

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
General Sessions Court

Honorable Judge John C. Hayes, III, General Sessions Court Judge

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MAY 13 2016
SC Court of Appeals

2013-GS-46-04422

The State,

Respondent

v.

Darnell Keri Slaton,

Appellant

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT IN REPLY

- I. The trial court's error in admitting the photographic lineup and Jacob Ballard's testimony pursuant to the *Neil v. Biggers* hearing was preserved for appellate review because Appellant contemporaneously objected to their admission following the hearing.**

Although inevitably intertwined, Appellant's initial brief raised both the issue of the improper admission of lineup and related testimonies *and* the unsuitability of the *Biggers* hearing to determine its admissibility. The connection between the improperly admitted evidence and inappropriateness of the *Biggers* hearing did not obliterate the former issue from appeal, as Respondent seems to suggest. Instead, the impermissible suggestiveness of the lineup was improperly admitted, in and of itself, and the lineup's suggestiveness inherent from its creation rendered *Biggers* unsuitable to determine its admissibility. Thus, contrary to Respondent's contentions, Appellant is not arguing a different theory on appeal than at trial.

A. Issue Preservation of Improper Evidence and its Related Testimony

For an issue to be properly preserved for appeal, the appellant must raise the issue by objection or motion to strike in a timely manner with sufficient specificity, and ruled upon by the trial court. *E.g.*, *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). Regarding the timeliness of an objection, to preserve an issue for appellate review, the objection must be contemporaneous when the evidence is offered. *State v. Patterson* (Ct. App. 2006) 367 S.C. 219, 625 S.E.2d 239, rehearing denied, certiorari denied.

In the present case, the trial court conducted a *Neil v. Biggers* hearing to determine the admissibility of the photographic lineup confidential informant, Jacob Ballard, used to identify Appellant and the testimony flowing from the lineup's admission. (R. p. 25, lines 5-25, and p. 26-31). In concluding the *Biggers* hearing, the trial court, despite agreeing with Appellant that the

other men in the lineup differed in appearance from Appellant, admitted the lineup into evidence and allowed for subsequent testimony pertaining to it. (R. p. 50, lines 12-25). Throughout trial, Appellant contemporaneously objected to the evidence and its corresponding testimony that were issue during the *Biggers* hearing on the same theory that the lineup was impermissibly suggestive based on the disparity between the men with Appellant. (R. p. 141, lines 22-23). Even though Appellant did not repeat the impermissibly suggestive lineup argument in each objection, the ground for each of the objections was clear from the context because of the extensiveness of the *Biggers* hearing. *See State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (S.C. 2013) (holding that objection was sufficient to preserve admission of evidence for review despite defendant's grounds not fully articulated because it appeared from transcript and context of proceedings that defendant's reference to parties' earlier discussion in course of his objection sufficiently apprised trial court of nature of objection). Moreover, the issue was properly preserved for appeal because the trial court ruled on each objection. (R. p. 132, lines 24-25, and p. 133, line 1).

Regardless, Appellant was not even required to repeat the objection during Ballard's testimony after the ruling of the *Biggers* hearing. While a motion in limine to exclude evidence at the trial's onset usually does not preserve the issue for appellate review because such motion is not a final determination, where a judge rules on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. *See State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (S.C. 1996); *See also State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (S.C. 2001). If no evidence is presented between the ruling and the testimony, there is no basis for the trial court to change its motion and the defendant is not required to renew her objection to preserve the issue for appeal. *Forrester*, at 642, 479 S.E.2d at 840 (quoting *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct.

App. 1995). In *Forrester*, the State's witness introducing the cocaine, which Forrester was charged with possessing, was the first trial witness and no evidence was admitted between the court's ruling on the cocaine's admission and the testimony, and thus there was no basis for changing the ruling on its admissibility. *Forrester*, at 643. Similarly, in the present case, confidential informant Ballard was the first witness called to testify, and his testimony was the State's first opportunity to introduce to the lineup into evidence. Therefore, there was no basis for the trial court to change its ruling between the *Biggers* hearing and Ballard's testimony. Additionally, it is not necessary to repeat an objection to evidence once an objection to that particular evidence has been made at any stage to the admission of evidence. See Rule 17, SCRCrP. Therefore, Appellant's initial objection to the evidence during Ballard's testimony would be sufficient to preserve the issue for appeal even if Appellant did not later object to further introduction of the evidence and its related testimony.

Additionally, Respondent cannot point to Appellant's lack of objection to the evidence during the *Biggers* hearing in arguing that the issue was not preserved for appellate review. (R. p. 49, lines 2-20) First, in response to the admission of the evidence, Appellant made clear that declining to object was for the purpose of the hearing:

Solicitor Jones: Your Honor, at this time, I'd like to move Court's Exhibit Seven into evidence.

The Court: Any objections?

Ms. Inzerillo: None, for the purposes of this hearing.

(R. p. 30, lines 13-17)

It would be nonsensical for Appellant to try to keep out evidence that was the purpose of the *Biggers* hearing, and thus prevent the defense from presenting the merits of the argument to

exclude the evidence. Furthermore, Appellant argued the impermissible suggestibility. (R. p. 48, line 25, and p. 49, line 1).

Therefore, it is clear from the record that the issue of the improper admission of the lineup and its associated testimony was properly preserved for appellate review.

B. Unsuitability of a *Neil v. Biggers* hearing

The inapplicability of a *Biggers* hearing at trial is based on the same reasoning as the improper admission of the evidence for which the hearing was held: the unconstitutional suggestiveness of the lineup in its creation and characteristics. The unsuitability of the *Biggers* hearing to evaluate the suggestiveness of the lineup is even evident in the trial judge's reasoning when explaining his ruling to admit it. The trial judge admitted that Appellant differed in his appearance by not only skin tone and facial hair, factors that *Biggers* does not address. *See Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1979) (holding that determination of a identification procedure involves: the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the defendant, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation). Although the Supreme Court held that the reliability of eyewitness identification is determined by the totality of the circumstances, the circumstances to be considered are those according to the eyewitness. Using a totality of the circumstances test to determine the reliability of the eyewitness in who he saw, and the conditions in which he saw the defendant, which are wholly diverse from the creation of a lineup. *Id.* Thus, Respondent's argument that the *Biggers* hearing at trial was conducted correctly bears no merit as to the unconstitutional defect in the lineup's creation and features.

Respondent also argues that the inapplicability of the *Biggers* hearing was not preserved for appeal because Appellant did not object to the hearing. However, there was no other known judicial avenue for Appellant to exclude a lineup that is unconstitutionally defective. Therefore, if Appellant had attempted to refuse or object to a *Biggers* hearing, then the only opportunity to exclude the evidence would be lost. Ultimately, Appellant was left with no other option than to attempt to use the *Biggers* hearing as a means to exclude the evidence.

II. The trial court's error in denying Appellant's motion for direct verdict is preserved for appellate review.

On motion by the defendant or *sua sponte*, the trial court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. Rule 19(a) SCRCrP. In determining whether to grant a motion for directed verdict, the trial court will weigh evidence in the State's favor; nonetheless, the trial court should grant the motion if the evidence merely raises a suspicion of guilt. *State v. Pipkin*, 359 S.C. 322, 597 S.E.2d 831 (Ct. App. 2004); *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (S.C. 2013). A mere suspicion of guilt implies a belief or opinion based on facts or circumstances which do not amount to proof required for conviction beyond a reasonable doubt. *Hepburn*, at 429, 753 S.E.2d, at 409 (quoting *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (S.C. 2004)).

In the present case, the trial court erred in denying Appellant's motion for directed verdict because the State failed to prove beyond a reasonable doubt that the Appellant distributed marijuana to Ballard. Because no marijuana was shown in the video, and Ballard had great incentive to assist law enforcement to dismiss his own criminal charges, the evidence only raised a mere suspicion of Appellant's guilt.

Respondent contends that this error was not preserved for appellate review because more than a general directed verdict motion is required to preserve a directed verdict ruling. At trial, Appellant moved for directed verdict at the close of the State's case: "Your Honor, at this time, we would renew all previous motions and objections. And at this time, we would move for a directed verdict." (R. p. 167, lines 18-20). Although this can be characterized as a general directed verdict motion, this issue is still properly preserved for appellate review. In *State v. James*, this

Court held that the trial court's error in denying James' motion for directed verdict was preserved for review even though James did not state the specific grounds while making the motion. 362 S.C. 557, 562 608 S.E.2d 455, 457-58 (Ct. App. 2004). This Court held that his grounds were apparent from the trial court's ruling on the motion. *Id* at 458, 563 (citing *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding argument that defendant was entitled to a directed verdict on the ground the State failed to establish the *corpus delicti* of DUI was preserved even though the defendant did not use the exact words where the ground for the motion was apparent from the record). Here, the grounds for Appellant's directed motion—that the State did not present evidence sufficient to prove that distribution of marijuana took place—is apparent from the court's ruling on the motion:

The Court: I deny the motion. I believe there is substantial direct evidence or plenty of direct evidence from which a jury could conclude that a distribution of marijuana took place, and that Mr. Slaton was, in fact, the individual involved in distributing the marijuana to Mr. Ballard on the date and that time and place in question, so I deny the motion for directed verdict.

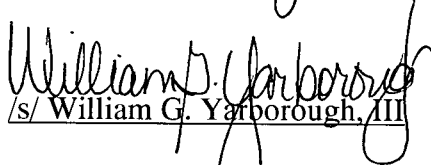
(R. p. 167, lines 21-25, and p. 168, lines 1-2).

Therefore, pursuant to *James* and *Russell*, the issue is preserved for appellate review.

CONCLUSION

For the foregoing reasons, and the reasons stated in Initial Brief of Appellant, it is respectfully submitted that the judgment of the lower court be overturned.

RESPECTFULLY SUBMITTED THIS 11th day of May, 2016


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CERTIFICATE OF COUNSEL

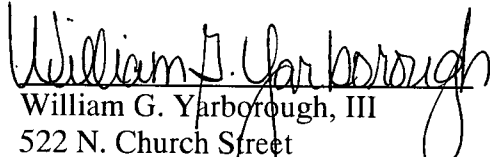
The undersigned hereby certifies that the Final Brief contains all material proposed to be included by the Appellant and not any other material.

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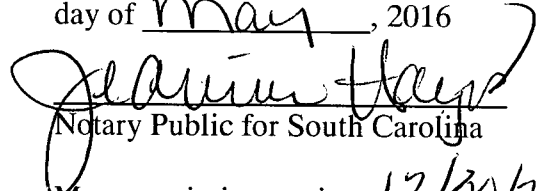

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Notary Public for South Carolina

My commission expires: 12/30/2023

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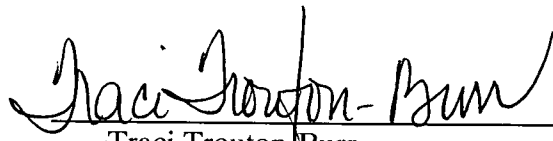
I, Traci Trouton-Burr certify that on this date, May 11, 2016, I served a FINAL Reply Brief in this action upon: (1) Jennie Abbott Kitchings, Clerk of Court, Court of Appeals of South Carolina; and (2) Ms. Megan Harrigan Jameson at the S.C. Attorney General's Office, and Kevin S. Brackett, at the Sixteenth Judicial Circuit Solicitor's office by mailing it to the Government Agents at their work addresses; depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

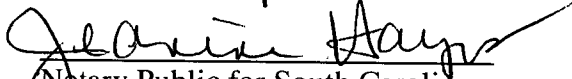
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