

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

APR 16 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

RICKY S. BOWMAN,

APPELLANT

APPELLATE CASE NO. 2011-202926

Unpublished Opinion No. 2014-UP-132

PETITION FOR REHEARING

Appellant respectfully petitions the Court for a rehearing of Opinion No. 2014-UP-132 pursuant to Rule 221(a), SCACR based on the following points overlooked or misapprehended by the Court.

BACKGROUND

Prior to Appellant's trial and a *Neil v. Biggers*¹ hearing, the State moved to close the courtroom for the testimony of some of its witnesses, alleging they had received threats and other undue influence from Appellant's family members. R. 28, ln. 13—R. 29, ln. 2. Counsel for Appellant objected, "There is no proof that I've seen, no evidence of [threats to the witnesses]. .

¹ 409 U.S. 188 (1972).

. . . I believe it's unfair to clear the courtroom . . . [i]n terms of singling out my client's family”² R. 29, ll. 3-13. The trial judge granted the State's motion, stating, “I don't know who is making all of these alleged threats, but I'll grant the motion.” R. 29, lines 3—R. 31, line 25. The judge closed the courtroom for two witnesses during the *Neil v. Biggers* hearing and for another witness during the trial. R. 51, ll. 3-15; R. 70, ll. 3-10; R. 119, ln. 10—R. 120, ln. 13.

DISCUSSION

COUNSEL SUFFICIENTLY URGED THAT CLOSING COURT TO APPELLANT'S FAMILY MEMBERS WITHOUT VERIFICATION OF THE THREATS ALLEGED BY THE STATE UNFAIRLY TOPPLED A LONGSTANDING PROTECTION OF HIS BASIC RIGHT TO AN OPEN TRIAL.

Counsel for Appellant preserved for review the issue of whether closing the courtroom for testimony from two State witnesses constituted reversible error. Counsel sufficiently urged the points that closing the court to the individuals having the greatest interest in Appellant's plight without any reliable justification was unfair, against sound judicial discretion, and unacceptably infringed his right to an open trial. In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004). A party must object with sufficient specificity to inform the trial court of the point being urged. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

“Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue.” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). The

² In its Brief of Respondent, the State presented this argument by Counsel and a follow-up argument as one and the same. Final Brief of Respondent at 6 (citing R. 29, ll. 3-13 and R. 31, ll. 1-6). However, the record shows two distinct arguments: (1) the initial argument by Counsel and the ruling of the judge upholding the closure and (2) an argument concerning what procedures were proper for closing the court.

Court's good practice is to reach the merits when error preservation is doubtful. *See Atl. Coast Builders & Contractors v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012); *see also State v. Parler*, 217 S.C. 24, 26, 59 S.E.2d 489, 489 (1950) (“[A]s the conviction and sentence involve the liberty of the appellant, this Court in accord with its liberal policy under such circumstances, waives his failure to comply with the Rule, and will consider the question on its merits.” (citing *State v. Lyles*, 211 S.C. 334, 45 S.E.2d 181 (1947); *State v. Stevens*, 116 S.C. 210, 107 S.E. 906 (1921))).

The Sixth Amendment directs in part that in all state and federal criminal prosecutions, the accused shall enjoy the right to a public trial, and this right encompasses suppression hearings. *Waller v. Georgia*, 467 U.S. 39 (1984). The Fifth and Fourteenth Amendments' guarantee of due process also subsumes this right. *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948) (“In view of . . . the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.”). The touchstone of due process in criminal prosecutions is fundamental fairness. *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 882 (Ct. App. 2004) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

Only in rare and carefully selected situations can the presumption of openness be overcome by specific findings that a sufficient interest is likely to be prejudiced by openness and that any closure is narrowly tailored to serve that interest. *Waller* at 45 (citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511-12 (1984)). In *Waller*, the United States Supreme Court quoted *Oliver* in edifying the justification for open criminal trials:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not

unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

In addition to ensuring that judge and prosecutor carry out their duties properly, a public trial encourages witnesses to come forward and discourages perjury.

Waller at 46 (quotations omitted). In *Oliver*, the Supreme Court first reflected on the principle that a “public trial” should be open to spectators whose interests in the proceedings align with those of the accused—first and foremost, family and similarly-related supporters. Citing, inter alia, *People v. Hall*, 64 N.Y.S. 433 (1900), the Court stated, “[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter what the offense he may be charged.” *In re Oliver* at 271-72. See also, e.g., *Bucci v. U.S.*, 677 F. Supp.2d 406, 416 (D. Mass. 2009) (“The presence of the defendants’ closest family members vindicated their public trial rights by ensuring that the defendants were ‘fairly dealt with and not unjustly condemned’ and by ‘keep[ing] [the defendants]’ triers keenly alive to a sense of their responsibility and to the importance of their functions.” (quoting *Waller* at 46)), *aff’d on other grounds*, 662 F.3d 18 (4th Cir. 2011).

In *Hall*, the Appellate Division of the New York Supreme Court stated that ensuring that an accused has been afforded an adequately open trial is inherently a matter of judicial discretion:

To make effectual the . . . requirement, the court must necessarily exercise its discretion. . . . [T]he court must decide whether or not the defendant has been denied a “public trial.” That is a term of some elasticity In a time of political or local excitement, if the trial judge permitted the court room to be packed exclusively with men opposed to the defendant on trial, the trial would not be public in fairness to the defendant. Every seat and all the standing room might be occupied, but the character of the spectators present, and the friendliness to the accused of those who failed to gain admittance . . . are to be considered in deciding whether the rights of the defendant have been trampled upon.

Hall at 436-37 (emphasis added). The United States Court of Appeals for the Fourth Circuit confirmed the discretionary nature of this type of decision in *Bell v. Jarvis* decided in 2000:

[T]he Supreme Court has recognized that there is a presumption in favor of open trials. Yet the right is not absolute, and **the Supreme Court has long recognized that trial judges have discretion to impose reasonable limitations on access to a trial** when overriding interests, “such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information,” are likely to go unprotected if closure is not employed.

Bell v. Jarvis, 236 F.3d 149, 165 (4th Cir. 2000) (emphasis added) (internal citations omitted) (quoting *Waller* at 45 and citing *Bell v. Evatt*, 72 F.3d 421, 433 (4th Cir. 1995)).

A trial court abuses its discretion by making a ruling based on factual conclusions that are without evidentiary support. *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653,656 (2006). A trial court also abuses its discretion by a failure to exercise discretion itself. *Id.* Thus, an abuse of discretion occurs when a trial court rules on an issue without engaging in a particular inquiry prescribed by controlling authority. *See State v. Collins*, 398 S.C. 197, 213, 727 S.E.2d 751, 760 (Ct. App. 2012) (holding trial court’s failure to perform analysis of photographs required under Rule 403, SCRE constitutes abuse of discretion (quoting *State v. Mansfield*, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (“The failure to exercise discretion, however, is itself an abuse of discretion.”))).

In this case, the State moved to close the court. Thus, the State put into issue whether a rare situation existed in which the presumption of openness should be overcome by specific findings that a sufficient interest was likely to be prejudiced by openness. Counsel objected, “There is no proof that I’ve seen, no evidence of [threats to the witnesses]. . . . I believe it’s unfair to clear the courtroom . . . [i]n terms of singling out my client’s family” R. 29, ll. 3-13. Counsel specifically stated the point that it was unfair to Appellant to exclude his family members based on


mere allegations without any verification whatsoever that one of them had threatened a witness. The expression was squarely within the due process guarantee of fundamental fairness, and a “Fourteenth Amendment” appellation would have added nothing of substance to the analysis at hand. Further, that the presence of Appellant’s family members was critical for a truth-exacting atmosphere during testimony from the State’s witnesses—who provided the only direct, but objectively equivocal, evidence of Appellant’s involvement in the crime—was self-evident. Similarly, Counsel urged the point held in *Waller* and *Press-Enterprise* that specific findings were necessary to overcome the strong presumption of openness and support closure of the courtroom. Counsel stated that the State provided no verification that any threats occurred or Appellant’s family members made them. The trial judge plainly understood the point in directly confronting and ruling against it: “**I don’t know who** is making all of these **alleged** threats, but I’ll grant the State’s motion.”

Finally, Counsel sufficiently urged the point that granting the State’s motion without any verification of the allegations was an abuse of discretion. On its very face, the trial court’s ruling was based on factual conclusions without support. The court also failed to undertake the prescribed inquiry under in *Waller* and *Press-Enterprise*. By calling the presumption into the focus of the trial court, Counsel thereby invoked the longstanding prophylactic having the one and only purpose of protecting Appellant’s basic Constitutional right to an open trial.

CONCLUSION

For these reasons, Appellant respectfully requests that the Court withdraw the Opinion, reverse the ruling of the trial court, and remand the case for a new trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2014.

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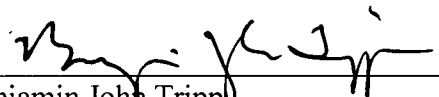
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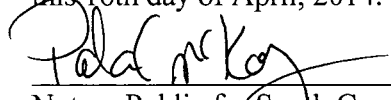
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of April, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of April, 2014.



Notary Public for South Carolina (L.S.)
My Commission Expires: July 24, 2022.