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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Marvin H. Dukes, III, Circuit Court Judge
Appellate Case No. 2025-000621

THE STATE,

Respondent,

vs.

JESSE SEBASTIAN BROUGHTON,

Appellant.

INITIAL 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

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

Post Office Box 1880
Bluffton, SC 29910
(843) 255-5880

ATTORNEYS FOR RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON APPEAL

Is Appellant's constitutional challenge to the trial judge's jury instruction on the inference that can be drawn from possession of more than twenty-eight grams or one ounce of marijuana properly preserved for appellate review when it was neither raised to nor ruled upon by the trial judge and, instead, defense counsel successfully asked the trial judge to present that particular jury instruction to the jury in a manner he personally suggested?

STATEMENT OF THE CASE

In March of 2023, Appellant Jesse Sebastian Broughton, who had multiple prior convictions for possession of a controlled substance with intent to distribute by that point,[1] was arrested after nearly half a pound of marijuana was found inside his rental vehicle during the course of a routine traffic stop for speeding. In April of 2024, the Colleton County Grand Jury indicted Appellant for possession of marijuana with intent to distribute. On March 24, 2025, a jury trial was commenced in the Colleton County Court of General Sessions with the Honorable Marvin H. Dukes, III, circuit court judge, presiding.[2] At the conclusion of the two-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced[3] Appellant to a five-year term of imprisonment, which was suspended to a two-year term of imprisonment to be followed by three years of probation. Appellant then timely filed a notice of appeal.

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[1] During trial, the solicitor recounted the details of Appellant's prior criminal record, which—amongst other things—included one conviction for possession of a controlled substance with intent to distribute from 2012 and another two from 2016. (Tr. pp. 163-164). Furthermore, based on the information provided by the solicitor, Appellant may have also been convicted of possession of cocaine base with intent to distribute in 2015. (Tr. p. 109).

[2] At the time of trial, Appellant had eleven pending charges in Charleston County related to incidents occurring between 2020 and 2024. (Tr. p. 164).

[3] Before the sentence was imposed, Appellant personally addressed the court, apologized for what he had done, and insisted he was not a drug dealer "anymore." (Tr. p. 168).

STATEMENT OF FACTS

On the night of March 30, 2023, Corporal Jermaine Smith of the Colleton County Sheriff's Office was on patrol when he observed a vehicle speeding along the roadway in excess of ninety miles per hour. (Tr. pp. 65-66; State's Ex. # 1 (Body Camera Recording)). In response, the deputy swiftly activated his patrol vehicle's blue lights and initiated a traffic stop. (Tr. p. 66; State's Ex. # 1).

After making the stop, Corporal Smith approached and made contact with the vehicle's driver, Appellant. (Tr. p. 66; State's Ex. # 1). During their ensuing interactions, Appellant candidly admitted he had been speeding and also readily acknowledged he had some "weed" in the vehicle, which was identified as a rental. (Tr. p. 74; State's Ex. # 1). In addition to that, Appellant provided consent for a search. (Tr. p. 74; State's Ex. # 1). Both Appellant and his passenger were subsequently removed from the vehicle, and, as Appellant exited it, he provided Corporal Smith with a bag[4] that had been positioned in front of the passenger and alerted him there was marijuana underneath the driver's seat. (Tr. p. 69; State's Ex. # 1).

As the stop continued, Corporal Smith found a large wad of cash tucked inside one of Appellant's pants pockets that totaled $8,190.[5] (Tr. p. 69; p. 81; p. 84; State's Ex. # 1). Likewise, from inside the rental vehicle, Corporal Smith recovered a bag that had been concealed underneath the driver's seat. (Tr. p. 69; State's Ex. # 1). Notably, that bag contained two things:

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[4] When he first approached the stopped vehicle, Corporal Smith detected an odor of marijuana emanating from it and also spotted a bag containing a "green plantlike substance" on the floor in front of the vehicle's female passenger, who was later identified only as "Diamond." (Tr. pp. 66-67; State's Ex. # 1).

[5] Before the money was fully counted, Appellant claimed it totaled $6,000, but he later raised that claim while insisting some of the money in his possession was his passenger's. (Tr. p. 81; State's Ex. # 1). However, Appellant's passenger, who had a purse with her, never attempted to claim any of the money as her own and never tried to prevent any portion of it from being seized from Appellant. (Tr. pp. 82-83; State's Ex. # 1).

(1) a large quantity of what was later confirmed to be marijuana; and (2) fifteen empty packets with intact tab-style openers that were marked with branding from a fake company such that they appeared to be commercial packaging for marijuana. (Tr. p. 69; pp. 71-72; pp. 81-82; pp. 85-86; pp. 99-100; State's Ex. # 2 (Photograph); State's Ex. # 3 (Photograph)). In total, slightly over seven-and-a-half ounces—or nearly half a pound—of marijuana was discovered during the stop. (Tr. pp. 99-100; State's Ex. # 1).

Ultimately, based on everything that had been uncovered, Appellant, who insisted "all [he] do[es] is smoke," was arrested and indicted for possession of marijuana with the intent to distribute, and he elected to proceed forward to trial. (Tr. p. 7; p. 69; Indictment; State's Ex. # 1). During the course of that trial, Corporal Smith recounted the details of the traffic stop that culminated in Appellant's arrest, and a recording of the stop captured by his body camera was admitted into evidence and played for the jury. (Tr. pp. 65-83). Along with that, Sergeant Jacob Scott of the Colleton County Sheriff's Office testified about the assistance he provided during the stop and confirmed the type of packet found along with Appellant's marijuana was "basically a knockoff bag to make some kind of product look to be . . . a real product." (Tr. pp. 83-91). Furthermore, expert testimony was presented confirming the substance found during the stop constituted 215 grams of illicit marijuana. (Tr. pp. 95-100).

After all that testimony and evidence was presented, both the State and the defense rested their cases, and the trial judge proceeded to discuss his intended jury instructions with counsel. (Tr. p. 102; p. 111; p. 117). Significantly, during that discussion, defense counsel—while specifically citing to this Court's decision in State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996)—asked the trial judge to add language to his proposed instructions that would make clear the inference that could be drawn from the possession of a certain quantity of marijuana

was a permissive one.[6] [7] (Tr. p. 111; pp. 114-115). In response, the trial judge agreed to include the requested language in his jury instructions. (Tr. pp. 111-115).

Thereafter, the solicitor and defense counsel presented their closing arguments[8] to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 118-150). In doing so, the trial judge emphasized to the jurors it was their exclusive duty to "decide all of the issues of fact" and "determine the effect, value, and weight of the evidence." (Tr. p. 134; pp. 136-137). He further explicitly instructed the jurors not to infer anything he said, including "during the course of th[e] charge[,]" as suggesting he had a personal opinion on the facts. (Tr. p. 136). Following that, the trial judge instructed the jurors on possession of marijuana with intent to distribute along with the lesser-included offense of possession of marijuana and, as part of those

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[6] More specifically, defense counsel asserted to the trial judge:

> I just had three things real quick. I don't think we need the identity charge. He's there and he has -- I don't think we need mere presence. We're not alleging that it was -- and then the actual PWID charge, just using the word inference. And I think I would like to add in there the language from State versus Andrews which is just permissive inference versus just inference. I feel like it's a bit burden shifting to say that there's this much, there's an inference, like you have -- kind of you have to take this inference versus permissive.

(Tr. p. 111). Defense counsel later followed those remarks be confirming it was "correct" he wanted the trial judge to "add the word 'permissive' in front of inference for the PWID." (Tr. pp. 114-115).

[7] Earlier during his testimony, Corporal Smith had explained he arrested Appellant for possession of marijuana with intent to distribute "[b]ecause of the amount. State of South Carolina, anything over an ounce would be possession with intent to distribute." (Tr. p. 69).

[8] Through her closing argument remarks, the solicitor argued Appellant's guilt for the indicted offense was established by the amount of cash in Appellant's pocket, the quantity of marijuana in his possession, and the fact he had fifteen empty packets designed to be filled with marijuana along with it. (Tr. p. 119). Conversely, defense counsel urged the jury to convict Appellant only of possession of marijuana because—in his view—"that's what he did." (Tr. p. 134).

instructions, included the following language consistent with what had been requested earlier by defense counsel:

> Possession of more than 28 grams or 1 ounce of marijuana creates a permissive inference that the defendant possessed the marijuana with intent to distribute it. This permissive inference does not relieve the State from proving beyond a reasonable doubt that the defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have.[9]

(Tr. pp. 143-145).

After those instructions were presented, the trial judge inquired of the parties as to whether they had any issues with or objections to the jury instructions as presented. (Tr. p. 150). Defense counsel responded: "Nothing from the defense." (Tr. p. 150). Subsequent to that, the case was submitted to the jury, and, after roughly four hours of deliberations, the jury convicted Appellant as indicted. (Tr. p. 151; p. 159).

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[9] That language was largely consistent with the language of the suggested jury instruction set out "[f]or the edification of the Bench and Bar" in the Andrews decision, which reads as follows:

> I charge you that possession of more than 28 grams or one ounce of marijuana gives rise to a permissive inference of a violation of this law. The resulting implication only permits rather than requires the jury to infer a violation of the section. This permissive inference does not relieve the State from actually proving beyond a reasonable doubt the element of intent to distribute. This permissive inference is simply an evidentiary fact to be taken into consideration by the jury along with the other evidence in the case and to be given such weight as the jury determines it should receive.

State v. Andrews, 324 S.C. 516, __, 479 S.E.2d 808, 814 (Ct. App. 1996).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review *preserved* errors of law. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). When reviewing a properly-preserved issue with the trial judge's jury charge on appeal, an appellate court must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see United States v. Park, 421 U.S. 658, 674 (1975) ("[I]n reviewing jury instructions, our task is also to view the charge itself as part of the whole trial."); Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."); State v. White, 253 S.C. 475, 482, 171 S.E.2d 712, 716 (1969) (finding White's appellate issue with a jury instruction was waived because White did not object to the instruction during trial despite having an opportunity to do so). Significantly, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

ARGUMENT

Appellant's constitutional challenge to the trial judge's jury instruction on the inference that can be drawn from possession of more than twenty-eight grams or one ounce of marijuana was and is not properly preserved for appellate review because it was neither raised to nor ruled upon by the trial judge and, instead, defense counsel successfully asked the trial judge to present that particular jury instruction to the jury in a manner he personally suggested.

Appellant contends the trial judge reversibly erred by instructing the jury possession of more than twenty-eight grams or one ounce of marijuana creates a permissive inference the defendant possessed the marijuana with intent to distribute. In support of that contention, Appellant—while acknowledging the trial judge's jury instruction in that regard was largely consistent with the one suggested by this Court in State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996)—maintains the instruction constituted an unconstitutional comment on the facts pursuant to the "modern trend"[10] in South Carolina. Moreover, while conceding no objections to that instruction were raised during trial, Appellant further maintains his failure to object simply does not matter because challenges to unconstitutional comments on the facts can purportedly be raised on appeal for the first time pursuant to our Supreme Court's more-than-a-century-old decision in State v. Orr, 128 S.C. 279, 122 S.E. 771 (1924),[11] which—by Appellant's

[10] Specifically, Appellant asserts on appeal the decision in Andrews is "*now* bad law" based on an evolving string of recent appellate decisions that began in 2013. (App. Br. p. 12) (emphasis added).

[11] In that case, the trial judge instructed the jury during Orr's murder trial it was relieved of the necessity of determining both whether a homicide had been committed and who had committed it because Orr purportedly had admitted to slaying the deceased before claiming he had acted in self-defense. State v. Orr, 128 S.C. 279, __, 122 S.E. 771, 771 (1924). Significantly though, Orr did not actually admit to the killing and, instead, had simply stated he acted in self-defense *if* he was the one who did it. Id. Ultimately, the jury convicted Orr of the murder, and he appealed. Id. On appeal, the Supreme Court reversed Orr's conviction based on the trial judge's misstatement of "the issues" to the jury even though no objection to the misstatement had been raised during trial. Id. at __, 122 S.E. at 771-772. In doing so, the Supreme Court recognized there was a "rule of court" requiring a party to first call an issue to the court's attention before

own admission—has never been followed or applied in any other cases since it was decided. Contrary to Appellant's contentions, his newly-conceived challenge to the trial judge's jury instructions was patently not properly preserved for appellate review because, pursuant to well-established South Carolina law, an issue—including a constitutional one—must have first been raised to and ruled upon by the trial judge before it can properly be raised to and considered by one of our state's appellate courts. Since that did not happen here and, instead, defense counsel himself suggested the trial judge include the permissive language from the Andrews decision as part of his jury instructions,[12] any issue with the jury charge was waived and cannot appropriately be considered or addressed for the first time on appeal. Appellant's conviction and sentence should be affirmed.

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). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." 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

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complaining about it on appeal but nevertheless found that rule "must give way to the constitutional prohibition as to a charge on the facts." Id. at __, 122 S.E. at 771.

[12] Tellingly, Appellant never once acknowledges in his thorough appellate brief defense counsel was the one who asked the trial judge to rely on the Andrews decision to as a guide for his jury instructions. (App. Br. pp. 1-21).

makes a ruling, an appellate court is unable to find error."); cf. Unemployment Compensation Comm'n of Alaska v. Aragan, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

For an issue to be preserved for appellate review pursuant to our state's well-established 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). If an issue—*including a constitutional one*—is not presented to and ruled upon by the trial judge, it cannot appropriately be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal."). Critically, on appeal, an appellant is limited solely to the grounds raised at trial, and South Carolina appellate courts simply do not engage in plain error review. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997); see State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]"); 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.").

Beyond those general issue preservation requirements, the South Carolina Rules of Criminal Procedure also provide specific guidance for raising and preserving an objection to a

jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Specifically, pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). Thus, the rule in South Carolina "is *firmly* established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) (emphasis added); see Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection."); cf. State v. Johnson, 315 S.C. 485, 487, 445 S.E.2d 637, 638 (1994) ("Johnson next alleges that the trial judge's instruction on circumstantial evidence violates due process. However, Johnson did not object to the jury charge. Therefore, this issue has not been preserved for appeal.").

With those basic principles in mind, the matter at the heart of the case sub judice rests on a contention the trial judge violated the constitutional prohibition on judicial comments on the facts by instructing the jury an intent to distribute could permissibly be inferred from an individual's possession of more than twenty-eight grams or one ounce of marijuana. However, during trial, defense counsel did not raise such a contention to the trial judge at any point,

including either before or after the trial judge presented the now-challenged instruction to the jury. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."). Instead of doing so, defense counsel personally asked the trial judge to add the language from the Andrews decision about the permissive nature of the inference that can be drawn from possession of a certain amount of marijuana to his jury instructions on the indicted offense. See State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("Counsel got the relief asked for and cannot complain on appeal."); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). And, after the trial judge did just that, defense counsel was afforded an opportunity to raise any objections he may have had to the jury instructions as presented and expressly affirmed he had none. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review when Brown explicitly stated to the trial judge he had no objection to it); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."). Thus, *none* of the arguments currently being raised on appeal in support of Appellant's newly-conceived challenge to the propriety of the trial judge's jury instructions were ever raised to or ruled upon by the trial judge, and, in fact, those arguments are directly at odds with what defense counsel himself asked the trial judge to do during trial. See State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) ("Baker cannot now add a constitutional

claim on appeal because he cannot raise one ground to the trial court and a different ground on appeal.").

Despite the glaring issue preservations problems that obviously exist under such circumstances, Appellant maintains his newly-advanced issue with the trial judge's jury instructions should now be addressed on appeal despite having never been presented to the trial judge because, pursuant to the Orr decision from 1924,[13] "an unconstitutional comment on the facts can" purportedly "be raised for the first time [since] it is a limitation on the judicial power itself." (App. Br. p. 16). Importantly though, since Orr was decided, our Supreme Court *has* expressly and consistently found our state's issue preservation requirements apply to a claim a

[13] For what it's worth, the court that decided Orr would *not* have considered the challenged jury instruction from Appellant's case to constitute an unconstitutional comment on the facts because—at least at that point in time—it was not considered inappropriate for a trial judge to instruct the jury on the different conclusions that could be drawn from a particular fact in the event the jury found such a fact had been established by the evidence presented. See State v. Clamp, 225 S.C. 89, 98, 80 S.E.2d 918, 922 (1954) ("Stating a legal conclusion which would result if the jury found certain facts is not a charge on the facts."); State v. Higgins, 215 S.C. 153, 158, 54 S.E.2d 553, 555 (1949) (instructing a trial judge "giving illustrations with respect to deducing a conclusion from facts and circumstances, but making no reference to any disputed fact, except in a hypothetical way" does not constitute an unconstitutional comment on the facts); Norris v. Clinkscales, 74 S.C. 488, __, 25 S.E. 797, 807-810 (1896) (explaining a trial judge does not violate the constitutional prohibition on comments on the facts by stating the legal effect of certain facts, "point[ing] out the different conclusions which might be drawn from them," or identifying "the inquiries they would naturally give rise to" and further instructing: "We are clearly of the opinion that under [the constitutional provision prohibiting judicial comments on the facts], as it now reads, a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the legal result. In so doing, if he be careful not to repeat any of the testimony, nor to intimate directly or indirectly what is in evidence, he will be chargeable neither with stating the testimony, nor with charging in respect to matters of fact."); see also S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); cf. State v. Gallman, 79 S.C. 229, __, 60 S.E. 682, 686 (1908) (concluding the trial judge did not present an unconstitutional charge on the facts by instructing the jurors "if you find from the testimony in this case that the defendant slew the deceased, and slew him because of some wrong that the deceased had done him, previous wrong, some slanderous report deceased had put into execution about him, and that that was a prime cause of the act, and he slew him for it, he is guilty of murder").

jury instruction constitutes an unconstitutional comment on the facts. See State v. Holland, 261 S.C. 488, 503, 201 S.E.2d 118, 126 (1973) ("If the appellant thought the foregoing charge violated Art. V, Sec. 26 of the Constitution, counsel should have made timely objection upon such ground. No such objection was interposed at the trial and it cannot be raised for the first time on appeal."); Lundy v. Lititz Mut. Ins. Co., 232 S.C. 1, 10, 100 S.E.2d 544, 548 (1957) ("If appellant thought these instructions violated [the constitutional prohibition on comments on the facts], which we are inclined to think they did, counsel should have made timely objection when the jury was excused at the conclusion of the main charge. They waived the objection by failing to do so." (citations omitted)); see also 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." (emphasis added)). Likewise, our Supreme Court has found earlier case law that created an exception to the standard contemporaneous objection requirement in the context of a similar constitutional issue with a jury charge was "nullified" by the adoption of statutory language ensuring litigants in our state will always be afforded an opportunity—just as Appellant was—to object to a trial judge's jury instructions during trial. Williams, 266 S.C. at 335, 223 S.E.2d at 43; see S.C. Code Ann. § 17-23-100 ("In all cases tried before a jury, other than cases in a magistrates or municipal court, after the court has delivered to the jury a charge on the law in the case, the court shall temporarily excuse the jury from the presence of counsel and litigants in order to give counsel and litigants an opportunity to express objections to the charge or request the charge of additional propositions made necessary by the charge, out of the presence of the jury."). Furthermore, due to its effect of encouraging "sandbagging" in a manner that frustrated the goals

of the criminal justice system, our Supreme Court has since abolished the in favorem vitae doctrine and affirmed the necessity of contemporaneous objections for issue preservation in our state even in the context of capital cases. See State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring in result for the majority) ("[W]e hold a contemporaneous objection is necessary *in all trials* beginning after the date of this opinion to properly preserve errors for our direct appellate review." (emphasis added and footnote omitted)); see also I'On, 338 S.C. at 422, 526 S.E.2d at 724 (instructing our state's issue preservation requirements prevent a party "from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity"). Based on all those significant developments that have come since the Orr decision was issued over a century ago, it has now been abrogated and no longer constitutes controlling precedent in South Carolina assuming that never-subsequently-relied-upon decision ever did. Williams, 266 S.C. at 335, 223 S.E.2d at 43; see Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule *shall constitute a waiver of objection*." (emphasis added)); cf. State v. English, 443 S.C. 49, 56-57, 902 S.E.2d 385, 389 (2024) (recognizing an earlier appellate decision was abrogated by subsequent decisions and the adoption of the South Carolina Rules of Evidence).

Accordingly, because defense counsel not only did not object to the jury instruction Appellant now seeks to challenge on appeal but asked the trial judge to present it in the manner it was presented, Appellant's newly-conceived appellate challenge to that jury instruction must be

rejected on procedural grounds as his issue with it was simply not properly preserved for appellate review pursuant to our state's well-established issue preservation requirements. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) ("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. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (recognizing an issue will be procedurally barred on appeal when a party fails to timely object because the absence of a contemporaneous objection denies the trial judge an opportunity to cure the alleged error); State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."); see also Boyd v. United States, 271 U.S. 104, 108 (1926) ("Certainly, after permitting [a jury instruction] to pass as satisfactory then, the defendant is not now in a position to object to it."); cf. State v. Charron, 351 S.C. 319, 328, 569 S.E.2d 388, 393 (Ct. App. 2002) (finding allegations of due process and equal protection violations were not preserved for appellate review when there was no indication those issues were raised to the trial judge). Appellant's conviction and sentence should be affirmed.

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

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

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

ATTORNEYS FOR RESPONDENT

May 12, 2026