

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2011-189148

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RICO BROWN,

APPELLANT.

PETITION FOR REHEARING

On August 28, 2013, this Court issued an unpublished *per curiam* opinion affirming Appellant's convictions for criminal conspiracy and possession of tools used in the commission of a crime. See State v. Brown, Op. No. 2013-UP-342 (S.C. Ct. App. filed Aug. 28, 2013). This Court upheld the trial judge's denial of Appellant's directed verdict motion on the merits, but rejected the State's error preservation argument. Although the State fully agrees with this Court's decision regarding the merits, the State respectfully takes issue with this Court's conclusion that the directed verdict issue was preserved for appellate review. Therefore, pursuant to Rule 221, SCACR, the State hereby petitions for rehearing regarding the points this Court overlooked or misapprehended with respect to the error preservation issue, as set forth below.

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On appeal, Appellant argued that the trial court should have directed a verdict for very specific reasons. First, he argued that “Appellant was a passenger in the back seat of a vehicle containing stolen items and that vehicle was owned and driven by others.” (See Final Brief of Appellant, p. 5 - Issue Statement). Second, under subpart (A) of that heading, he argued that “the State failed to produce direct or substantial circumstantial evidence of Appellant’s involvement in a criminal conspiracy.” (See Final Brief of Appellant, p. 8). Third, under subpart (B) of that heading, he argued that “the State failed to produce direct or substantial circumstantial evidence of possession of tools used in the commission of a crime where the car in which the tools were found was owned and was driven by others when Appellant was a mere passenger.” (See Final Brief of Appellant, p. 10-11).

However, at trial, Appellant made only a general motion for directed verdict, stating, “Your Honor, the defense moves for directed verdict. The defense feels that the State has not met its burden of proof showing that beyond a reasonable doubt that [Appellant] did commit any of these crimes.” (R. p. 105, lines 15-18). No specific argument was made with respect to any of the five charges, and the judge did not address any specific issues in his ruling. Instead, the judge responded, “[m]otion is noted and I’ll deny at this time.” (R. p. 105, line 19). The parties then proceeded with closing arguments.

In its *per curiam* opinion, this Court concluded that the directed verdict issue was preserved for appellate review because Rule 19 (a), SCRCrimP, the criminal directed verdict rule, does not specifically include a requirement that a motion for directed verdict state the specific grounds therefor, whereas the civil rule, Rule 50 (a), SCRCP, does include such a requirement. Respectfully, the State submits that this Court overlooked the fact that,

although Rule 19, SCRCrimP, sets forth a rule regarding procedures that attorneys must follow in general sessions court, it does not displace the well-established case law specifying the requirements for issue preservation on appeal.

Initially, the State submits that Appellant's *general* directed verdict motion at trial was insufficient to preserve the *specific* issues he ultimately raised on appeal. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting that the "plain error" rule does not apply in South Carolina and a party must make a contemporaneous and *specific* objection to preserve an issue for appellate review) (emphasis added); State v. Geer, 391 S.C. 179, 193, 705 S.E.2d 441, 449 (Ct. App. 2010) (to be preserved for appellate review, an 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*." (citing Jean Hofer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002) (emphasis added); State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (an objection should be addressed to the trial court in "a sufficiently specific manner that brings attention to *the exact error*;" if a party fails to do this, he is procedurally barred from raising the issue on appeal) (emphasis added); McCray v. State, 271 S.C. 185, 188, 246 S.E.2d 230, 231-32 (1978) (in belated direct appeal case, the Supreme Court suggested that the defendant's "general" JNOV motion that "the evidence did not support the verdict" was not sufficiently specific to preserve for review the more specific grounds raised on appeal); State v. Ivey, 325 S.C. 137, 142-43, 481 S.E.2d 125, 127 (1997) (defendant's argument that the trial court erred in permitting certain testimony was not preserved for review where his objection below - that the testimony went "out of bounds" - was not sufficiently specific); State v. Kennerly,

331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998) (where defendant failed to raise the issue of the State's failure to establish the *corpus delicti* in her directed verdict motion below, the issue was not preserved for review); cf. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (directed verdict argument that the State failed to establish the *corpus delicti* of the crime was preserved for appellate review because, although the defendant did not use the exact words "corpus delicti" in his motion to the trial judge, it was clear from his argument that the motion was made on this ground, especially where the prosecutor did use the words *corpus delicti* in his responsive argument and cited the relevant case law).

Importantly, Appellant's directed verdict motion *merely recited a standard of law* without explaining how it applied to his case. Appellant's motion did not alert the trial judge to any particular deficiencies in the State's evidence and did not point out which elements of which of the five crimes were lacking. See State v. Porter, 389 S.C. 27, 38, 698 S.E.2d 237, 242-43 (Ct. App. 2010) (imposing the preservation requirements is aimed at enabling the trial court to rule properly *after it has considered all the relevant facts, law, and arguments*; issues not raised and ruled upon in the trial court will not be considered on appeal) (citations omitted) (emphasis added); State v. Bailey, 253 S.C. 304, 309-310, 170 S.E.2d 376, 379 (1969) (argument that the trial judge erred in admitting certain testimony was not preserved for review where the objection made below was merely general and did not specify any grounds); State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (the post-trial motion issue raised on appeal was not preserved where the defendant made no specific motion for a directed verdict or a motion for arrest of judgment; the defense attorney's statement at the end of trial that he was making the "standard motions" did not preserve a directed verdict

issue or a motion for arrest of judgment); see also In re McCracken, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (in sexually violent predator case, where the appellant made only a “general” directed verdict motion at trial, stating “I think [the State has] failed to meet their burden of proof beyond a reasonable doubt,” the Supreme Court stated, “[t]his motion, which stated *no specific ground*, preserved *nothing* for appellate review”) (emphasis added). Indeed, Appellant’s wholly perfunctory directed verdict motion did not convey to the trial judge that there were any real, meritorious grounds upon which to grant the motion.¹ Based upon the foregoing, the State believes that Appellant’s general directed verdict motion preserved nothing for appellate review.

However, even assuming Appellant’s motion was sufficient to preserve *some* issue for appellate review, Appellant would be limited to the grounds he stated at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); 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.”). Appellant may not raise one ground for directed verdict at trial and another ground on appeal. See State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (directed verdict argument was not preserved where the defendant raised different arguments below and did not raise the issue argued on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (where defendant objected to certain testimony on one ground at trial and raised another ground on appeal, the issue raised on appeal was not preserved); In re Richard D., 388 S.C. 95, 100-101, 693 S.E.2d 447, 450 (Ct. App. 2010) (particular argument in support of directed

¹ In that vein, it should be noted that the directed verdict motion was made *immediately* after the State rested its case and was made in the presence of the jury. (R. p. 105, lines 13-18).

verdict was not preserved for appellate review where defendant raised different argument below); State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) (defendant failed to preserve chain of custody issue for appellate review where he raised a different objection to the evidence below); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (arguments not raised to or ruled upon by the trial court are not preserved for appellate review, and a defendant may not argue one ground below and another on appeal).

In this case, the only issue that could have been preserved for appeal would be whether the State “met its burden of proof showing that beyond a reasonable doubt that [Appellant] did commit any of these crimes.” (R. p. 105, lines 15-18). Importantly, this is the only argument that could have possibly been ruled upon by the trial judge since it was the only argument advanced. (See R. p. 105, line 19, where the judge succinctly states, “[m]otion is noted and I’ll deny at this time.”). However, Appellant did not raise the ground articulated below on appeal; instead he raised other, very specific issues – specific issues that the trial judge never ruled upon. (See Final Brief of Appellant, p. 5; p. 8; p. 10-11). See, e.g., State v. Porter at 38, 698 S.E.2d at 242-43; State v. Geer at 193, 705 S.E.2d at 449 (both indicating that the trial judge must rule on an issue for it to be preserved for appellate review); see also State v. Howard, 396 S.C. 173, 181-82, 720 S.E.2d 511, 516 (Ct. App. 2011) (particular arguments made on appeal, although made within the scope of the broader issue, were not preserved for appellate review because the particular arguments were not raised to the trial judge). Since the issues actually raised on appeal were not the same issues raised below - or ruled upon below - they were not preserved for review.

CONCLUSION

For the reasons set forth above, and in the State's Final Brief and at oral argument, the State respectfully submits that this Court erred in concluding that the directed verdict issue was preserved for appellate review. Therefore, the State requests that this Court grant rehearing and find that the issue was not preserved for review.

Respectfully submitted,

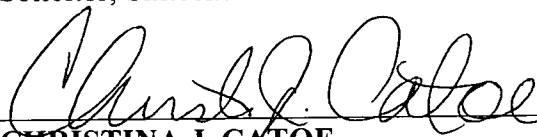
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September 6, 2013

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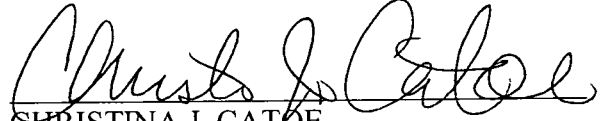
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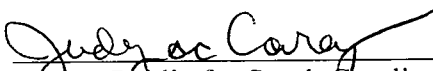
The undersigned attorney hereby certifies that the **Petition for Rehearing** in the above-referenced case has been served upon **Benjamin John Tripp**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **6th day of September, 2013**.



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SWORN to before me this 6th day of September, 2013.


Notary Public for South Carolina.
My Commission Expires: 5/11/2014

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