1110, 1114 (10th Cir. 1995) (recognizing Callwood's complaints about defense counsel's performance and suggestion he would prefer for defense counsel not to represent him did "not qualify as an unequivocal request for self-representation"); State v. Shumaker, 914 So. 2d 1156, 1162 (La. Ct. App. 2005) ("[Shumaker] never expressly asked that he be allowed self-representation. He simply indicated that he wanted to fire his counsel. That statement certainly does not reach a clear and unequivocal expression requesting the right to represent oneself as required by Faretta."). Meanwhile, the only time self-representation was even conceivably mentioned occurred when Appellant stated at a single lone point toward the end of the hearing he "would like to take the next step and as a self-representative," and that isolated remark occurred in the middle of a rant in which Appellant discussed various unrelated topics such as the length of his employment history, his past work injuries, his traumatizing experiences, his drug usage, his mental health issues, his victimization as the apparent result of some conspiracy, his dissatisfaction with defense counsel for not providing him with the assistance he believed an attorney should provide, and his experiences walking to and from work. Significantly, when viewed in the context of all Appellant's *other* statements along with the relief he expressly

[4] Notably, a defendant convicted of armed robbery in South Carolina cannot properly receive a probationary sentence for that offense. See S.C. Code Ann. § 16-11-330(A) (mandating a person conviction of armed robbery "must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted").

requested, that isolated remark was simply not sufficient to constitute a clear and unequivocal assertion of the right to self-representation, which is perhaps best demonstrated by the fact neither the pre-trial hearing judge, defense counsel, nor the solicitor appeared to interpret it as such. See Moreno v. Estelle, 717 F.2d 171, 176 (5th Cir. 1983) ("[A] defendant's request to be relieved of counsel in the form of a general statement of dissatisfaction with his attorney's work does not amount to an invocation of the Faretta right to represent oneself[.]"); cf. Assa'ad-Faltas, 420 S.C. at 46-47, 800 S.E.2d at 791 ("In light of the record and the constitutional primacy of the right to counsel over the right to self-representation . . . along with the presumption against waiver of the constitutional right to counsel, . . . we cannot say that the municipal court erred in failing to construe [Assa'ad-Faltas]'s musings as a waiver of the right to counsel." (citations and internal quotations omitted)); State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991) (rejecting Sims's contention his right to self-representation was violated by the trial judge's denial of his pre-trial request for defense counsel to be "dismissed" because that request did not constitute a clear assertion of the right to appear pro se). Under those circumstances, the pre-trial hearing judge was free to presume Appellant was not waiving—or attempting to waive—the right to counsel and, thus, was under no obligation to conduct an inquiry to determine if Appellant was knowingly, voluntarily, and intelligently exercising the right to self-representation. See Brewer v. Williams, 430 U.S. 387, 404 (1977) (instructing courts must "indulge in every reasonable presumption against waiver" of the right to counsel); see also Cromer, 389 F.3d at 682 (6th Cir. 2004) (instructing a Faretta colloquy is only necessary when a defendant clearly and unequivocally asserts his right to self-representation).

However, even assuming Appellant's isolated musing during the pre-trial hearing could somehow have been construed as a clear and unequivocal invocation of the right to self-

representation, Appellant nevertheless waived that right by later changing his mind by the time of trial and electing to go forward with defense counsel representing him. See Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982) (en banc) ("Even if defendant requests to represent himself, . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether. . . . A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself."). Critically, demonstrating that fact, Dr. Maddox—at the outset of trial and in Appellant's presence—communicated to the trial judge Appellant had advised her that day he wished to be represented during trial by defense counsel. In response to that, Appellant did not object, interject, or disagree. Cf. Cain v. Peters, 972 F.2d 748, 749-750 (7th Cir. 1992) (affirming a ruling Cain waived his right to self-representation by acquiescing in representation by counsel during trial when Cain unequivocally invoked his right to self-representation pre-trial, was later appointed new counsel, "remain[ed] mute" at that time, and did not raise the subject of self-representation again despite having "plenty of time to protest" and an opportunity to "speak up" if he wished to do so). Instead, he proceeded forward with defense counsel representing him without ever doing anything to suggest at any point during trial he wished to represent himself in a pro se capacity. See id. at 750 ("[D]efendants forfeit self-representation by remaining silent at critical junctions before or during trial."). Resultantly, Appellant's failure to assert his right to self-representation at trial despite the fact—by his own admission—no judge had yet addressed the matter in any way constituted a valid waiver of the right to self-representation even if it had been validly asserted at some earlier point. Cf. id. at 750 ("Cain had only to speak up. Despite having ample time to do so, he kept his counsel (in both senses)."); Brown, 665 F.2d at 612 ("After a *clear* denial of the request, a defendant need

not make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal. Neither of these circumstances, however, is present here.").

Accordingly, for those reasons, the pre-trial hearing judge neither erred through the manner in which he addressed Appellant's motion to relieve defense counsel nor infringed in any way upon Appellant's constitutional right to represent himself, and Appellant's constitutional rights were not violated by him being represented by defense counsel during trial. See Frazier-El, 204 F.3d at 559 ("The requirement that a request for self-representation be clear and unequivocal also prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial places the trial court in a difficult position because it must traverse a thin line between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a constitutional primacy to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." (citations, internal quotations, and ellipses omitted)); People v. Span, 955 N.E.2d 100, 112 (Ill. App. Ct. 2011) ("Even if a defendant has given some indication that he wishes to represent himself, he may later acquiesce in representation by counsel by vacillating or abandoning an earlier request to proceed pro se."); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (instructing a trial judge is allowed "safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes"). Appellant's convictions should be affirmed.

II.

Appellant's appellate arguments challenging the trial judge's refusal to grant the directed verdict motion as to the resisting arrest charge are not properly preserved for appellate review because those arguments were neither raised to nor ruled upon by the trial judge, who was only presented with a general and groundless directed verdict motion that did not include any specific arguments concerning resisting arrest or any of Appellant's other distinct charges.

Relevant Facts

During the course of Appellant's trial, evidence and testimony was presented establishing Appellant was apprehended a short time after he robbed a 7-Eleven convenience store while still in possession of a pillowcase that contained a pistol matching the description of the one used in the robbery along with the exact amount of cash taken in that robbery. (R. pp. 51-63; pp. 69-79; p. 102; pp. 126-151; p. 155). Likewise, evidence and testimony was presented establishing Appellant, who was wearing clothing identical to the clothing worn by the robber, responded to the approach of law enforcement officers by rapidly fleeing, including after he was directly advised he was under arrest and ordered to stop. (R. p. 54; pp. 95-103; pp. 126-151; p. 155). Similarly, testimony and evidence was presented establishing gloves just like those worn by the robber were found in close proximity to the location where Appellant was finally apprehended. (R. p. 73; pp. 88-91; pp. 93-94). Furthermore, testimony and evidence was presented establishing Appellant, who surrendered only after he was confronted by an armed deputy waiting for him on the other side of a wooded area he had fled into, candidly acknowledged his involvement in the robbery upon being arrested. (R. pp. 99-101; pp. 137-138; pp. 142-143).

After that testimony and evidence was presented, the State rested its case, and defense counsel moved for a directed verdict. (R. p. 158). In doing so, defense counsel—in total—asserted: "Judge, at this time I would move for a directed verdict on behalf of my client,

[Appellant], and also renew my previous motions in this case, Your Honor." (R. p. 158). Following those groundless and nonspecific remarks, the trial judge denied the directed verdict motion, stating: "As far as the directed verdict, I find there is existence of evidence that would show the defendant is guilty of the crime. Obviously, the standard is whether there is the existence or nonexistence of evidence, and I certainly find there is." (R. p. 158).

Thereafter, the trial proceeded forward, and Appellant elected to testify on his own behalf. (R. pp. 163-173). Through that testimony, Appellant alleged he was simply a victim of happenstance, had unwittingly picked up the pillowcase filled with the gun and stolen cash while out for a jog in the rain, and had only told the officers he was involved in the armed robbery after unsuccessfully attempting to flee from them because he was depressed and intoxicated. (R. p. 71; pp. 164-167; p. 169; pp. 172-173).

After that testimony was presented, the defense rested, and defense counsel generically renewed all her earlier motions, including—presumably—the directed verdict motion. (R. p. 174). Once again, the trial judge denied those motions. (R. p. 174).

Thereafter, the parties presented their closing arguments to the jury. (R. pp. 177-190). Notably, through her brief closing argument remarks, defense counsel never specifically argued the State's evidence as to the resisting arrest charge was insufficient as a matter of law and, instead, argued the brevity of the State's investigation should cause the jurors to have reasonable doubt without discussing any of Appellant's charges individually or with particularity. (R. pp. 185-188).

Following the closing arguments, the trial judge instructed the jury on the applicable law, including on the elements of resisting arrest.[5] (R. pp. 190-205). At the conclusion of the charge, defense counsel confirmed she had no objections to the instructions as presented. (R. p. 206).

Subsequent to that, the case was submitted to the jury. (R. p. 206). However, shortly after deliberations began, the jury submitted a note seeking clarification as to what constituted "resisting arrest," questioning whether it was noncompliance with an order, and asking whether Appellant was immediately told he was under arrest. (R. pp. 207-208). In response to that, the trial judge discussed the matter with the parties, and defense counsel indicated she had no position on the matter and no objection to the trial judge's proposed course of action. (R. pp. 208-209). Resultantly, the trial judge—without objection—responded by providing a written copy of the resisting arrest charge that had already been presented to the jury and advising them they would need to resolve their fact-based query based on the evidence presented. (R. pp. 208-211).

Ultimately, after a little over an hour of deliberations in total, the jury convicted Appellant of all the indicted charges, including resisting arrest. (R. pp. 212-213). The trial judge then sentenced Appellant to an aggregate twenty-year term of imprisonment, which included a concurrent one-year term of imprisonment for resisting arrest. (R. pp. 220-221).

---

[5] In instructing the jury on resisting arrest, the trial judge stated: "The defendant is also charged with resisting arrest. The State must prove, again, beyond a reasonable doubt that the defendant knowingly and willfully resisted a lawful arrest being made by a person the defendant knew or reasonably should have known was a law enforcement officer. 'Knowingly' means with knowledge, consciously done. 'Willfully' means done intentionally and not done by accident. 'Resist' means to oppose, strive against, or obstruct. 'Obstruct' means to impede, hinder or interfere with. Even peaceful, nonviolent, indirect obstruction of an arrest or the service or execution of process is considered resisting arrest. If the means used are sufficient to prevent the officer from making an arrest, the defendant is guilty of resisting arrest." (R. pp. 201-202).

Standard of Review

In criminal cases, appellate courts sit to review *preserved* errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016); see State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("In criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e., the issue has been raised to and ruled on by the trial court."); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (recognizing appellate courts "cannot address unpreserved errors"). When reviewing a properly-preserved directed verdict issue on appeal, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). In other words, "unless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Argument

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] 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). Through their enforcement and application, the trial court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and

arguments[,]" and the appellate court is provided with everything needed to properly review whatever ruling is made within the limits of the applicable standard of review. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see Queen's Grant, 368 S.C. at 373, 628 S.E.2d at 919 ("The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, 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, 912-913 (Ct. App. 2004). Thus, based on those requirements, an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial judge. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Likewise, an appellant is precluded from arguing one ground or theory in support of an issue during trial and then a different ground or theory in support of the issue on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); 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."). Significantly, in light of those requirements, a general directed verdict motion "does not preserve *any* issue for appeal." State v. Sterling, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012) (emphasis added); see State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (explaining a general objection without any specifics is insufficient to properly preserve an issue for appellate review); cf. Roberts v. State, 408 S.C. 123, 129-130, 757

S.E.2d 744, 747-748 (2014) (concluding Roberts's directed motion was not properly preserved for appellate review because Roberts only made a general motion for directed verdict based on the sufficiency of the evidence during trial and never raised the specific grounds he advanced on appeal to the trial judge).

In the case at bar, Appellant contends on appeal the trial judge erred by refusing to grant a directed verdict solely as to the resisting arrest charge. And, for the very first time in his case, Appellant—unlike defense counsel during trial—has provided arguments on appeal in support of that contention. More specifically, Appellant now maintains a directed verdict should have been granted because the evidence of his rapid flight from a pursuing law enforcement officer who was ordering him to stop and telling he was under arrest as he continued to flee was allegedly insufficient to prove the offense of resisting arrest under South Carolina law.

Significantly though, defense counsel did not present such arguments in support of the directed verdict motion at trial. Instead, defense counsel *generically* moved for a directed verdict without providing *any* specific grounds in support of that motion. Cf. In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("At trial, appellant made only a general directed verdict motion, stating, 'I think the State has failed to meet their burden of proof beyond a reasonable doubt.' This motion, which stated no specific ground, preserved nothing for appellate review." (brackets omitted)). In fact, defense counsel did not even distinguish between any of Appellant's charges when making the directed verdict motion and, thus, did not present even a single charge-specific argument related to any of Appellant's charges, including his resisting arrest charge. Cf. Sterling, 396 S.C. at 612, 723 S.E.2d at 183 ("At trial, the only court for which [Sterling] identified deficiencies in the State's case was count 2, one of the two charges for which

[Sterling] was acquitted. There is no proper directed verdict issue concerning count 1 preserved for our review.").

Under such circumstances, the new arguments Appellant has raised on appeal in support of his current challenge to the sufficiency of the evidence are not properly preserved for appellate review since they were unquestionably neither raised to nor ruled upon by the trial judge. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."); cf. State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) ("The contention of the appellant that the trial judge erred in failing to grant a directed verdict on the ground that the proof showed the commission of the crime of obtaining property by false pretenses, rather than a breach of trust with fraudulent intent, raises no issue for determination by us because such was not a ground of his motion for a directed verdict. This court has, in numerous cases, held that it will not consider a question on appeal which was not presented in the court below."); State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126 (Ct. App. 1998) ("This precise argument was neither raised to nor ruled upon by the trial court. Appellant argued only that the evidence did not rise to the 'level of a reasonable doubt as to counts 1, 2, and 3.' . . . Adams's argument, therefore, is not preserved for our review."). Therefore, pursuant to the mandates of South Carolina's issue preservation requirements, Appellant's appellate challenge to the trial judge's denial of the general and nonspecific directed verdict motion raised below simply cannot appropriately be considered or addressed for the first time on appeal.[6] See Sterling, 396 S.C. at 612, 723 S.E.2d at 183 ("A

[6] Moreover, even if defense counsel's groundless directed verdict argument had somehow been sufficient to properly preserve the issue for appellate review, the trial judge properly declined to grant a directed verdict as to the resisting arrest charge because the evidence and testimony presented was sufficient to prove that offense since it established the pursuing officers actually intended to arrest Appellant, who continued to flee even after being advised he was under arrest.

general directed verdict motion . . . does not preserve any issue for appeal."); cf. State v. Kennerly, 331 S.C. 442, 454-455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("Kennerly . . . contends the trial judge erred in denying her motion for directed verdict based on the State's failure to introduce into evidence portions of the Benjamin trial transcript regarding the trial judge's premature deliberations instructions. She argues that without having the specific language of the premature deliberations instructions, the trial court did not have sufficient evidence to find her guilty of contempt. However, Kennerly did not raise this issue to the trial court in her directed verdict motion. *Instead, she simply moved for a directed verdict without stating any specific grounds*. In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below." (emphasis added and citations omitted)), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). Appellant's convictions should be affirmed.

See S.C. Code Ann. § 16-9-320(A) ("It is unlawful for a person knowingly and wilfully . . . to resist an arrest *being made* by one whom the person knows or reasonably should know if a law enforcement officer, whether under process or not." (emphasis added)); cf. State v. Brannon, 388 S.C. 489, 504, 697 S.E.2d 593, 597 (2010) ("Because the State has failed put forth any *evidence demonstrating that the officers* either *intended to arrest Brannon* or that Brannon submitted to the arrest, we find an arrest was not being made when Brannon ran from police." (emphasis added)).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

October 27, 2023

RECEIVED
Oct 27 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. D. Morgan, Jr., Circuit Court Judge
Appellate Case No. 2022-001311

THE STATE,

Respondent,

vs.

JEFFERY KEYON TIMOTHY GRIFFIN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

October 27, 2023