THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Appellate Case No.: 2013-000332

The State,

Respondent,

v.

Norris T. Steplight,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Jerry N. Theos (Bar No.: 5518)
Barry Krell (Bar No.: 3573)
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ARGUMENT

1. Counsel Properly Preserved the Issue for Appellate Review

"Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 597 (2010) (citation omitted). In order to claim the protection afforded by Rule 16, SCRCrimP, a defendant or his attorney must object at the first opportunity to do so, and failure to object constitutes waiver of the issue on appeal. *State v. Williams*, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (citing *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed. (2d) 486 (1985)).

Appellant's counsel objected to proceeding without his client at the first opportunity he had before the pretrial motion to suppress began as the trial court noted Appellant counsel's "**vehement objection**" to continuing "**without your client's presence**". (Tr. 10:19-20) (emphasis added). Appellant's counsel thanked the trial court for noting his objection to proceeding without Appellant and that he wished Appellant was present as he had shown up at least a half dozen times prior. (Tr. 11:7-12). Appellant's counsel informed the court that Appellant's absence was not intentional but due to the belief that Appellant's case was going to be tried second until counsel received a text message early Monday morning that the case was going to be tried first. (Tr. 5:14-15, 6:25-7:1, 12:9-10). At that time, counsel immediately called the bondsman at 8:30 a.m. to go and locate Appellant because Appellant's phone number was not working. (Tr. 4:15-17, 5:12-17, 12:9-16). When the court inquired as to the notice Appellant received for trial, the solicitor stated that the letters had "them coming on Monday morning, and everything says nine o'clock tomorrow [Tuesday]." (Tr. 6:7-9).

It is evident that Appellant has properly preserved this issue as Appellant's counsel objected to going forward without his client's presence at the first opportunity he had and made several assertions to the trial judge that Appellant's absence was not deliberate but due to Appellant's case being bumped up to number one early Monday morning. The purpose of the contemporaneous objection rule is to alert the trial judge to possible error in time for the trial judge to evaluate the issue and, if necessary, make a correction. No one could seriously argue that Appellant counsel's objection did not meet that purpose. *See State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (a contemporaneous objection on proper grounds is required to preserve an error for appellate review).

2. Whether the Error was Harmless Beyond a Reasonable Doubt?

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citation omitted). "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." Id. (citation omitted). An accused's right to be present at both jury selection and a pretrial motion to suppress derives from the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and S.C. Const. art. I, § 14, which provides that: "[a defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both."

In *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 369, 983 N.E.2d 1227 (2013), Campbell appealed from his convictions contending that he was deprived "of his right to be present at a critical stage of the proceedings, specifically at a hearing on the motion to suppress." In deciding whether Campbell's deprivation of his right to be present at the pretrial motion to suppress was harmless beyond a reasonable doubt, the court noted that in a pretrial motion to

suppress, the defendant "has the opportunity to listen to the strength (or weakness) of at least a part of the government's case and to assess the witnesses. He has the ability to consult with his attorney and, as a participant in the event under examination, offer a unique perspective." *Id.* At 373-74. In finding that the Commonwealth had not met its burden proving that the error was harmless beyond a reasonable doubt, the court stated that "the motion to suppress concerned evidence that was used against the defendant at trial and was the basis for his conviction. In these circumstances it is not for an appellate court or a motion judge to determine how a defendant's presence at a critical stage which concerns the evidence against him could have assisted his over-all defense. *Id.* at 374. *See also State v. Grey*, 256 N.W.2d 74, 77 (Minn. 1977) (defendant's absence at a hearing on a motion to suppress, a critical stage, was not harmless beyond a reasonable doubt because it is impossible on the record to determine what contribution or assistance to counsel defendant could have rendered had he been present to hear the oral testimony of the officer).

In *State v. Irby*, 170 Wn.2d 874, 877, 246 P.3d 796 (2011), the issue before the court was whether the trial court violated defendant's right to be present at trial by conducting a portion of the jury selection process by e-mail in defendant's absence. The court determined that the State did not meet its burden proving that the error was harmless beyond a reasonable doubt as the State could not show that the jurors excused in Irby's absence had no chance to sit on Irby's jury. *Id.* at 886. Likewise, in *USA v. Gordon*, 829 F.2d 119, 122-23, 264 U.S. App. D.C. 334 (1987), the court had to determine whether the trial court's impaneling a jury in Gordon's absence violated Gordon's rights. The court found that Gordon had a Fifth Amendment right to be present at voir dire and noted that " 'what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to

his defense.' " *Id.* at 124. In finding that the government did not meet their burden of showing that the error was harmless beyond a reasonable doubt, the court noted that Gordon did not observe a prospective juror, did not hear a single response to the court's questioning of jurors and did not participate in a single peremptory challenge. *Id.* at 128. The court further stated that "A defendant [] who does not make his appearance until midway through the first day of his trial is surely noticed by the jury, and it is not beyond a reasonable doubt that 'the jury speculated adversely to the defendant about his absence from the courtroom.' " *Id.* (citation omitted).

The State contends that the harm done by the error of proceeding without Appellant can be assessed exclusively through looking at the prosecution's evidence and declaring that it would have been the same result regardless of Appellant's presence or absence, which is incorrect. If that were the case, then almost every violation of the right to be present would be harmless (with the only exception coming in cases where the accused's own testimony was essential), and the right itself would become meaningless and all but unenforceable. The better approach, as outlined in *Campbell*, *Grey*, *Irby* and *Gordon*, is to require the beneficiary of the error (the State) to affirmatively demonstrate not merely that the evidence presented by the prosecution was constitutionally sufficient, but also that Appellant's absence did not affect the defense at any other critical stage(s) of the proceeding, e.g., jury selection, suppression, etc.

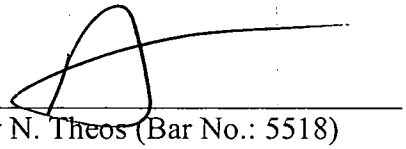
Accordingly, the State cannot prove that the error was harmless beyond a reasonable doubt as Appellant was deprived of his right to consult with his lawyer, to listen to the evidence and assess the credibility of the witnesses (and evidence) against him at the pretrial motion to suppress. Further, it is impossible to determine what contribution or assistance to counsel Appellant could have rendered had he been present to hear the oral testimony of the police officer's. Here, as in *Irby*, jurors were excused in Appellant's absence. (Tr. 51:6-53:11, 57:16-

59:14, 62:18–25, 63:3-9, 66:9-16, 66:19-67:1, 70:6-13). Furthermore, like *Gordon*, Appellant did not observe a single juror, did not hear the court's questioning of the prospective jurors or their responses, nor did Appellant have the opportunity to participate in a single peremptory challenge in his trial. Finally, Appellant did not make his first appearance in front of the jurors until the next day.

CONCLUSION

Based upon the foregoing, Appellant respectfully submits that the issue is preserved for appellate review and that the State has not met its burden demonstrating that the error was harmless beyond a reasonable doubt.

Respectfully submitted,



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I certify that I have served the Initial Reply Brief on Jennifer Ellis Roberts and The Honorable Jenny Abbott Kitchings by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2013.

November 8, 2013

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