STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2014-001617

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DOMINIQUE LAVAR WILLIAMS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. **The firearm was lawfully removed from Appellant's vehicle pursuant to the "plain view" exception to the warrant requirement where an officer saw the firearm, from his position outside the vehicle, in plain view by the driver's seat; where the officer reasonably believed, based upon his observations, that the gun was "real" and not a prop gun; and where Appellant subsequently approached the vehicle, opened the driver's door with a key, and prepared to get in the vehicle, at which point he was within reaching distance of the firearm.**

II. **Appellant's directed verdict motion was properly denied since the evidence supported that Appellant unlawfully carried a handgun about his person where the handgun was unsecured in Appellant's vehicle, belonged to Appellant, and was readily accessible and convenient for Appellant's immediate use.**

III. **Appellant's issues regarding the jury charge are not preserved for appellate review where Appellant expressly waived any objection to the jury charge by telling the judge he had no objection to the charge as given and where Appellant never raised his appellate issues to the trial judge until after trial in his post-trial motion. Error preservation concerns aside, however, the trial judge properly crafted a jury charge containing an appropriate definition of carrying "about the person" and the charge regarding one of the exceptions in the statute was neither erroneous nor prejudicial to Appellant.**

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in November 2012 for unlawful carrying of a handgun in violation of S.C. Code § 16-23-20. On June 18-19, 2014, Appellant was tried before the Honorable Kristi Lea Harrington and a jury. The jury found Appellant guilty. Judge Harrington deferred sentencing until July 22, 2014, when she heard Appellant's post-trial motions. Judge Harrington denied Appellant's motion for a new trial at the conclusion of this hearing and then sentenced Appellant to two days of time served. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

Around 11:00 pm on July 24, 2011, Officer James Greenawalt of the North Charleston Police Department was out on patrol in the parking lot of a nightclub called Club Pulse, which was located on Dorchester Road in North Charleston. (R. p. 90-91). Officer Greenawalt explained that law enforcement was patrolling this area because there had been "numerous incidents, particularly at this club itself, where we've had shootings inside and outside the club in the parking lot" as well as other incidents such as fights and "drunken disorderly conducts." (R. p. 91-92). He stated that one of his duties was to walk through the parking lot to see if there were any people loitering inside the vehicles, since a lot of the problems occurred while people were hanging out in vehicles outside the club. (R. p. 13; p. 92, lines 6-10).

When Officer Greenawalt walked past one particular car, he immediately noticed in plain view a firearm in the area between the driver's and front passenger's seats. (R. p. 13-14; p. 92). The firearm was actually touching the driver's seat. (R. p. 125, lines 2-5). In light of his twelve years of experience as a police officer, he believed the gun was a "real gun" as opposed to a prop because, using the light of his flashlight, he could see the gun was made out of metal, that there was a safety on the gun, and that there were serial numbers on the gun. (R. p. 12, lines 19-21; p. 26-27). He was also able to see "the make of the gun itself." (R. p. 93, lines 9-13). There was no red or orange tip on the muzzle. (R. p. 35, lines 11-13). Officer Greenawalt acknowledged that he was not able to tell for certain that the gun was "real" without removing and inspecting it. (R. p. 36, lines 4-7).

At that point, Officer Greenawalt backed away from the vehicle since it was unoccupied, but kept the vehicle under surveillance from a distance. (R. p. 15). During this time, no one went near the vehicle or attempted to tamper with it. (R. p. 15, lines 15-19). After about an hour, however, Officer Greenawalt observed two men, one of whom turned out to be Appellant, walk out of the club and approach the vehicle. (R. p. 15-16). Appellant had the car keys in his hand and he unlocked the passenger door and driver door using an electronic key fob. (R. p. 16). Appellant then opened the driver's side door and was preparing to enter the vehicle and sit in the driver's seat. (R. p. 17). Appellant, as he stood in the apex of the driver's door, was within two or three feet of the firearm and could have reached it. (R. p. 124, lines 12-22).

At that point, the officers made their presence known and detained both Appellant and his passenger. (R. p. 17). Handcuffs were used during this detention due to officer safety concerns since there was a weapon nearby. (R. p. 17). Officers informed Appellant he was not under arrest but was being detained, and he was moved to the rear area of the car. (R. p. 18). Appellant was generally cooperative with the officers. (R. p. 19). Around the time the pistol was removed from Appellant's vehicle, Appellant commented that the pistol was his and that it fell out of his pocket as he was exiting the vehicle.[1] (R. p. 18-19). After being arrested, Appellant told Detective Jason Monroe in an interview that the gun belonged to him and that he purchased it from the Money Man Pawn Shop in in February 2012. (R. p. 128-29).

[1] The trial judge later excluded this statement from the evidence at trial after ruling that the statement was not voluntary and that the officer did not provide Appellant with his Miranda warnings. (R. p. 79).

I. **The firearm was lawfully removed from Appellant's vehicle pursuant to the "plain view" exception to the warrant requirement where an officer saw the firearm, from his position outside the vehicle, in plain view by the driver's seat; where the officer reasonably believed, based upon his observations, that the gun was "real" and not a prop gun; and where Appellant subsequently approached the vehicle, opened the driver's door with a key, and prepared to get in the vehicle, at which point he was within reaching distance of the firearm.**

Applicable Law

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009), *overruled in part on other grounds by* State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S.

Const. amend. IV. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. Elkins v. United States, 364 U.S. 206, 213 (1960). "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"). Significantly, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

The well-settled rule is warrantless searches are unreasonable *per se* unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). "[W]arrantless searches are allowed when the circumstances made it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Kentucky v. King, __ U.S. __, 131 S.Ct. 1849, 1858 (2011). There are several recognized exceptions to the warrant requirement. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). One such exception is plain view. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). Under this exception, items observed within the plain view of an officer who is rightfully in a position to view the items are subject to seizure and may be introduced into evidence. Id. The two elements needed to satisfy the plain view exception are (1) that

the initial intrusion which afforded officers the plain view was lawful and (2) that the incriminating nature of the evidence was immediately apparent to the seizing authorities. State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 372 (2011).

The Unlawful Carrying Statute

South Carolina Code § 16-23-20 states that it is unlawful for "anyone to carry about the person any handgun, whether concealed or not," subject to a number of exceptions. This statute can be traced back to a law passed on Christmas Eve in 1880, which prohibited "any person carrying a pistol . . . concealed about his person". 17 Stat. 447, *quoted in* State v. Johnson, 16 S.C. 187 (1881). Johnson discussed the purpose and policy of this law as follows:

> . . . [W]e think that the purpose was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of deadly weapons, *with a view to prevent acts of violence and bloodshed,* which are too apt to be committed by persons under excitement *when they have at hand* such effectual means of perpetrating such acts.

Id. at 191 (emphasis added).

One of the exceptions to the general rule of S.C. Code § 16-23-20 is contained in subsection (9) of the statute, which deals with handguns in vehicles:

> (9) a person in a vehicle if the handgun is:
>
> (a) secured in a closed glove compartment, closed console, closed trunk, or in a closed container secured by an integral fastener and transported in the luggage compartment of the vehicle; however, this item is not violated if the glove compartment, console, or trunk is opened in the presence of a law enforcement officer for the sole purpose of retrieving a driver's license, registration, or proof of insurance. If the person has been issued a concealed weapon permit pursuant to Article 4, Chapter 31, Title 23, then the person also may secure his weapon under a seat in a vehicle, or in any open or closed storage compartment within the vehicle's passenger compartment; or

(b) concealed on or about his person, and he has a valid concealed weapons permit pursuant to the provisions of Article 4, Chapter 31, Title 23;

S.C. Code § 16-23-20(9).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted). Furthermore, "[even penal laws, which it is said should be strictly construed, ought not to be so construed as to defeat the obvious intention of the Legislature." Pickens v. Maxwell Bros. & Quinn, 176 S.C. 404, 180 S.E. 348, 349 (1935). When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000). "The well-settled rule in South Carolina is that, where possible, all provisions of a statute must be given full force and effect." Nucor Steel v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

Since S.C. Code § 16-23-20 uses the word "about" the person rather than "on" the person, it is clear that a person need not be actually touching a handgun in order to violate

the statute.[2] "About" is not synonymous with "on." The legislature, in utilizing the term "about," chose an expansive definition to further the statute's objectives, which are to prevent violence that results from a person having easy access to a deadly weapon. See Johnson, 16 S.C. at 191. Numerous other jurisdictions have found that "about the person" is different than "on the person" and that "about the person" generally means sufficiently close to the person so as to be readily accessible for immediate use. See *infra* p. 12-15. As is discussed more fully in section II of this Brief, the State submits that this definition of carrying about the person is an appropriate definition.

When officers observe an unsecured handgun in a vehicle, the officer has probable cause to believe that S.C. Code § 16-23-20 has been violated.[3] This is because – quite obviously – a person had to have "carried" the handgun to that location. Furthermore, once that person returns to the vehicle, he or she will once again be unlawfully carrying the handgun when he or she is in sufficient proximity that the handgun is "about the person." The incriminating nature of the handgun is immediately apparent where it is objectively reasonable for an officer to conclude the handgun is real as opposed to a toy or prop, and where the handgun is not secured in a glove box or otherwise so as to place it within the exception contained in subsection (9) of the statute.[4]

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[2] Defense counsel candidly acknowledged this in his post-trial motion. (See R. p. 220).

[3] The fact that Officer Greenawalt used a flashlight to see inside Appellant's vehicle is of no consequence. See Texas v. Brown, 460 U.S. 730, 740 (1983) (contraband can be in "plain view" despite the fact that an officer shines a flashlight into a vehicle; use of artificial illumination does not constitute a "search"); see also State v. Daniels, 252 S.C. 591, 596, 167 S.E.2d 621, 624 (1969) (finding the use of a flashlight in a lawful search of a suspect's car is of no real consequence when the evidence found had been left in a place where it could be easily seen). Appellant does not challenge the officer's use of a flashlight on appeal.

[4] Contrary to defense counsel's suggestion below, the officers did not need to be absolutely certain that the gun was real; it is sufficient that they had probable cause to believe it was. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613-14 (1999) (concluding that the incriminating nature of a pair of latex gloves, which were found by police in the defendant's mobile home during the course of execution of a search warrant for a gun, was immediately apparent where a witness had previously given a statement that the defendant wore gloves during the commission of the murder); State v. Johnson, 410 S.C. 10, 763 S.E.2d 36

The gun is subject to seizure under the plain view exception as soon as officers ascertain the identity of the unlawful carrier; in other words, as soon as they obtain probable cause that a particular person was the one who carried the handgun to that location.

In Appellant's case, Officer Greenaway reasonably believed, based on his training and experience, that the handgun he saw in Appellant's vehicle was a "real" handgun. (See R. p. 12, lines 19-21; p. 26-27; p. 35, lines 11-13; p. 93, lines 9-13). As soon as officers observed Appellant approach the vehicle with the car keys in hand, unlock and open the driver's side door, and prepare to sit in the driver's seat, they had probable cause that Appellant had committed a violation of § 16-23-20. Accordingly, the handgun Officer Greenawalt observed in plain view – from a public location where he clearly had a lawful right to be – was subject to seizure under the plain view exception. The trial judge properly denied Appellant's motion to suppress.

II. Appellant's directed verdict motion was properly denied since the evidence supported that Appellant unlawfully carried a handgun about his person where the handgun was unsecured in Appellant's vehicle, belonged to Appellant, and was readily accessible and convenient for Appellant's immediate use.

In ruling on a motion for directed verdict, the trial judge must view the evidence, and all of its reasonable inferences, in the light most favorable to the State. See State v. Frazier, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (2007). If the State presents direct or substantial circumstantial evidence reasonably tending to prove the guilt of the defendant, including evidence from which his guilt can be logically deduced, the defendant's directed verdict motion is properly denied. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d

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(Ct. App. 2014) (holding that the incriminating nature of evidence, discovered in plain view while executing a search warrant in a hotel room, was immediately apparent where the hotel room was full of computers in various states of disassembly and officers suspect the computers had been stolen and were being used to extract personal information from the hard drives).

254, 256 (2001). Our Supreme Court has stated that the appropriate test to be applied when reviewing a directed verdict motion in a case relying solely on circumstantial evidence is as follows:

> When the state relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004) (citations omitted) (emphasis in original). On appeal from the denial of a motion for a directed verdict, the appellate court may only reverse the trial court only if there is no evidence to support the trial court's ruling. See, e.g., State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002).

In this case, the trial judge properly denied Appellant's motion for directed verdict because evidence supported that he unlawfully carried a handgun in violation of S.C. Code § 16-23-20. To prove a violation of the statute, the State must prove that Appellant carried about his person any handgun. See S.C. Code § 16-23-20 ("It is unlawful for anyone to carry about the person any handgun, whether concealed or not. . . ."). At issue in this case is the meaning of the phrase "carry about the person." In the State's view, the trial judge correctly concluded that "[a] weapon is about the defendant's person if it is readily accessible and is convenient for immediate use."[5] (R. p. 149, lines 14-16; p. 182, lines 3-5).

[5] Note that defense counsel did not object to or argue against the trial judge's definition of carrying about the person during the directed verdict motion. (See R. p. 140-51). Instead, defense counsel merely argued

As discussed briefly above in section I, the statute uses the word "about" the person rather than "on" the person. See S.C. Code § 16-23-20. "About" is not synonymous with "on," and the legislature, in utilizing the term "about," chose an expansive definition to further the statute's objectives, which are to prevent violence that results from a person having easy access to a deadly weapon. See Johnson, 16 S.C. at 191. There appears to be no case law in South Carolina defining "about the person" in the context of this statute. However, other jurisdictions have contemplated what constitutes having a weapon "about" his person as opposed to merely "on" the person in reviewing their own weapons laws. In State v. McManus, 89 N.C. 555 (1883), the North Carolina Supreme Court noted:

> The language is not "concealed *on* his person," but "concealed about his person"; that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. If the pistol was concealed in the basket, and that was in the defendant's lap, on his arm, or fastened about his person, or if placed near his person, though not touching it, this would be sufficient. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged.

Id. (emphasis in the original).

The Court of Appeals for the District of Columbia considered the propriety of a charge to the jury that if a pistol "was within reach of the defendant" then it would be considered "concealed about the person". Brown v. United States, 30 F.2d 474, 475

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that the facts did not support that Appellant carried the handgun about his person. (See R. p. 140-48). Furthermore, arguably, defense counsel's failure to timely object to the judge's definition in the jury charge (as is discussed *infra* in section III) renders the trial judge's definition the law of the case. See Mickle v. Blackmon, 255 S.C. 136, 141-42, 177 S.E.2d 548, 549-50 (1970) (recognizing the failure to object to a jury instruction makes the charge the law of the case).

(D.C. Ct. App. 1929). The Brown court surmised as follows:

> The word "about" is a comprehensive term, and we must assume that Congress intended that it should be accorded such an interpretation. Had it been intended to limit the prohibition to the carrying of such a weapon on the person, it must be assumed that Congress would have used the word "on" instead of "about."

Id.

An Ohio case is particularly instructive where the defendant was being chased by police as he drove out of Hancock County into Putnam County. Reaching Putnam County, the defendant stepped on the running board of his moving vehicle and jumped on the roadway while throwing a revolver in a field. Schraeder v. State, 162 N.E. 647 (Ohio Ct. App. 1928). He later admitted that he had the revolver "in a pocket attached to the inside of the left front door of his automobile and when he left the car took it with him for the purpose of 'ditching' it." Id. at 649. The Court noted that the revolver obviously was hidden in the automobile pocket during the chase in Hancock County and proceeded to determine whether the revolver would at that point be considered "concealed on or about the person of the accused". Id.

The Ohio Court concluded: "the word 'on,' in the expression 'on or about his person,' means connected with or attached to, while the word 'about' means near by, close at hand, in reach of." Id. (citations omitted). The court found that the gun fell within the purview of the statute, since it was immediately beside the defendant as he drove the car. Id.; see also Porello v. State, 121 Ohio St. 280, 289, 168 N.E. 135, 137 (Ohio 1929) (finding sufficient evidence to support that the defendant had a pistol concealed "on or about his person" where there was testimony connecting the defendant with the revolver, and placing him in such proximity thereto that he is shown to have had

immediate physical possession and control of the weapon, in other words, that it was so close and convenient of access as to be literally within the words of the statute about – that is, nearby, his person).

Numerous other jurisdictions have agreed that "about the person" is different than "on the person" and that "about the person" generally means sufficiently close to the person so as to be readily accessible for immediate use. See Doulgerakis v. Commonwealth, 61 Va. App. 417, 421, 737 S.E.2d 40, 42 (Va. Ct. App. 2013) (explaining that the Supreme Court of Virginia has previously declared that "about the person" in the context of the unlawful concealed carrying statute means "so connected with the person as to be readily accessible for use or surprise if desired") (citing Schaaf v. Commonwealth, 220 Va. 429, 430, 258 S.E.2d 574, 574-75 (1979)); State v. Tibbs, 772 S.W.2d 834, 838 (Mo. Ct. App. 1989) ("Whether a weapon is on or about the person . . . is determined by whether it is in such close proximity to the accused so as to be within his easy reach and convenient control."); Turley v. Commonwealth, 307 Ky. 89, 92, 209 S.W.2d 843, 845 (Ky. 1948) (stating that "the question of accessibility and convenience of use" enter materially into the question as to whether or not a weapon is about one's person); United States v. Waters, 73 F.Supp. 72, 73 (1947) (finding the evidence sufficiently established that the defendant had a pistol "about his person" within the meaning of an unlawful carrying statute where the evidence showed that the defendant did not need to move from the front seat of his taxicab to obtain the pistol); People v. Niemoth, 322 Ill. 51, 52, 152 N.E. 537, 537 (Ill. 1926) (stating that "about the person" within the meaning of the unlawful concealed carrying statute means "sufficiently close to the person to be readily accessible for immediate use"); State v. Mulconry, 270 S. W.

375, 377 (Mo. 1925) (finding correct an instruction including a statement the revolving pistol need not be in the defendant's pocket to be concealed about his person, but that it would be sufficient if the weapon, found behind his body on the seat of the automobile and concealed from view, was in such close proximity to the defendant as to be within reach and convenient control of the defendant); State v. Renard, 273 S. W. 1058 (Mo. 1925) (a loaded revolver found on the floor of the car at the defendant's feet was held to be carrying about the person); Lewallen v. State, 148 Tenn. 326, 255 S. W. 373 (Tenn. 1923) (where the defendant, when caught operating a still, "reached over to a nearby log and secured a pistol," it was held to be sufficient carrying to sustain a conviction for unlawful carrying of a pistol); Wagner v. State, 188 S. W. 1001 (Tex. Crim. App. 1916) ("The Legislature must have meant something when it used the words, 'or about the person,' and, on principle, using the word 'about' in its ordinary meaning, taking into consideration the context and subject-matter relative to which it is employed, the word, not being specially defined, must, as we believe, be held to mean, within the pistol statute, near by, close at hand, convenient of access, and within such distance of the party so having it as that such party could, without materially changing his position, get his hand on it; otherwise every person having a vehicle would be authorized to keep prohibited weapons in his vehicle and within reach of his hand, ready for action. . . ."); Garrett v. State, 25 S.W. 285 (Tex. Crim. App. 1894) ("The pistol was on the wagon seat near appellant. This was about his person."). In this case, the trial judge's definition of carrying about the person – that is, that "[a] weapon is about the defendant's person if it is readily accessible and is convenient for immediate use," (R. p. 149, lines 14-16; p. 182, lines 3-5), was proper and appropriate.

Furthermore, a jury question was created regarding whether or not Appellant unlawfully carried the handgun about his person. First, there was evidence presented supporting that Appellant unlawfully carried his pistol prior to entering the club. The evidence reflected that when he exited the club, Appellant had the car keys in his hand, unlocked the driver's side door, and prepared to sit in the driver's seat. (R. p. 98-100). Furthermore, Appellant admitted to Detective Monroe that the pistol belonged to him. (R. p. 129). Based on this evidence, a reasonable jury could properly infer that Appellant unlawfully carried the pistol – which a jury could infer he knew about under the circumstances since it unquestionably belonged to him – about his person as he drove the vehicle to the club and/or at some point prior to his exiting the vehicle to go inside.

Second, there was evidence presented supporting that Appellant unlawfully carried the pistol about his person when he returned to his vehicle after exiting the club. Again, the evidence reflected that Appellant exited the club with the car keys in hand, unlocked the driver's side door, and prepared to sit in the driver's seat; a reasonable jury could properly infer Appellant knew about the gun and its location in the car since the gun belonged to him. When Appellant knowingly and voluntarily placed himself within sufficient proximity of his handgun in the vehicle such that the handgun was readily accessible and convenient for his immediate use, he violated the unlawful carrying statute. For both of the above reasons, the trial judge properly denied Appellant's motion for directed verdict.

III. Appellant's issues regarding the jury charge are not preserved for appellate review where Appellant expressly waived any objection to the jury charge by telling the judge he had no objection to the charge as given and where Appellant never raised his appellate issues to the trial judge until after trial in his post-trial motion. Error preservation concerns aside, however, the trial judge properly crafted a jury charge containing an appropriate definition of carrying "about the person" and the charge regarding one of the exceptions in the statute was neither erroneous nor prejudicial to Appellant.

Relevant Facts

After both the State and the defense rested, defense counsel asked the judge if he could submit proposed jury charges. (R. p. 157, lines 18-25). His proposed charges included a circumstantial evidence instruction from State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), which the judge subsequently indicated she would charge. (R. p. 158-60). Defense counsel also requested that the judge "charge the jury on statutory interpretation, the rules of statutory interpretation," including that "terms would be given their ordinary and plain meaning" and that "ambiguities in the statute are to be interpreted in favor of the defendant." (R. p. 158, lines 11-20). In support of this request, defense counsel presented two cases discussing the principles of statutory construction. (R. p. 159, lines 13-23). Counsel did not present the judge with a written proposed charge on statutory construction but instead referred generally to the language in the two cases he presented. (R. p. 159, lines 13-23). The judge told counsel she would not be charging statutory interpretation principles to the jury. (R. p. 160, lines 3-5). Counsel again reiterated that he was requesting simply that the jury be charged that the "terms of [a] statute be given a plain and ordinary meaning" and that "any ambiguity of the statute is to be interpreted in favor of the defendant." (R. p. 160, lines 6-12). The judge again denied the request but stated it was preserved for the record. (R. p. 160, lines 13-14).

Thereafter, the attorneys gave their closing arguments. During the defense's closing, counsel discussed the exception under subsection (9) of the statute and argued it did not apply since there was no evidence Appellant was a "person in a vehicle."[6] (R. p. 171-72). Subsequently, the judge issued the charge on the law, which included the following:

> A weapon is about the defendant's person if it is readily accessible and convenient for immediate use. The pistol need not be actually touching the person of the defendant. There are exceptions to this general law against carrying a pistol which allows certain people to carry pistols. The exception in this case is a person in a vehicle where the pistol is secured in a closed glove compartment, closed console or closed trunk. (R. p. 182, lines 3-11).[7]

After the jury charge, the judge asked if there were any objections or corrections to the jury charge as read. (R. p. 184, lines 8-9). Defense counsel stated: "Not from the defense, Your Honor." (R. p. 184, line 12).

Following trial, defense counsel filed a motion for a new trial. (See R. p. 216-21). In this motion, defense counsel argued that the verdict was against the greater weight of the evidence because Appellant never carried the handgun and the handgun was never about his person; that the handgun should have been suppressed pursuant to the Fourth Amendment; that the jury instructions were "confusing and misleading," and that the trial judge erred in denying Appellant's directed verdict motion. (See R. p. 216-21). Regarding the jury instructions, defense counsel argued they were confusing because the judge "erroneously denied the Defendant's request to charge the jury on the rules of

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[6] Notably, during closing argument, defense counsel seemed to acknowledge that the pistol was to some degree about Appellant's person: "And clearly, from the facts, there's no carrying. *It's barely about the person.*" (R. p. 173, lines 23-24).

[7] The language defining "about the person" may have come from an Attorney General Opinion construing a statute prohibiting the "carrying about the person" of certain pistols. See 1964 S.C. Op. Att'y Gen. No. 1704. This Attorney General Opinion discussed case law from all over the country before setting forth the opinion's definition. See id.

statutory interpretation;" the judge "erroneously charged the jury that "about the person" meant "readily accessible and convenient for immediate use" because "[t]here is no South Carolina precedent stating that "about the person" means readily accessible and convenient for immediate use; and "the Court erred by charging the jury on the statutory exception provided for carrying handgun[s] in automobiles" since the defense did not assert a defense pursuant to the exception and State v. Clarke, 302 S.C. 423, 396 S.E.2d 827 (1990) stated that the exceptions to the statute are "not descriptive of the offense." (R. p. 220). In that vein, counsel argued that "[b]y charging only the automobile exception enumerated in part (9)(a), the Court expanded the operation of the statute and violated a cardinal rule of statutory interpretation." (R. p. 221).

On July 22, 2014, the trial judge convened a sentencing hearing and a hearing on Appellant's motion for new trial. At the hearing, defense counsel incorporated his written motion and stated he had no oral argument to supplement it. (R. p. 197, lines 11-14). However, after the solicitor made a brief argument, defense counsel responded and argued there was no evidence Appellant ever carried the pistol or that the pistol was about his person. (R. p. 199, lines 2-21). The trial judge ruled that the evidence was sufficient to sustain the verdict; that there was no Fourth Amendment violation since the gun was properly seized under the plain view exception; that the directed verdict motion was properly denied; and that the jury instructions were not confusing or misleading. (R. p. 200-201). The judge explained that she charged what she believed to be the appropriate law in South Carolina based upon the facts, and that she crafted the definitions in a way that made the law clear to the jury. (R. p. 201, line 20 – p. 202, line 1). The judge also ruled that it was proper to charge the language regarding subsection

(9) of the statute where this exception "was mentioned several times throughout the trial." (R. p. 202, lines 1-3). She also found that this language would not have been prejudicial to Appellant in any event. (R. p. 202, lines 3-4). The judge then denied Appellant's motion for new trial and proceeded with sentencing. (R. p. 202, lines 9-20). After hearing extensively from defense counsel and from Appellant himself, the judge sentenced Appellant to two days of time served. (R. p. 213, lines 17-20).

Issue Preservation

In order for an issue to be preserved for appellate review, 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); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

On appeal, Appellant contends that the trial judge erred in charging the jury regarding a definition of carrying a handgun "about the person" that is not contained in the statute. (Brief of Appellant, p. 12). He also argues that the judge erred in charging the jury regarding subsection (9) of the statute when this exception is "an affirmative defense that was not raised by the defense and illegally expanded the proscribed conduct." (Brief of Appellant, p. 12). However, the issues raised on appeal are not preserved for appellate review. First, Appellant expressly waived any issues he may have

had regarding the jury charge when he told the judge he had no objections or corrections to the jury charge.[8] (R. p. 184, lines 8-12). See 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."); State v. Armstrong, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge."); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue with the admission of a challenged piece of evidence was waived where Dicapua's counsel specifically stated he had no objection when the evidence was introduced during trial).

Second, Appellant never raised the issues being raised on appeal to the trial judge until after trial in his post-trial motion. (See R. p. 216-21). When a party raises issues for the first time in a post-trial motion, the judge never receives an opportunity to rule on those issues at a time when potential error could be cured. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."). Accordingly, it is unfair to allow a

[8] Critically, the issues Appellant raised in the earlier charge conference are **not** the same issues that are being raised on appeal. Again, in the charge conference, Appellant requested only a Logan circumstantial evidence charge and that the judge charge the jury regarding the principles of statutory construction. (See R. p. 196-99).

litigant to raise such untimely issues on appeal, and consequently, such issues are considered unpreserved for appellate review. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, which usually requires it be made at the earliest possible opportunity); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); State v. King, 334 S.C. 504, 509-510, 514 S.E.2d 578, 581 (1999) (where defendant failed to object to issue arising during the jury charge until after the verdict in his post-trial motion for a new trial, he waived appellate review of the issue); Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."); State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."); State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("Hale concedes that no exception was taken to the 'Allen' charge in the trial court. Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal."); see also 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."); State v. Penland, 275 S.C. 537,

538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.").

For the foregoing reasons, Appellant's issues regarding the jury instructions are not preserved for appellate review and these issues should be dismissed as procedurally barred. See, e.g., State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (an issue not preserved for review should not be addressed by the Court of Appeals).

Discussion of the Merits

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. "The substance of the law is what must be charged to the jury, not any particular verbiage. State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003) (citations omitted). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." Id. at 318, 577 S.E.2d at 463 (citations omitted). A jury charge which is substantially correct and covers the law does not require reversal. Id. at 319, 577 S.E.2d at 464. An appellate court will not reverse a trial court's decision regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005). Finally, "[p]rejudice to the appellant's case is a prerequisite to reversal of a verdict due to an erroneous jury charge. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007) (citations omitted).

The Judge's Definition of Carrying About the Person

Appellant asserts that the trial judge "should only have charged the jury that appellant could be found guilty if he carried the handgun about his person." (Brief of Appellant, p. 12). Appellant also contends that the judge's definition of carrying about the person "expanded the statutory terminology" and violated principles of statutory construction, particularly the rule that penal statutes must be construed strictly against the State. (Brief of Appellant, p. 13-14). Initially, the trial judge's providing the jury with an explanation of terms in the statute did not in any way violate statutory construction principles. Judges routinely define statutory terms in jury instructions, and doing so does not violate any principle of law or "expand" the statutory terminology unless the judge provides an incorrect explanation or definition. Here, the trial judge crafted a simple and appropriate definition of carrying about the person. (See R. p. 182, lines 1-6: "A weapon is about the defendant's person if it is readily accessible and convenient for immediate use. The pistol need not be actually touching the person of the defendant."). As discussed above, this definition has been accepted in many other jurisdictions. See *supra*, p. 11-15. Appellant has provided no authority or reasoning supporting that this definition is incorrect in any way.[9] To the contrary, the definition provided to the jury was proper and correct and would clearly aid the jury in applying the facts of the case to the law. Accordingly, the trial judge committed no error with respect to the jury charge defining carrying about the person.

[9] In fact, in his motion for a new trial, **defense counsel conceded that the pistol needed not be found on the person of Appellant**: "The statutory language makes it clear that the gun need not be actually on the defendant's person, because the General Assembly used the word *about* instead of the word *on*." (R. p. 220).

Charging the Jury Regarding the Exception of Subsection (9)

Appellant also argues that the trial judge erred in charging the vehicle exception contained in subsection (9) of the statute because the defendant presented no evidence and did not assert this exception as a defense. (Brief of Appellant, p. 14). This argument is wholly without merit. As the trial judge pointed out at the hearing on Appellant's post-trial motion, the exception of subsection (9) was mentioned numerous times at trial, and in fact, the defense began its closing argument by discussing this exception and arguing that it did not apply. (See R. p. 171-72). Clearly, defense counsel anticipated that the trial judge would charge the jury regarding this exception and he did not have any complaints about this charge until drafting his post-trial motion in the days following trial. The charge on subsection (9) was plainly appropriate here, where this exception was mentioned repeatedly at trial; where the pistol was found in a vehicle; and where there was evidence from which the jury could infer that Appellant drove the vehicle to the club, as discussed above in section II. Further, although Appellant cites to the State v. Clarke case for the proposition that "the exceptions are not descriptive of the offense and the defendant bears the burden of producing evidence," in fact, the Clarke case held that "**the trial court did not improperly instruct the jury**" when it charged the jury regarding the statutory exceptions. State v. Clarke, 302 S.C. 423, 425, 396 S.E.2d 827, 828 (1990). While Clarke does stand for the proposition that the State does not have the burden to negate the applicability of the statutory exceptions, it clearly does **not** stand for the proposition that the State is prohibited from anticipating possible defenses and seeking to rebut the exceptions if it deems it appropriate to do so under the facts of a

particular case. The trial judge did not err in charging the jury regarding subsection (9) of the statute.

In any event, even assuming, for argument's sake, that the trial judge erred in charging the language of subsection (9), the charge could not have prejudiced Appellant. The pertinent portion of the charge is as follows:

> Mr. Williams is charged with unlawful carrying of a pistol. The State must prove beyond a reasonable doubt that Mr. Williams carried a pistol about his person, whether concealed or not. A weapon is about the defendant's person if it is readily accessible and convenient for immediate use. The pistol need not be actually touching the person of the defendant. There are exceptions to this general law against carrying a pistol which allows certain people to carry pistols. The exception in this case is a person in a vehicle where the pistol is secured in a closed glove compartment, closed console or closed trunk. (R. p. 181, line 25 – p. 182, line 11).

The jury was clearly told that the State was required to prove, beyond a reasonable doubt, that Appellant "carried a pistol about his person." Therefore, under their oaths, the jurors could not convict unless they found beyond a reasonable doubt that Appellant carried a pistol about his person. Contrary to Appellant's assertions, the subsequent language regarding the exception did not "allow the jury to convict appellant based on the exception, not the statute itself." (Brief of Appellant, p. 14). Moreover, even if, as defense counsel argued to the jury below, the subsection was not applicable because there were no facts to support it, then the jury charge was mere surplusage that could not have affected the jury's determination regarding whether or not Appellant carried a pistol about his person. See State v. Belcher, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) (to warrant reversal, a jury charge must be both erroneous and prejudicial to the defendant); see also

Cole v. Raut, 378 S.C. 398, 406, 663 S.E.2d 30, 34 (2008) ("Considering the entire jury charge in light of the evidence and issues presented at trial, we conclude that the erroneous charge on assumption of the risk was not prejudicial to the Coles."); State v. Rivers, 186 S.C. 221, 196 S.E. 6, 7 (1938) (concluding that the giving of a jury charge not applicable to the facts of the case did not constitute reversible error where the jury could not have been misled by the charge). Because Appellant could not have suffered any prejudice from the charge regarding subsection (9), he is not entitled to reversal on this ground.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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August 7, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2014-001617

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DOMINIQUE LAVAR WILLIAMS,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **David Alexander,** South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this 7th day of **August, 2015.**

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