

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY
Donald B. Hocker, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2014-000852

THE STATE,RESPONDENT

v.

JOHN LYNDON UPSON,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent’s Statement of Issues on Appeal1

Statement of the Case.....2

Statement of Facts.....3

Argument:

I. The trial court properly denied Appellant’s motion for a directed verdict respecting the armed robbery charge when testimony of witnesses present during the incident and other evidence introduced constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence?.....6

II. The issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges cannot be considered on appeal the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant’s motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.14

Conclusion21

TABLE OF AUTHORITIES

Cases:

<u>Busillo v. City of North Charleston</u> , 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013)	13, 15
<u>Connolly v. People’s Life Ins. Co. of South Carolina</u> , 299 S.C. 348, 384 S.E.2d 738 (1989)	13, 15
<u>Creech v. South Carolina Wildlife and Marine Resources Dep’t</u> , 328 S.C. 24, 491 S.E.2d 571 (1997)	13, 15
<u>I’On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	16
<u>McDill v. Mark’s Auto Sales, Inc.</u> , 367 S.C. 486, 626 S.E.2d 52 (2006)	11
<u>State v. Condrey</u> , 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002)	9
<u>State v. Bland</u> , 318 S.C. 315, 457 S.E.2d 611 (1995)	8
<u>State v. Buckmon</u> , 347 S.C. 316, 555 S.E.2d 402 (2001)	7
<u>State v. Carlson</u> , 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005)	13, 16
<u>State v. Charping</u> , 333 S.C. 124, 508 S.E.2d 851 (1998)	12
<u>State v. Cherry</u> , 361 S.C. 588, 606 S.E.2d 475 (2004)	7, 8, 18
<u>State v. Childs</u> , 299 S.C. 471, 385 S.E.2d 839 (1989)	11
<u>State v. Dunbar</u> , 356 S.C. 138, 587 S.E. 2d 691 (2003)	16
<u>State v. East</u> , at 638, 578 S.E.2d	12, 17, 19
<u>State v. Hall</u> , 280 S.C. 74, 310 S.E.2d 429 (1983)	18
<u>State v. Hudgins</u> , 319 S.C. 233, 460 S.E.2d 388 (1995)	13, 15
<u>State v. Jennings</u> , 394 S.C. 473, 716 S.E.2d 91 (2011)	13, 15
<u>State v. Kennerly</u> , 331 S.C. 442, 503 S.E.2d 214 (Ct.App. 1998)	16
<u>State v. Kornahrens</u> , 290 S.C. 281, 350 S.E.2d 180 (1986)	12, 17
<u>State v. McCombs</u> , 368 S.C. 489, 629 S.E.2d 361 (2006)	6

<u>State v. Morris</u> , 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991).....	13, 15
<u>State v. Nix</u> , 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986).....	8
<u>State v. Owens</u> , 309 S.C. 402, 424 S.E.2d 473 (1992)	18
<u>State v. Prioleau</u> , 345 S.C. 404, 548 S.E.2d 213 (2001).....	16
<u>State v. Rogers</u> , 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004)	13, 15
<u>State v. Salisbury</u> , 343 S.C. 520, 541 S.E.2d 247 (2001)	7
<u>State v. Steadman</u> , 216 S.C. 579, 59 S.E.2d 168 (1950).....	19
<u>State v. Stuckey</u> , 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001).....	12, 17
<u>State v. Thompson</u> , 374 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007).....	8, 9, 10, 11
<u>State v. Tucker</u> , 334 S.C. 1, 512 S.E.2d 99 (1999)	18
<u>State v. Weston</u> , 367 S.C. 279, 625 S.E.2d 641 (2006)	6, 7
<u>State v. Williams</u> , 266 S.C. 325, 223 S.E.2d 38 (1976).....	7
<u>State v. Zeigler</u> , 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005)	7
<u>U.S. v. Kochel</u> , 416 F.2d 370 (4th Cir. 1969).....	10

Statutes:

S.C.Code Ann. § 16-11-330 (A).....	8
S.C. Code Ann. § 16-3-910 (2003)	17

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court properly deny Appellant's motion for a directed verdict on the armed robbery charge when testimony of witnesses present during the incident and other evidence constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence?

II.

May this Court consider the issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant's motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.

STATEMENT OF THE CASE

Appellant was indicted on January 9, 2014, by the Aiken County Grand Jury, for one count of armed robbery (2014-GS-02-74) and two counts of kidnapping (2014-GS-02-79 and 2014-GS-02-80). He was represented by Andrew Smith and De Grant Gibbons, and the State was represented by Assistant Solicitors Jeffery Alan Slocum and Kevin R. Molony. On April 15-16, 2014, Appellant proceeded to trial by jury pursuant to which Appellant was found guilty as charged. He was sentenced by the Honorable Donald B. Hocker to twenty years' imprisonment with all three sentences to run concurrently.

Appellant timely filed a notice of appeal and subsequently submitted a brief. This brief of Respondent follows.

STATEMENT OF FACTS

On November 27, 2013, Scott Hall, a cook employed at Captain D's restaurant, was taking out the trash at the rear entrance of the restaurant when two masked men approached dressed in black and wearing bandanas and surgical gloves. One of the two men had a gun and pressed the gun against Hall's head before Hall could get inside. The two men directed Hall inside and told Hall to take them to the front of the restaurant to the safe. Hall complied with the demands. (Tr. pp. 57; 79 - 80). Hall testified that he was forced "up front" by the gunman while the gun was still held against Hall's head. (Tr. 81). Hall was very frightened. (Tr. p. 81). Manager Devin Johnson was at the front of the restaurant at the time. (Tr. p. 93). Johnson was the only person with access to the safe. (Tr. p. 93). After forcing Hall to the front of the restaurant with the gun to Hall's head, the gunman instructed Hall to get on all fours, and look down. (Tr. p. 81; 94). Hall heard the gunman demanding that the manager Devin Johnson give the gunman money. (Tr. p. 81). Hall heard Johnson fumble a couple of times getting the safe open. (Tr. p. 85). During the exchange between the gunman and Johnson, Hall heard the gunman tell Johnson to give him the cash but not the coins. (Tr. 81; 91). Specifically, the gunman said, "Give me the money, I don't want the damn coins." (Tr. 85). Hall also stated that the gunman put the money in one of the restaurant "take-out" bags that the gunman grabbed as he walked to the front of the restaurant. (Tr. 85; 91). Hall described that after the gunman "had gotten the money and everything," the gunman directed Hall to stand with his arms over his head. (Tr. 85 - 86). Hall specifically testified that the gunman received money from Johnson after Johnson "fumbled with it a couple times to get the safe open." (Tr. 85). Hall stated that after taking the money and while holding the gun to the back of Hall's head, the gunman directed Hall into the "cooler" where employee

Jameshia Alston already stood. (Tr. p.86; 91; 95). Hall did not feel free to leave. (Tr. p. 86). The assailants searched Alston, Hall and Johnson's pockets for anything they had and took Johnson's cell phone. (Tr. p. 54; 118; 122). Hall remained in the cooler for approximately five minutes. (Tr. p. 86; 91; 95). Hall was frightened and did not feel he was free to leave. (Tr. 86). Hall said the robbery lasted a few minutes. (Tr. 91; 98). Hall testified that money was missing from the safe that night and he had to count the money left in the drawers. (Tr. p. 98 – 99; 119). When the assailants were gone, Johnson called the police. (Tr. pp. 91 – 92). Hall provided descriptions of the assailants, including the fact that the gunman had a teardrop tattoo or birthmark under his eye. (Tr. 87). The police arrived shortly thereafter, took statements and began their investigation. Photographs were introduced of the cash drawers, coins, and areas involved. (R. ____ [State's exhibits 1-12]).

Two other employees, manager Devin Johnson and cashier Jameshia Alston were inside the restaurant when the two assailants entered with Hall at gunpoint at around 10:15 p.m. (Tr. p. 53). Alston was located at the back of the restaurant counting her cashier's drawer down to one hundred and fifty dollars before placing the money and cashier's drawer in the safe as she did every evening she worked. (Tr. p. 53 – 54; 58 - 59). Alston started that process around 10:00 p.m. when the restaurant closed. (Tr. 53; 65). Alston observed the armed assailant enter the restaurant holding a gun held to Hall's head and heard the assailant direct Hall to go to the safe. (Tr. 54). A second, unarmed assailant who entered with the armed assailant went to Alston's location and told her to "stand right here. Don't move." Alston asked to go home and the assailant responded, "No, stay right here." (Tr. 54). Alston was fearful of the two assailants and described

them as forceful and demanding. (Tr. 60). She did as she was told. (Tr. p. 54). Alston recognized the unarmed assailant standing with her as the person she saw at the restaurant two days earlier with another employee. Alston recalled the order the unarmed assailant placed for a large drink as well as the fact that he and another employee took a photograph together. (Tr. 56 – 58; 65; 70). After making Alston remain at the back of the restaurant, the unarmed assailant whom Alston identified as Appellant during the trial then walked Alston to a location near the “stand-up refrigerator” – or “cooler” - where he kept her for a minute before forcing her inside. (Tr. pp. 54, 60; 64). Alston complied. (Tr. 54). Alston believed she could not leave and she feared for her life. (Tr. p. 58). Alston remained in the cooler until after the armed robbery. (Tr. p. 60). Alston informed the officers who responded to the scene that she recognized Appellant but did not know his name. (Tr. 61; 67). Within one hour of leaving the restaurant after the incident, Alston researched Facebook photographs and found the photograph taken at the restaurant. Alston called officers with the name she discovered and forwarded the photographs. (Tr. 61 – 62; 72 – 74; 77; p. ____ [State’s Exhibits 1 – 12]).

Officer Royster testified that Johnson was not a suspect because he left some money in the safe during the armed robbery, had a sufficient explanation for suspicious calls, and had his cell phone stolen during the armed robbery. (Tr. p. 107; 118- 119; 122-123; 133-134). Photographs introduced depict the scene, coins and safe. (Tr. p. 101; State’s exhibits 1 – 12).

ARGUMENTS

I.

The trial court properly denied Appellant's motion for a directed verdict respecting the armed robbery charge when testimony of witnesses present during the incident and other evidence introduced constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence.

Appellant argues the trial court erred in denying his motion for directed verdict respecting the armed robbery charge arguing the State failed to present evidence establishing that money or goods belonging to Captain D's was forcibly taken from the manager, Devin Johnson, because Johnson was not called as a witness at trial. The State submits that a review of the evidence presented and the reasonable inferences arising from that evidence taken in the light most favorable to the State reveals the trial court properly declined to direct a verdict of acquittal in Appellant's favor.

"When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of the evidence, not its weight. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362 - 63 (2006). However, the trial judge should deny a directed verdict motion and submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be

fairly or logically deduced. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) (emphasis added); State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976). “[A] trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.” State v. Zeigler, 364 S.C. 94, 102 – 03, 610 S.E.2d 859, 863 (Ct. App. 2005). In State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004), the Court described circumstantial evidence and direct evidence as follows:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Where the State relies exclusively on circumstantial evidence, the trial court must submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). A case is considered a direct evidence case, rather than circumstantial, when the State relies upon direct evidence to prove the acts of the crime and the identity of the perpetrator, and circumstantial evidence was merely corroborative or offered to demonstrate intent. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) (stating the officers’ personal observations and opinions of the defendant’s actions, appearance, and condition constitute direct evidence of DUI because it is based on the officers’ actual knowledge of the situation and requires no inference from the jury).

On appeal from the denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in light most favorable to the State. State v.

Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.” State v. Cherry, 361 S.C. at 588, 593 – 94, 606 S.E.2d 475, 478. “[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge’s ruling upon a motion for a directed verdict must stand absent an error of law.” State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Appellant was charged with armed robbery in violation of S.C. Code Ann. § 16-16-11-330 (A) (2003), which provides that “[a] person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony.” S.C.Code Ann. § 16-11-330 (A). “Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. The crime is ‘armed robbery’ when a person commits a robbery while armed with a deadly weapon.” State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007), citing State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995); see also State v. Nix, at 492, 343 S.E.2d at 627. “Under the ‘hand of one is the hand of all’ theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and

purpose.” State v. Thompson, at 261, 647 S.E.2d at 704, citing Sate v. Condrey, 349 S.C. 184, 195, 562 S.E.2d 320, 324 (Ct. App. 2002).

The record before this Court reflects that Appellant moved for a directed verdict as to the armed robbery charge at the close of the State’s case arguing the State failed to present any testimony that money or property was taken because the restaurant manager Devin Johnson was not called as a witness at trial. (Tr. pp. 163 – 164). The discussion about Appellant’s motion verifies that the sole ground offered was the State’s failure to establish that money or property was taken. (Tr. p. 163-169). The trial court denied the motion, finding the evidence was sufficient to submit the charge to the jury and that Appellant was improperly asking it to consider the weight rather than existence of evidence. (Tr. pp. 164 - 170). The motion was renewed at the close of Appellant’s case and was again denied. (Tr. p. 205).

The only argument Appellant presented at trial to support his request for a directed verdict of acquittal as to the armed robbery charge was the lack of evidence to establish that money or property was taken during the armed robbery based upon the fact that restaurant manager Johnson did not testify at trial.¹ The State submits the evidence

¹ Nevertheless, there is no question that a gun was present and used by Appellant and his companion to put the employees of Captain D’s in fear of their lives in order to gain entry into the closed restaurant and to secure compliance with their demands for the contents of the safe. Scott Hall and Jameshia Alston testified to seeing the gun, which looked and felt to be real. Hall testified that when it touched his skin, the gun was cold and had the feel and weight of a real gun. Hall testified that the gun was held to his head as he was forced inside the restaurant by the perpetrators and as the gunman demanded to be taken to the safe. Alston reported seeing the gun being held against Hall’s head, of the demands made by the perpetrators to accomplish the armed robbery, and compliance by Hall, Alston, and Devin Johnson with those demands in the face of the gun and forceful demands and actions of the perpetrators. Alston was also in fear for her life. It is also uncontested that, while using the gun, Appellant’s accomplice in the armed robbery demanded access to the restaurant safe and that restaurant manager Devin Johnson was

and the reasonable inferences arising from the evidence were sufficient to support the denial of the directed verdict motions. As set forth in Respondent's Statement of Facts herein, Alston testified that she was counting down her cashier's drawer to one-hundred and fifty dollars to thereafter place it the safe where the restaurant cash is stored. However, Alston was interrupted in this process by the arrival of the armed perpetrators and heard and observed Hall being held at gunpoint and Hall being forced to take the gunman to the location of the restaurant safe. Alston's response was "Oh my God, I'm going to die" and compliance with the demands of the perpetrators. (Tr. p. 53).

Scott Hall testified that he was forced into the restaurant at gunpoint and complied with the gunman's demand to be taken to the safe. Hall observed the gunman pick up a "take-out" bag as they walked toward the safe. Hall was in the presence of the gunman and Johnson but was forced down on his hands and knees by the gunman at the location of the safe. Hall heard the gunman demand money from restaurant manager Johnson and heard Johnson fumbling as he tried to open the safe. Johnson was the only person present in the restaurant with access to the safe. During the interaction between the gunman and Johnson, Hall heard the gunman direct Johnson to leave the coins and only give him the cash. "Give me the money, I don't want the damn coins." (Tr. pp. 81; 91). Hall testified that the gunman put the money in the "take-out" bag. Hall also testified that the gunman "had gotten the money and everything." After this exchange between the gunman and

heard as he fumbled in his efforts to comply with the gunman's demands. Appellant does not contested the evidence presented establishing that Alston knew Appellant from an earlier encounter at the restaurant and identified him in court as one of the perpetrators of the armed robbery. U.S. v. Kochei, 416 F.2d 370 (4th Cir. 1969) (where four bank employees positively identified the defendant as one of two perpetrators). While Appellant was not the person with the gun, he clearly joined and acted in concert with and aided in the commission of the armed robbery. See State v. Thompson, at 257, 647 S.E.2d at 702.

Johnson, Hall was directed by the gunman to stand with his arms above his head. Hall further testified that money was missing from the safe that night and he had to count the money left in the drawers. Hall testified that he and Johnson were taken into the “cooler” while the gun was still being held against Hall’s head. Before leaving, the perpetrators searched Hall, Alston, and Johnson for “cell phones and anything else that they had.” (Tr. pp. 54 – 55). Johnson’s cell phone was taken. (Tr. p. 118).

Officer Royster testified that Johnson was questioned but was not a suspect in the armed robbery because Johnson explained suspicious telephone calls, left some money in the safe during the armed robbery, and had his cell phone stolen by the perpetrators. (Tr. p. 107; 118-119; 122-123; 133-134). Photographs also depict the scene, coins and safe. (Tr. p. 101; State’s exhibits 1 – 12).

Contrary to Appellant’s argument to the trial court, the evidence presented at Appellant’s trial and inferences arising from the evidence taken in the light most favorable to the State were sufficient to establish that money or property was taken to withstand the motion as to the armed robbery charge. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) (stating testimony indicating \$87.00 was unaccounted for after the murder of the victim is sufficient to establish that money was taken from the person or in the presence of the victim). The State submits that the trial court properly determined that the weight of the evidence, credibility of the witnesses and conflicts in the evidence as advanced by Appellant are matters that must be left to the jury as the finder of fact. McDill v. Mark’s Auto Sales, Inc., 367 S.C. 486, 626 S.E.2d 52 (2006). Assessing the weight of the evidence is not a task undertaken by the trial judge when ruling on a motion for directed verdict. State v. Thompson, at 257, 647 S.E.2d at 702. Hall’s later answers

during cross-examination do not negate the existence of that evidence. Instead, any discrepancies in later answers are matters related to the weight of the evidence which is solely a matter for the jury. See State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (stating that while the evidence supporting the burglary charge is disputed, testimony of a witness was sufficient to submit the issue of burglary to the jury); State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001) (stating that while it is contradicted by other evidence, a witness' statement that the victim was crying during a car ride constitutes direct evidence that that the victim was alive and reasonably tends to prove the defendant participated in an on-going kidnapping such to withstand a directed verdict motion.). Appellant's apparent suggestion that it is reasonable to believe the perpetrators left the restaurant without taking any money is simply not supported by the evidence.

As to Appellant's reliance on the fact that the manager Devin Johnson did not testify despite being there on the night in question and having the close contact with the gunman, the State submits this fact is immaterial to the findings of guilt and issues raised on appeal. Evidence presented at trial concerning the actual robbery and Johnson's involvement was illustrated by the testimony of fellow employees, Hall and Alston, as well as that of detective Royster. See State v. East, at 638, 578 S.E.2d at 751 (sating that the "failure of the State to call one of the victims as a witness, there was testimony in the record from the other KFC employees that [said victim] was present when they were confined in the hallway."); see also State v. Charping, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) (stating that "an adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed

to be within the knowledge of the absent witness have been testified to by other qualified witnesses).

The State also submits that, to the extent Appellant is advancing any other ground in support of his argument that a directed verdict should have been granted, it is clear from the record that nothing else was presented by Appellant to the trial court for its consideration and is, therefore, not preserved for appellate review. Pursuant to the error preservation rules in South Carolina, this Court may not reverse a trial court for error in a ruling when the trial court was not presented with the argument at trial and never ruled on the specific ground offered as error on appeal. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); see also Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. 348, 384 S.E.2d 738 (1989). Our error preservation rules require objections or motions to be made on specific grounds by Appellant and subsequent responsive rulings by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013); State v. Jennings, 394 S.C. 473, 481-482, 716 S.E.2d 91, 95 (2011); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004); State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 (1998); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991). An issue may not be raised for the first time on appeal, but must have been raised to the trial court to be preserved for appellate review. State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005). Appellant's argument on appeal is without merit and the ruling of the trial court must be affirmed.

II.

The issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges cannot be considered on appeal the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant's motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.

Appellant argues to this Court on appeal that the trial court erred by refusing to grant directed verdict motions on the kidnapping charges related to Jameshia Alston and Scott Hall contending the kidnappings were incidental to the confinement during the armed robbery and the State's failure to present substantial circumstantial evidence that money for forcibly taken from manager Devin Johnson entitled him to a directed verdict on kidnapping. He claims that acquittal on the armed robbery charge requires acquittal of kidnapping.

First, that State submits that this argument was not made to the trial court in support of Appellant's motions for directed verdict as to the kidnapping charges and, therefore, cannot be considered by this Court on appeal. The State also submits that Appellant's argument that the kidnapping charges merged into the armed robbery charge and could not stand if Appellant was acquitted of armed robbery is simply contrary to established precedent and is not logical. Moreover, for the reasons stated in Respondent's Argument I herein, the motion for directed verdict of acquittal as to armed robbery was properly denied. Additionally, the record before this Court reveals more than sufficient evidence to support the trial court's decision to submit the kidnapping charges to the jury.

At the close of the State's case, Appellant moved for directed verdicts of acquittal respecting the two kidnapping charges in question arguing solely that "[t]he State has presented no credible evidence upon which a jury would be able to base a decision of guilt." (Tr. p. 163). Appellant offered nothing further to support his request even when specifically asked by the trial court. (Tr. p. 169 - 170). The directed verdict motion on the kidnapping charges was later renewed without a stated ground. The motions were denied. (Tr. pp. 169-170; 205). On appeal, Appellant urges this Court to reverse the trial court's ruling arguing the trial court erred in denying his motions. However, the error advanced by Appellant on appeal is based on a ground Appellant failed to present to the trial court for consideration and upon which he failed to secure a ruling. Pursuant to the error preservation rules in South Carolina, this Court may not reverse a trial court for error in a ruling when the trial court was not presented with the argument at trial and never ruled on the specific ground offered as error. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. at 24, 491 S.E.2d at 571; see also Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. at 348, 384 S.E.2d at 738. Error preservation rules require an objection or motion to be made on specific grounds by Appellant and a subsequent responsive ruling by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. at 604, 745 S.E.2d at 142; State v. Jennings, 394 S.C. at 481-482, 716 S.E.2d at 95; State v. Rogers, 361 S.C. at 178, 603 S.E.2d at 910; State v. Hudgins, 319 S.C. at 233, 460 S.E.2d at 388 overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 1998); State v. Morris, 307 S.C. at 480, 415 S.E.2d at 819. An issue may not be raised for the first time on appeal, but

must have been raised to the trial court to be preserved for appellate review. State v. Carlson, 363 S.C. at 586, 611 S.E.2d at 283. “In order to preserve for review, an alleged error[,] an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the [circuit court].” State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); see also State v. Dunbar, 356 S.C. 138, 587 S.E. 2d 691 (2003) (stating that in order to properly preserve an issue for review on appeal, the defendant must present the argument to the trial court and receive a ruling); State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App. 1998) (stating that arguments not presented to the trial court in support of directed verdict are not preserved for review on appeal).

The record simply fails to establish that the issue and ground Appellant now raises on appeal were presented first to the trial court to enable the trial court to consider Appellant’s position and make a ruling responsive to Appellant’s requests. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) (“The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues before an appellate court will review those arguments.”). Accordingly, this Court should not consider the merits of Appellant’s argument respecting the trial court’s erroneous ruling when the trial court was never given an opportunity to consider the matter.

Nevertheless and assuming *arguendo* the issue is properly presented, the State submits that the trial court properly denied the motion in response to the ground advanced

by Appellant at trial. Pursuant to South Carolina Code Ann. § 16-3-910 (2003), kidnapping occurs when one “unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s] or carr[ies] away any other person by any means whatsoever without authority of law” “South Carolina’s kidnapping statute requires proof of an unlawful act taking one of several alternative forms” and merely requires that at least one of these acts to accomplish kidnapping is satisfied. State v. East, 353 S.C. 634, 636 - 637, 578 S.E.2d 748, 749-750 (Ct. App. 2003). Kidnapping is a continuing offense which commences when a person is wrongfully deprived of freedom and continues until freedom is restored. State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); see also State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986).

In this case, the Captain D’s employee Jameshia Alston testified that she saw Scott Hall with a gun held to his head and being directed inside by the perpetrators. She also saw that Hall was being forced to take the gunman to the location of the safe. Alston said that Appellant stood at the back of the restaurant with her. Alston asked Appellant if she could go home. In response, Appellant demanded that Alston stay where she was. Alston was fearful, thought she was going to die, and complied with Appellant’s demands. Alston testified that Appellant held her at the back of the restaurant and then walked her to an area outside the “cooler” where he made her stand. Alston testified that Appellant thereafter forced Alston inside the “cooler” where she was held until Appellant and the gunman left.

Scott Hall also presented testimony establishing that he was forced into the restaurant at gunpoint by Appellant and the gunman and that he was forced to take the gunman to the safe at the front of the restaurant. Hall was also directed by the gunman to

get onto his hands and knees on the floor. Hall was fearful for his life and did as the gunman demanded. Later, the gunman forced Hall to stand with his arms over his head and to walk to the "cooler." Hall was then ordered inside the "cooler" with Alston where they remained until Appellant and the gunman left.

It is clear that Hall and Alston were held at gunpoint, were directed where to stand, kneel and walk, were placed in fear for their lives and were unlawfully deprived of their freedom by the concerted action of Appellant and his accomplice. It is abundantly clear that neither was free to leave or move as they desired. This evidence was sufficient to establish kidnapping. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999) (stating that kidnapping is an offense which "commences when one is wrongfully deprived of freedom and continues until freedom is restored."). The motion made to the trial court was properly denied. State v. Cherry, 361 S.C. at 588, 606 S.E.2d at 475.

As to Appellant's unpreserved argument that the kidnapping offense merged into the armed robbery offense, the State submits that this argument has been considered and rejected. Our supreme court and this Court have held that a defendant cannot escape a kidnapping conviction by claiming that the kidnapping was incidental to offense of armed robbery or another offense in which confinement is an integral matter. See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983) (holding that the restraint of the victim constituted kidnapping despite the fact that the taking was to facilitate the commission of sexual battery); State v. Owens, 309 S.C. 402, 424 S.E.2d 473 (1992) (stating prosecution for murder after a kidnapping conviction for the murder victim is not barred by double jeopardy even though a majority of the evidence linking the defendant to the murder could have been discovered at the time of the kidnapping trial); State v. Tucker, 334 S.C.

1, 512 S.E.2d 99 (1998) (stating that restraint constitutes kidnapping regardless of the fact that the purpose of the seizure was to facilitate the commission of burglary and robbery); State v. East, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003)(same). In State v. Porter, this Court acknowledged that “[l]ogically, in order to commit armed robbery, an assailant must constrain his victim’s activities in some way; otherwise the victim could simply walk away,” but determined that “confining bank employees and customers while robbery was taking place could support a finding of kidnapping” regardless of whether it was incidental to an armed robbery. State v. Porter, 389 S.C. 27, 39, 698 S.E.2d 237, 243 (Ct. App. 2010). This Court’s conclusion was based on a determination by our supreme court that “when a single act combines the requisite ingredients of two distinct offenses, the defendant may be severally indicted and punished for each.” State v. Steadman, 216 S.C. 579, 589, 59 S.E.2d 168, 171 (1950). Moreover, this Court noted in Porter that similar to Alston and Hall, people in the bank were being confined against their will but were not being robbed which also supported kidnapping independent of armed robbery. Porter, 389 S.C. 27, 40, 698 S.E.2d 327, 244.

In rejecting Appellant’s argument, this Court should consider that it and our supreme court have concluded the charge of armed robbery has no bearing on the viability of the kidnapping charges. Further, relevant to this case is the fact that Alston and Hall themselves were not being robbed; rather, Captain D’s restaurant was the victim. Pursuant to Porter, this fact further supports an independent finding of kidnapping. Additionally, this Court should also consider that the trial court charged the jury that each indictment is a separate and distinct offense and must be decided separately. (Tr. p. 240). State v. East, 353 S.C. at 634, 578 S.E.2d 748.

CONCLUSION

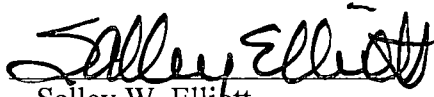
For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
July 8, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM AIKEN COUNTY
Donald B. Hocker, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2014-000852

JUL 08 2015

THE STATE,RESPONDENT

v.

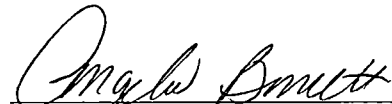
JOHN LYNDON UPSON,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated July 8, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

John H. Strom, Appellate Defender
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 8th, day of July, 2015.



Angela Bennett
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUL 08 2015

SC Court of Appeals

July 8, 2015

John H. Strom, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

Re: The State v. John Upson
Appellate Case No. 2014-000852

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

SWE/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services