

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to
Orangeburg County
Honorable Edgar W. Dickson, Trial Judge
Honorable Kristi Curtis, PCR Judge

Appellate Case No. 2025-000344

RECEIVED

Nov 24 2025

S.C. SUPREME COURT

SHELLY FAULLING.,

APPELLANT,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE**

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by trying Appellant in his absence while he was being held in custody in the county jail?
2. Did the trial court err by denying Appellant's motion for a continuance due to his absence from Court while in custody?
3. Did the trial court make an unconstitutional comment on the facts by instructing the jury that possession of more than one gram of methamphetamine?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion on denying Appellant's motion for a continuance based on his absence when the uncontradicted evidence showed Appellant refused to be transported to his trial despite being notified of the trial date and that it would proceed in his absence if he did not attend?
2. Is Appellant's argument related to the jury charge preserved when—as Appellant concedes—counsel did not object to the charge?

STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections serving an aggregate thirty-year sentence. In December 2017, the Orangeburg County Grand Jury indicted Appellant for possession with intent to distribute (PWID) methamphetamine, third or subsequent offense (2017-GS-38-0375). On December 12, 2017, a jury trial convened before the Honorable Edgar W. Dickson. Deborah J. Butcher, Esquire, represented Appellant. Assistant Solicitor Ashley Cornwell prosecuted the case. Appellant was not present and was tried in his absence.¹

At the conclusion of trial, the jury found Appellant guilty as indicted. Following the verdict, Judge Dickson sealed the sentence. On December 14, 2017, Appellant appeared before Judge Dickson and was sentenced to thirty years.

Appellant filed a *pro se* notice of appeal. By order filed March 29, 2018, the South Carolina Court of Appeals dismissed the appeal, finding Appellant failed to timely serve and file a notice of appeal. The remittitur was sent April 16, 2018. Thereafter, Appellant filed an application for post-conviction relief seeking *inter alia* a belated appeal. Respondent conceded the evidence did not show he voluntarily waived his right to a belated appeal. Following a hearing, Judge Curtis issued an order granting Appellant a belated appeal of his jury trial pursuant to White but denying his remaining allegations.

STATEMENT OF FACTS

Prior to trial, trial counsel moved for a continuance “based on the fact that my client is not here. **He has refused to come** here, and I am at a little bit of a disadvantage because I don’t think I can actually disclose some of our conversation or it would be a violation of attorney/client

¹ Appellant was at the detention center at the time. The State arranged to have him transported to his trial, but he refused to be transported.

privilege. (App. 44, emphasis added). The trial court questioned whether Appellant had notice of this trial, and counsel indicated he did, in fact, have notice. (App. 45). She elaborated, “I, I went to the jail when this came about, and I’ve been down there several times prior to that. But, yes, and he I think left, left the room in probably less than a minute.” (App. 45). Counsel also told the court the attorney-client relationship had deteriorated, but she did not feel it would be appropriate to move to be relieved because she had been court-appointed. (App. 45-46). The solicitor indicated Appellant had appeared before the trial judge—the very same judge who was hearing the continuance motion—on November 20, 2017, and was notified that trial was set for the December 11th term of court. (App. 47). After the solicitor addressed the court, the following exchange occurred:

[Trial counsel]: And, Your Honor, he was put on notice to be here yesterday for a Court appearance. That’s in the order. He was at the jail. He of course, couldn’t show up on his own. He—the only notice of the trial is from me, which I am telling the Court I, I did tell him—

The Court: You did tell him about the trial?

[Trial counsel]: —it would be tried.

The Court: Okay.

[Trial counsel: But the State has not—

The Court: Okay.

[Trial counsel]: —independently of me.

The Court: But he has been—he has been, I’m assuming, the words obstinate applies to you as well as to his dealings with you?

[Trial counsel]: I believe that would be applicable.

Your Honor, the one thing that does concern me is I don’t recall if, when he made a motion to relieve me, if it was explained to him he could represent himself or anything of that. He has refused to come over. I don’t know how the Court would like to handle that to inform

him he, he certainly could represent himself. I, I don't know, Your Honor.

The Court: Yes, ma'am.

[Solicitor], anything you wanted to interject?

Solicitor Cornwell: Your Honor, I'm just gonna state at this point notice was given. He received notice of his right to be present and to represent himself. He's been given all of those rights before.

Based on *State v. Ravenel*, which is 387 S.C. 449, it stats the—you would make a finding of fact on the record that the Defendant received notice of his right to be present and, and that was done. He has also received notice that he could be tried in his absence should he fail to appear. The State did give notice to the Defendant through defense counsel, which was sent to them.

As far as his—Ms. Butcher's not having been able to prepare for this case, this case was appointed to Ms. Butcher on March 20th of 2017, which is approximately eight months, to prepare for this case. I understand that her client has been obstinate, but her client is an indigent defendant. He has not hired anybody else.

It would set a poor precedence to allow continuances to continue to go on just because he is being obstinate in his representation.

He has had ample opportunity to hire independent counsel. . . .

So I believe that he's been given ample notice. He knows that he can be tried in his absence, and simply his refusal to come, the State did arrange for transportation to have him brought there so that he could be present for his trial and he refused.

Based on those things, I do not think it would be appropriate to continue the case and encourage his poor behavior.

The Court: All right. And anything else you need to put on the record?

[Trial counsel]: Simply, Your Honor, just to make sure that it's clear on the record, I've had ample opportunity to prepare for trial, which I've done. I have visited him many times. What I'm talking about are those final preparations before—

The Court: I, I understand.

[Trial counsel]: —an actual—

The Court: It, it—it's—you would think as a defense attorney, it would be helpful to have your client there to help you picking the jury since—and other matters like that. I understand what you mean.

[Trial counsel]: Well, yes, Your Honor.

The Court: Okay. Okay. All right.

All right. I'm gonna deny your motion—

[Trial counsel]: Thank you.

The Court: —to continue. I—and I, I don't know that, if he was represented by anyone else, that he would be more compliant to that attorney than he is with you.

(App. 47-50).

At the conclusion of trial, the Court had a brief charge conference; counsel did not object to the proposed charges.² (App. 157-58). Counsel also did not object after the charge. (App. 184). The jury convicted Appellant of PWID methamphetamine, and the trial court sealed the sentence.

Two days later, Appellant appeared for sentencing. At that time, he informed the Court he “was getting bailed out at the time. Next thing I know I got a jury trial going on in my absence.” When asked if he was made aware of his trial, he replied,

I was up front getting bailed out. I was—she told me one day that we was going—one day last week and then she said Monday. Next thing I know I'm up front getting bailed out, and they said that was gonna—that I had to come over her for the GPS monitoring.

I'm waiting for that and they said if you—I mean hell, Mr. Faulling, you already been found guilty.

(App. 200). The Court sentenced Appellant to thirty years. This White appeal followed.

² Trial counsel briefly questioned the court about its decision to charge a lesser-included offense but did not object to the charge. (App. 157-58).

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wrapp, 421 S.C. 531, 535, 808 S.E.2d 821, 823 (Ct. App. 2017). “An appellate court is bound by the trial court's factual findings unless they are clearly erroneous.” Id. at 535, 808 S.E.2d at 823. “The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion.” Id. Reversals of continuance decisions “are about *as rare as the proverbial hens’ teeth*” in our state. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) (emphasis added).

ARGUMENT

1. The trial court did not abuse its discretion in denying the motion to continue based on Appellants absence when the uncontradicted evidence showed Appellant refused to be transported to his trial despite being notified of the trial date and that it would proceed in his absence if he did not attend.

Appellant asserts the trial court erred by trying him *in absentia*. Specifically, he contends the court failed to make the requisite findings of fact before trying Appellant *in absentia*, and the court erred in proceeding because Appellant was not warned he would be tried in his absence. Contrary to these assertions, however, the uncontradicted evidence presented to the trial court showed Appellant was informed of his trial date and that he could be tried in his absence, and notwithstanding this Appellant refused to be transported from jail to his trial. Appellant also asserts an on-the-record waiver should be required before an in-custody defendant is found to have waived his right to be present at trial, and the trial court erred by selecting the jury before addressing Appellant's absence. These arguments were not presented to the court and thus are not preserved.

“It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence.” State v. Wrapp, 421 S.C. 531, 535, 808 S.E.2d 821, 823 (Ct. App. 2017). The constitutional right to be present for trial is coupled with a corresponding legal obligation to appear at the time set for the trial. See Illinois v. Allen, 397 U.S. 337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.”); State v. Holloway, 262 S.C. 552, 556, 206 S.E.2d 822, 824 (1974) (“A person charged with crime is required to appear at the time set for trial, and he cannot be permitted to absent himself for any reason which he chooses.”); State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006) (“The right to be present at trial is not the right to be absent from trial.”).

A defendant “may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.” Rule 16, SCRCrimP. “[A] bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear.” State v. Ravenell, 692 S.E.2d 554, 558 (S.C. Ct. App. 2010). Likewise, “[n]otice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present.” City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006). “The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicated nothing less than an intention to obstruct the orderly processes of justice.” Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010).

a. The uncontradicted evidence showed Appellant refused transport despite having notice of his trial date and that it would proceed in his absence if he did not attend.

Here, the uncontradicted evidence showed Appellant refused transport despite having notice of his trial date and that it would proceed in his absence. Prior to trial, trial counsel moved for a continuance “based on the fact that my client is not here. **He has refused to come here . . .**” (App. 44, emphasis added). Counsel informed the court that Appellant was aware the trial was scheduled for that day, and she had met with Appellant at jail and informed him of his trial date. (App. 45, 47). In fact, she stated she “went to the jail *when this came* about,” indicating she had been to the jail that very morning. (App. 45, emphasis added). The solicitor indicated Appellant had appeared before the trial judge—the very same judge who heard the continuance motion—on

November 20, 2017, and was notified that trial was set for the December 11th term of court.³ (App. 47). Nothing in the record contradicts the statements that Appellant had notice of his trial.⁴

Likewise, the uncontradicted evidence showed Appellant had notice he could be tried in his absence. The solicitor clarified twice that Appellant had such notice, and trial counsel did not refute that in any way. (App. 48, 49). In fact, counsel stated, “He—the only notice of the trial is from me, which I am telling the Court I, I did tell him—it would be tried.” (App. 47). Immediately after the solicitor relayed that Appellant had notice he could be tried in his absence, the court provided counsel a chance to respond. Counsel did not refute the solicitor’s statement in any way; rather, she stated, “Simply, your Honor, just to make sure that it’s clear on the record, I’ve had ample opportunity to prepare for trial, which I’ve done. I have visited him many times. What I’m talking about are those final preparations before—.” (App. 50). Nothing about this record contradicts the statements that Appellant had notice he could be tried in his absence. *Cf. Ravenell*, 387 S.C. at 457, 692 S.E.2d at 558 (“While Ravenell argues on appeal that the trial judge mistakenly thought he had warned Ravenell about the dangers of not being present but the trial record failed to reflect that, we note that *counsel did not contest the trial judge’s recollection of his discussion with Ravenell but implicitly accepted the judge’s rendition of his discussion with*

³ Standing alone, this would constitute sufficient notice of the trial even though the trial began on December 12. See *Koontz*, 368 S.C. at 547, 629 S.E.2d at 689 (“Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present.”); *Ellis v. State*, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) (“In our courts of general sessions, defendants are generally only given notice of the term of court in which they will be tried and do not know the exact date and time of their trial until shortly before the trial begins. We think such notice is sufficient to enable a defendant to make an effective waiver of his right to be present at his trial.”).

⁴ At sentencing, Appellant himself acknowledged having notice of trial. Specifically, when asked if he was aware his case was going to trial, he replied, “I was—she told me one day that we was going—one day last week and then she said Monday.” (App. 199).

Ravenell.” (emphasis added)).

Finally, the uncontradicted evidence showed the State arranged to transport Appellant to his trial, but Appellant refused to be transported.⁵ Trial counsel stated *twice* that Appellant had “refused” transport. (App. 44, 48). The solicitor also indicated the State had arranged transport but Appellant refused. (App. 49). Appellant’s refusal to be transported to trial indicates “nothing less than an intention to obstruct the orderly processes of justice.” Ravenell, 387 S.C.at 456, 692 S.E.2d at 558; see also Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) (“The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.”). Because uncontradicted evidence showed Appellant refused transport despite having notice of his trial date and that it would proceed in his absence, the trial court did not abuse its discretion in denying the motion to continue.

Admittedly, the trial court did not explicitly state its findings on the record. However, the trial court denied the motion to continue immediately after being informed by the solicitor that the standard required the court to consider whether Appellant had notice of his trial date and notice that it would proceed in his absence. (App. 48-50). Likewise, although trial counsel never explicitly said Appellant was advised that trial would proceed in his absence if he failed to appear,

⁵ Appellant now speculates that he could have been “horribly ill and simply unable to come to court.” (App. Br. 10). Notably, however, at sentencing he did not allege he was sick; rather, he told the court he believed he was getting bailed out of jail. (App. 199-200). Likewise, at the PCR hearing, Appellant never testified he was sick. Rather, when asked why he refused transport, he testified he believed he was being bonded out. (App. 352). Further, although Appellant now complains that there was not a full discussion “about the precise circumstances of his alleged ‘refusal’ to be transported,” counsel informed the trial court that she was not comfortable going into the details of their conversation due to attorney-client privilege. (App. 44).

counsel did not dispute the solicitor’s statement that Appellant had notice he could be tried in absentia. (App. 48). By denying the motion immediately after hearing the standard, the trial court implicitly made the requisite findings.⁶ Cf. Ravenell, 387 S.C. at 457, 692 S.E.2d at 558 (“While Ravenell argues on appeal that the trial judge mistakenly thought he had warned Ravenell about the dangers of not being present but the trial record failed to reflect that, we note that *counsel did not contest the trial judge's recollection of his discussion with Ravenell but implicitly accepted the judge's rendition of his discussion with Ravenell.*” (emphasis added)).

Appellant’s reliance on Wrapp is misplaced. Unlike Wrapp, the uncontradicted evidence in the record supports these findings. As set forth above, this record contains uncontradicted evidence that Appellant had actual notice of the term of court in which his trial would occur. Contra Wrapp, 421 S.C. at 536, 808 S.E.2d at 824 (“[T]he record is devoid of any fact indicating Wrapp had actual notice of the term of court in which his trial would occur.”). Specifically, counsel here told the court she notified Appellant of the trial date. (App. 45, 47). Likewise, the solicitor reminded the judge that Appellant had appeared before him on November 20 and been notified of the term of court at that time. (App. 47). The record also contains uncontradicted evidence that Appellant was advised the trial would proceed in his absence. Finally, unlike the situation *sub judice*, the attorney in Wrapp informed the court, “I don’t have personal knowledge of why he isn’t here. I don’t know if . . . his absence is voluntary or involuntary.” Id. at 534, 808 S.E.2d at 822. Likewise, the attorney in Wrapp objected to proceeding, saying, “I don’t feel like Mr. Wrapp

⁶ At the PCR hearing, counsel testified she had advised Appellant that trial could proceed in his absence. (App. 365). Likewise, the solicitor testified that when Appellant appeared in court on November 20, he was informed on the record that the case would be set for the December 12th term and if he failed to appear, he would be tried in his absence. (App. 367). The PCR court found counsel and the solicitor’s foregoing testimony credible.

has been adequately noticed and we object to going to trial. Id. at 534-35, 808 S.E.2d at 823. Here, however, counsel clearly stated Appellant knew about his trial and refused to be transported. Because uncontradicted evidence showed Appellant refused transport despite being informed of his trial date and that it would proceed in his absence, the trial court did not abuse its discretion in denying the motion to continue.

Finally, Appellant's reliance on Varn v. Green, 50 S.C. 403, 27 S.E.2d 862 (1897), is misplaced.⁷ In Varn, the trial court denied a motion to continue the case due to the attorneys being too sick to proceed and placed the case on the docket the following day with an attorney who did not have time to prepare. Here, however, trial counsel was present (and not sick), she informed the court she was prepared (App. 50), and a review of the transcript shows she was in fact prepared.

Additionally, in Varn, the judge expressed regret about denying the motion to continue but did so because he "believed it would be an abuse of his discretion to continue a case which had been so long upon the docket on account of the illness of counsel." 50 S.C. at 403, 27 S.E.2d at 862. In reversing, the South Carolina Supreme Court concluded the trial court "committed an error of law" by relying on his custom of not allowing continuances in these circumstances and believing he "had no power to grant new trials." Ultimately, the Varn judge did not exercise discretion but rather made a decision that was controlled by an error of law. Here, the trial court's decision was not controlled by an error of law. Rather, the court denied the motion to continue based on Appellant's absence after hearing uncontradicted evidence that Appellant refused transport despite being informed of the trial date and that he could be tried in his absence. Based on the foregoing,

⁷ The fact Appellant is relying on a case that is over 100 years old to support his contention that the judge erred in denying the motion to continue illustrates that the reversal of a continuance motion is, in fact, "about as rare as the proverbial hens' teeth." Lytchfield, 230 S.C. at 409, 95 S.E.2d at 859.

the trial court did not abuse its discretion in denying the motion to continue based on Appellant's absence.

b. Appellant's remaining arguments were not presented to the trial court and are not preserved.

In addition to arguing the trial court failed to make the requisite findings and he was not warned the trial could proceed in his absence, Appellant also contends an on-the-record waiver should be required before an in-custody defendant is found to have waived his right to be present at trial, and the court erred by performing jury selection before addressing Appellant's absence. These arguments, however, were not raised to the trial court and thus are not preserved.

“An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.” State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). “In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). “A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.” Id. at 142, 587 S.E.2d at 694. “A party may not argue one ground at trial and an alternate ground on appeal.” Id.

Here, counsel moved for a continuance “based on the fact that my client is not here. He has refused to come here” (App. 44). The trial court asked whether Appellant had notice of this trial, and counsel indicated he did. (App. 45). She elaborated, “I, I went to the jail when this came about, and I’ve been down there several times prior to that. But, yes, and he I think left, left the room in probably less than a minute.” (App. 45). Counsel also told the court the attorney-client relationship had deteriorated, but she did not feel it would be appropriate to move to be relieved

because was appointed. (App. 45-46). After the solicitor addressed the court, counsel reiterated that Appellant

was put on notice to be here yesterday for a Court appearance. That's in the order. He was at the jail. He of course, couldn't show up on his own. He—the only notice of the trial is from me, which I am telling the Court I, I did tell him—

....

—it would be tried.

....

But the State has not—

....

—independently of me.

....

. . . [T]he one thing that does concern me is I don't recall if, when he made a motion to relieve me, if it was explained to him he could represent himself or anything of that. He has refused to come over. I don't know how the Court would like to handle that to inform him he, he certainly could represent himself. I, I don't know, Your Honor.

(App. 47). The solicitor responded that Appellant had been given notice of his “right to be present and to represent himself.” After the solicitor addressed the court, counsel stated, “[J]ust to make sure that it's clear on the record, I've had ample opportunity to prepare for trial, which I've done. I have visited him many times. What I'm talking about are those final preparations before—.”

(App. 50). The Court acknowledged “it would be helpful to have your client there to help you picking the jury since—and other matters like that. I understand what you mean.” (App. 50). The Court then denied the motion to continue.

In her motion to continue, counsel did not argue that Appellant had to be brought before the court to waive his right to attend trial.⁸ Likewise, although the Court noted it would have been helpful to have Appellant at jury selection, counsel never objected to the Court considering the motion after the jury had been selected—making this argument unpreserved.⁹ C.f. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951) (finding directed verdict argument raised on appeal unpreserved because it was not advanced by party at trial even though court discussed it in ruling on the directed verdict motion); Wierszewski v. Tokarick, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992) (“An issue is not preserved for appeal merely because the trial court mentions.”). Because counsel did not raise these arguments, they are not preserved.

2. As Appellant concedes, counsel did not object to the jury charge—leaving any issue related to the charge unpreserved.

Appellant argues the trial court erred in charging the jury that it could infer an intent to distribute based on the weight of drugs because it is an unconstitutional comment on the facts.

⁸ This argument also lacks merit because it is contrary to South Carolina law, which provides a trial can proceed *in absentia* if the court determines the defendant had notice of the trial and that it could proceed in his absence. Nothing about South Carolina caselaw requires the defendant to appear and waive his right to attend trial on the record. Appellant is effectively asking this Court to change South Carolina precedent on an unpreserved issue, which it should decline to do. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 694 (“An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved.”). Further, such a rule would allow criminal defendants to postpone trial by absconding or, if they are detained, refusing transport. See Ellis, 267 S.C. at 261, 227 S.E.2d at 306 (“The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.”). In the case of detained defendants, it would require the detention centers to forcibly transport unwilling participants to court. If a criminal defendant can voluntarily waive his right to attend trial, then why should detention centers be required to forcibly transport them?

⁹ Further, where Appellant refused transport and never actually showed up at trial—despite having notice of the trial and that it would proceed in his absence—any error in addressing this motion after jury selection was harmless beyond a reasonable doubt.

However, as Appellant himself concedes (App. Br. 20), this issue is not preserved. Thus, this Court should not consider it.

“An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.” State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). “In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). “A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.” Id. at 142, 587 S.E.2d at 694. “A party may not argue one ground at trial and an alternate ground on appeal.” Id. “An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved.” Id.

Here, trial counsel did not object to this charge at either the charge conference or after the court charged the jury, leaving it patently unpreserved. (App. 157-58, 184). Appellant now argues he was not required to object, citing a 1924 case that he admits “has not been utilized since.” (App. Br. 20, citing State v. Orr, 128 S.C. 279, 122 S.E.2d 771 (1924) (excusing defendant’s failure to object to court’s misstatement to jury about facts of the case)). Not only is this not the law, but neither appellate court in our state has cited Orr for this proposition in the 100 years since Orr was decided. South Carolina law is clear: a contemporaneous objection is required to preserve a claim of error in a trial court’s jury charge—even when the objection is on constitutional grounds. See State v. Daniels, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012) (holding claim that jury charge unconstitutionally shifted the burden of proof was not preserved because “[i]t is axiomatic that an objection to a jury charge may not be raised for the first time on appeal”); State v. Lemire, 406

S.C. 558, 573, 753 S.E.2d 247, 255 (Ct. App. 2013) (“As to Lemire's arguments that the charge was redundant, confusing, and tantamount to a charge on the facts, these concerns were neither raised to nor ruled upon by the trial court and are therefore not preserved for appeal.”). Because this issue is patently unpreserved, this Court should not consider it.¹⁰

¹⁰ Further, this charge is consistent with the charge given in State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996), which the South Carolina Court of Appeals found did not unconstitutionally shift the burden of proof. Appellant is effectively asking this Court to change South Carolina precedent on an unpreserved issue.

CONCLUSION

Based on the foregoing, this Court should affirm.

Respectfully Submitted,

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