

ORIGINAL

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
C. Victor Pyle, Jr., Circuit Court Judge

Appellate Case No. 2013-002513

THE STATE, .....RESPONDENT

v.

EVERETTE M. JENKINS, .....APPELLANT.

**FINAL BRIEF OF RESPONDENT**

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 1871

Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727

W. WALTER WILKINS  
Solicitor, Thirteenth Judicial Circuit

305 E. North Street, Suite 325  
Greenville, South Carolina 29601  
(864) 467-8647

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

May this Court consider Appellant's argument on appeal that the trial court erred in refusing to direct a verdict in his favor when the issue of the reliability of cross-racial identification presented on appeal was never mentioned to the trial judge in support of directed verdict or by way of pretrial motion to suppress or objection to the eye-witness's identification of Appellant; nevertheless the reliability of the identification is a matter of weight and not the existence of the evidence and there is more than sufficient evidence to support the trial judge's refusal to direct a verdict as to the shoplifting charge, including direct testimony from the store clerk that he observed Appellant acting suspiciously in the store, that he saw Appellant leave the store with a tool box and that he followed Appellant until officers arrived and apprehended Appellant a short distance from the store with the stolen toolbox and a number of other items taken from the store?

## **STATEMENT OF THE CASE**

Appellant was indicted at the May, 2013 term of the grand jury for Greenville County for shoplifting (2013-GS-23-004280). On November 14, 2013, Appellant proceeded to trial by jury pursuant to which Appellant was found guilty of shoplifting. He was sentenced by the Honorable C. Victor Pyle, Jr., to eight (8) years' imprisonment. Appellant timely filed a notice of appeal and subsequently submitted a Brief. This Brief of Respondent follows.

## RESPONDENT'S STATEMENT OF FACTS

On March 17, 2013, Serbando Garcia, an employee at Advanced Auto Parts, noticed a customer behaving strangely. R. pp. 8-15. Garcia noted that the customer was wearing a very heavy black jacket, which was strange attire for a sunny spring day. R. p. 12. Garcia noticed that the customer was watching him intently, and would put down the items he was looking at whenever Garcia glanced in his direction. R. pp. 13-15. Garcia informed the store manager that a customer was acting suspiciously and asked the manager to keep an eye on him. R. pp. 14-15. After helping another customer, Garcia noticed the customer walking away from the Advanced Auto Parts with a toolbox in his left hand. R. p. 15. Garcia asked the manager if they had sold a toolbox, to which the manager replied that they had not. R. pp. 15-16. Garcia checked the inventory and saw that no toolboxes had been sold recently; he then confirmed that a toolbox was missing from where it was supposed to be in the store. R. p. 16. Garcia then got into his car to pursue the customer. R. p. 17. After travelling a short distance, Garcia located the customer, who was still carrying the toolbox. R. p. 18. Garcia then called the police. R. p. 18. At trial, Garcia identified Appellant as the customer he saw acting suspiciously and later carrying the toolbox away from the store. R. pp. 16-17. Garcia maintained visual contact until the police arrived a few minutes later. R. pp. 24-26. Upon their arrival, the police officers questioned and arrested Appellant. R. p. 21. In order to get out of traffic, Garcia and the police officers proceeded to the parking lot of the Li'l Cricket store. R. p. 21. In addition to the toolbox, Appellant had several other items from the Advanced Auto Parts store in his pockets. R. p. 27. Garcia and the police officers then returned to the Advanced Auto Parts store to determine the value of the stolen items. R. p. 27. Garcia testified that he was able to determine that all of the items found on Appellant's person

were from his store due to the presence of the store brand on all of the items. R. p. 28.

The stolen items were worth a total of around one hundred and forty dollars. R. p. 28.

Garcia again testified that the individual he saw in the store and followed is the individual who had stolen the items from the store. R. p. 32. Garcia further testified that the defendant, who was present in the courtroom, was that individual who stole the items from the store. R. p. 32. While the Advanced Auto Parts Store has video surveillance, the surveillance system was not in use the day of Appellant's shoplifting due to a system upgrade being undertaken. R. pp. 31-32.

Deputy John White was the first officer on the scene. R. p. 44. Deputy White spotted Appellant walking across the 124 overpass on Whitehorse Road. R. pp. 43-44. Deputy White observed Defendant wearing a black jacket and carrying a toolbox. R. pp. 43-44. After briefly interviewing Appellant, Deputy White placed him in handcuffs and put Appellant in his patrol car. R. pp. 45-46. Garcia arrived at the scene and confirmed that Appellant was the person he had been following. R. p. 46. Deputy White placed the items found on Appellant's person on the trunk or hood of his patrol car, where they were identified by Garcia as items from his store. R. p. 52. Due to a shift change, Deputy Horne arrived to take over the investigation from Deputy White. R. p. 51. Deputy Horne took Garcia's statement regarding Appellant's shoplifting. R. p. 54. Deputy Horne made a slight error when taking Garcia's statement, writing down that Garcia worked at AutoZone instead of Advanced Auto Parts. R. p. 55. Deputy Horne testified that he made a mistake when recording Garcia's statement. R. p. 55. Deputy Horne testified that there was no question in his mind that Garcia was an employee of Advanced Auto Parts, not AutoZone. R. p. 55. Deputy Horne also testified that Garcia was able to identify

Appellant. R. p. 55. Deputy White testified that upon activation of his patrol car's blue lights, the in-car video is also activated. R. p. 50. Deputy White did not bring a copy of the in-car video from his patrol car from the day of the incident. R. p. 50. Deputy Horne did not activate his blue lights when approaching the scene. R. p. 57. The defense counsel moved for a directed verdict. R. p. 58. Defense Counsel argued:

“Judge, I’d move, due to the confusion whether it’s AutoZone or Advanced Auto Parts and the fact that the video, which would have been the best evidence, was not working in the store, and the officer did not attempt to look at it or obtain it and bring to court the auto—the video from the car, which comes on automatically when it activates, which he admits it does, that this charge be dismissed because of the confusion and the lack of evidence. The best evidence has not been presented.”

R. p. 58.

The judge denied the motion. R. p. 58. Appellant did not present any witnesses or exhibits for the jury’s consideration. R. pp. 59 – 62. The jury subsequently found the defendant guilty of shoplifting. R. p. 83.

## ARGUMENT

**May this Court consider Appellant's argument on appeal that the trial court erred in refusing to direct a verdict in his favor when the issue of the reliability of cross-racial identification presented on appeal was never mentioned to the trial judge in support of directed verdict or by way of pretrial motion to suppress or objection to the eye-witness's identification of Appellant during trial; nevertheless the reliability of the identification is a matter of weight and not the existence of the evidence and there is more than sufficient evidence to support the trial judge's refusal to direct a verdict as to the shoplifting charge, including direct testimony from the store clerk that he observed Appellant acting suspiciously in the store, that he saw Appellant leave the store with a tool box and that he followed Appellant until officers arrived and apprehended Appellant a short distance from the store with the stolen toolbox and a number of other items taken from the store?**

Appellant argues that the trial judge erred in failing to direct a verdict in his favor because the identification was an "unreliable and uncorroborated cross-racial identification." The State disagrees and submits that Appellant's argument is without merit. First, the State submits that Appellant's issue was never presented or argued to the trial judge and, therefore, is not properly before this Court on appeal. Second, there was no issue regarding the identification of Appellant at trial, as the identification was both reliable and supported by corroborating evidence and was never challenged on this or any other basis at trial. Third, there is more than sufficient evidence to support the trial judge's refusal to direct a verdict as to the shoplifting charge, including direct testimony from the store clerk that he observed Appellant acting suspiciously in the store, that he saw Appellant leave the store with a tool box and that he followed Appellant until officers arrived and apprehended Appellant a short distance from the store with the stolen toolbox and a number of other items taken from the store.

As set forth in Respondent's Statement of Facts herein, the record before this Court clearly establishes that Appellant moved to dismiss the charge at the close of the State's case on the grounds of the scrivener's error over the name of the store, the fact

that the video was not working in the store, and the lack of video from the patrol cars of Deputy White and Deputy Horne. Missing from these grounds for directed verdict is Appellant's argument on appeal, that the trial judge erred in failing to direct a verdict for Appellant on the ground of an "unreliable and uncorroborated cross-racial identification." This ground was simply **never mentioned** to the trial judge in support of the motion to dismiss or by way of a challenge to the witness' identification. Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001). A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Appellant's failure to make his argument regarding the sufficiency of the "unreliable and uncorroborated cross-racial identification" at trial precludes him from arguing the issue on appeal.<sup>1</sup> Appellant's alternative justification for a directed verdict that was not argued at trial is therefore not preserved for review by this Court.

Even if the issue were preserved for appellate review, the trial judge did not err in denying Appellant's directed verdict motion. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Rosemund, 356 S.C. 426, 589 S.E.2d 757 (2003). In reviewing a motion for a directed verdict, the trial judge is concerned with the existence of the evidence, not its weight. Id. at 429. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or substantial

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<sup>1</sup> Appellant merely speculates that a cross-racial identification occurred in this case. Because the issue was not presented to the trial judge in support of a motion or objection or litigated at trial in any manner, race is absent from the transcript. The race of the witness is not found anywhere in the Record. Appellant is listed on the sentence sheet as a white male; however, the South Carolina Department of Corrections' Inmate Search Report lists him as a black male. See <http://www.doc.sc.gov/pubweb/>

circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Id. at 429-430.

Section 16-13-110 of the South Carolina Code provides in pertinent part:

(A) A person is guilty of shoplifting if he:

(1) takes possession of, carries away, transfers from one person to another or from one area of a store or other retail mercantile establishment to another area, or causes to be carried away or transferred any merchandise displayed, held, stored, or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value;

S.C. Code Ann. § 16-13-110 (A) (1).

The Court in State v. Shaw, 328 S.C. 454, 457, 492 S.E.2d 402, 404 (Ct. App. 1997) stated:

Common sense tells us that anyone who, in violation of the shoplifting statute, takes and carries away a storekeeper's merchandise with intent to deprive the owner of its possession without paying for it, or alters or removes a label or price tag in an attempt to buy a product at less than its value or transfers merchandise from its proper container for the purpose of depriving a storekeeper of its value acts dishonestly.

There was a great deal of evidence presented at trial tending to prove Appellant's guilt, including Garcia's identification of Appellant. Even though never challenged in any manner by Appellant, Garcia's identification exhibited significant indicia of reliability, and was also supported by strong corroborative evidence. Garcia's identification was sufficiently reliable, as the identification easily passes muster under Neil v. Biggers, 409 U.S. 188 (1972). The factors considered in determining the likelihood of misidentification include the opportunity of the witness to view the criminal

at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation. Id. at 199-200. The first factor is clearly met, as Garcia observed Appellant's face and clothing for a period of time in the store acting suspiciously and surreptitiously filling his pockets with items from the store. Garcia later noticed Appellant outside walking away from the store carrying a toolbox he shoplifted from the store. Garcia exhibited a high degree of attention, as he observed Appellant throughout his time at the store, as well as engaging in a pursuit once he noticed that Appellant had left the premises. Garcia gave an accurate description of Appellant, as he described the Appellant's direction and clothing such that police were able to quickly apprehend him. When asked to identify Appellant, Garcia responded with 100% certainty that this was the man he observed inside the store and later pursued away from the store. There was little time between the crime and the confrontation, as Garcia was in hot pursuit of the Appellant and police arrived to apprehend Appellant in a matter of minutes. All of these factors tend to prove that Garcia's identification of Appellant was credible, as Garcia was observing while the crime was occurring, as well as afterwards. (See R. pp. 12-16; 18- 21; 23; 32; 40; 44; 46; 55). Garcia's continued involvement in observing Appellant makes it exceedingly unlikely that he could be mistaken regarding Appellant's identity. Appellant's assertion that Garcia's identification lacks reliability simply because Appellant speculates that Garcia is of another race lacks support and is therefore without merit.

Appellant also asserts that Garcia's identification lacked support from corroborating evidence. This assertion lacks any factual basis. Garcia watched Appellant

while he acted suspiciously in the store, observed Appellant as he walked away from the store with the stolen toolbox, and followed Appellant until Appellant was apprehended by law enforcement officers. Garcia's identification that Appellant was in fact the man who stole the items from Advanced Auto Parts was also supported by the presence of the stolen merchandise on Appellant's person at the time he was apprehended by police. Appellant was caught red-handed with merchandise that Garcia confirmed came from Advanced Auto Parts and had not been paid for. This evidence is highly corroborative of the validity of Garcia's identification of Appellant.

Taking all of the evidence above in the light most favorable to the state, the trial judge was justified in denying Appellant's motion for directed verdict, as there was ample evidence to support the charge against Appellant. Therefore, the issue Appellant presents is without merit. The conviction must be affirmed.

**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

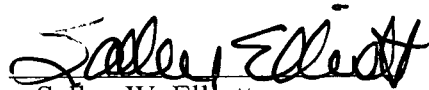
Respectfully submitted,

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

W. WALTER WILKINS  
Solicitor, Thirteenth Judicial Circuit

BY:



Salley W. Elliott  
S.C. Bar No: 1871

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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**CERTIFICATE OF COUNSEL**

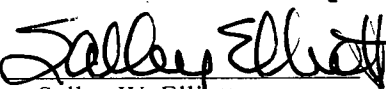
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The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

W. WALTER WILKINS  
Solicitor, Thirteenth Judicial Circuit

BY:   
Salley W. Elliott  
S.C. Bar No. 1871

Office of the Attorney General  
Post Office Box 11549  
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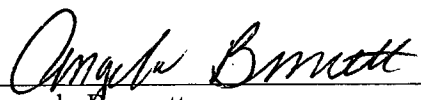
**PROOF OF SERVICE**

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I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated July 23, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda M. Carter, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.  
This 23<sup>rd</sup>, day of July, 2014.

  
\_\_\_\_\_  
Angela Bennett  
Administrative Assistant

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JUL 23 2014

**SC Court of Appeals**

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727