THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2016-000999

Johnnie L. Clark and Harriet Clark ..... Appellants,

v.

The City of Columbia ..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court correctly ruled that the Appellants failed to properly raise and preserve objections and error for appeal?

II. Did the trial court correctly ruled that the Appellants had raised a constitutional issue about vagueness; and whether the Appellants failed to otherwise raise and preserve defenses under the free speech and free exercise provisions of the First Amendment?

STATEMENT OF THE CASE

The City of Columbia Police Department responded to the Rehoboth United Assemblies Church on Laurel Street after receiving calls by desperate neighbors whose house was vibrating from all the sound. The seven (7) occasions, February 27, 2013, February 28, 2013, March 10, 2013, April 19, 2013, October 4, 2013, November 21, 2013, and April 4, 2014, were the subject of a Municipal Court trial that began on September 10, 2014. Appellants Johnnie L. Clark and Harriet Clark (hereinafter "Appellants") were issued citations for violations of City of Columbia Municipal code § 8-67 (c):

> Creating public nuisance. It shall be unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance.

The jury found Appellants guilty on September 10, 2014, and sentencing was held on September 11, 2014. Appellant Johnnie L. Clark was sentenced to Two Thousand One Hundred eight-five dollars ($2,185.00) and fourteen (14) days in jail, while Appellant Harriet Clark was sentenced to a fine of One Thousand ninety-two dollars and fifty cents ($1,092.50) or fifteen (15) days. Appellants filed a timely appeal in Richland

County Circuit Court on September 12, 2014, and filed an amended appeal on September 17, 2014. On December 8, 2014, the municipal court filed a transcript of the proceeding.

The matter came before the Honorable Diane S. Goodstein on May 15, 2015. After hearing oral arguments and reading the submitted documents, the Circuit Court Order affirmed the lower court convictions on April 14, 2016, filed on April 18, 2016. This timely appeal follows.

STATEMENT OF FACTS

In 2009, Tim Ellis ("Ellis") purchased a home in the area known as Arsenal Hill Neighborhood in downtown Columbia at 615 Laurel Street. R. p. 176, lines 4-15. The residence was located next door to Rehoboth United Assemblies of the Apostolic Faith Church ("Church") at 611 Laurel Street. R. pp. 177-178, lines 16-1. Ellis began residing in the home full-time in 2011. R. p. 178, line 10. Ellis contacted the City of Columbia Police Department because on the dates listed above, the noise was excessively loud and in violation of the Ordinance. *Id.*. Pre-trial motions were argued and ruled upon concerning the constitutionality of the ordinance being overly vague. R. pp. 130-135. The Appellants did not renew their motions regarding dismissal of the charges on the basis of the constitutionality arguments. Moreover, the jury, by way of a videotape of the preaching, was able to sense and perceive the actual noise level. R. p. 186, lines 3-5. It was within the province of the fact finder, judge or jury, to review this evidence and determine whether a violation of the Ordinance occurred.

ARGUMENT

I. THE APPELLANTS FAILED TO PROPERLY RAISE AND PRESERVE FIRST AMENDMENT CLAIMS AND DEFENSES.

The Appellants assert an overly-broad series of issues that far exceed the scope of the trial court's rulings as well as fail to address the actual issue ruled upon by the court.[1] The Appellants argue that they repeatedly raised and preserved First Amendment defenses to both the trial court as well as the circuit court.[2] Moreover, Appellants argue that they raised and preserved objections to jury charges which the trial court denied. However, the record is clear that the Appellants failed to properly preserve objections and/or requests to charge on a First Amendment instruction; and the circuit court properly ruled that the issue was not preserved for appeal.

"There are four basic requirements to preserving issues at trial 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." *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 457, 772 S.E.2d 544, 557 (Ct. App. 2015). Moreover, "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Id.* In addition, "it is the responsibility of counsel to preserve issues for appellate review." *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005). "The issue preservation requirement applies to assertions of constitutional violations as well." *Id.* Lastly, the rules of issue preservation "must also be applied consistently and not selectively" such that an issue that is not preserved should

[1] The actual issue was the vagueness of the noise ordinance under the free speech provision of the First Amendment, not the free exercise of religion.
[2] See footnote one (1).

not be considered, "regardless ... of the life-blood litigant or criminal defendant" that comes before the court. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282 (2012).

A. THE APPELLANTS FAILED TO RAISE AND PRESERVE POTENTIAL DEFENSES UNDER THE SOUTH CAROLINA RELIGIOUS FREEDOM ACT.

In the case at bar, Appellants explicitly concede that they failed to assert any claim or defense pursuant to the South Carolina Religious Freedom Act (hereinafter "the Act" or "SCRFA"). S.C. Code Ann. § 1-32-10 *et. seq.* *See* footnote 3, Appellant's Initial Brief, p. 5. In addition, a review of the record on appeal plainly shows that the entire sum of the record is devoid of any reference or assertion related to the Religious Freedom Act; and the Appellants now strive to simply bootstrap the issue with generalized and otherwise unpreserved arguments under the First Amendment. However, the mere fact that a constitutional issue is involved does not permit the Supreme Court to address issues not properly before it. *McLeod v Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198 (2012).

It is a generally accepted principle that a party cannot argue a specific matter with the trial court and then argue an entirely separate matter on appeal. *See State v. Tucker,* 319 S.C. 425, 462 S.E.2d 263 (1995) (a party cannot argue one ground below and then argue another ground on appeal). Moreover, Appellants had an ongoing opportunity to raise the possibility of an affirmative defense under the SCRFA and failed to do so. *See also, e.g., Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Because Appellants failed to timely raise an issue related to the SCRFA, failed to pursue a ruling, and otherwise

failed to make or otherwise renew contemporaneous objections, the basic principles of issue preservation operate as a bar to further review in this matter. *Johnson*, 412 S.C. at 457, 772 S.E.2d at 557 (Ct. App. 2015).

B. THE APPELLANTS FAILED TO RAISE AND PRESERVE TIMELY OBJECTIONS TO JURY INSTRUCTIONS.

The singular argument that could be potentially construed as an objection on the record is the Appellants' *suggestion* that the trial court instruct the jury on issues of constitutional law. Specifically, the record shows the following:

> THE COURT: ALL RIGHT. ANY OBJECTIONS OR ADDITIONAL CHARGES?
>
> MS. MANGUM: NOT FROM THE CITY, YOUR HONOR.
>
> THE COURT: MR. BRIGGS, ARE YOU OK WITH MY CHARGE?
>
> MR. BRIGGS: NO, NO OBJECTION AND NO COMPLAINT, YOUR HONOR. BUT I FEEL LIKE THEY NEED SOME CONSTITUTIONAL LAW AND I WOULD SUGGEST A SUMMARY OF THE EDWARDS CASE, YOUR HONOR. THAT'S ALL I'VE GOT TO SAY.
>
> THE COURT: WELL, THAT CASE IS CERTAINLY RELEVANT TO YOUR MOTION, IT WAS CERTAINLY RELEVANT TO MY PREVIOUS DECISIONS ON THOSE MOTIONS BUT IT'S NOT FOR THE JURY. THAT WOULD BE FOR ME. HAND THEM THESE AND MAKE SURE THEY GET THE EXHIBITS OVER HERE, TOO, PLEASE.

See R. p. 197, lines 11-23. Pursuant to Rule 20, SCRCrimP, "the parties shall be given the opportunity to object to the giving or failure to give an instruction" and the failure to object operates as "a waiver of objection." South Carolina Rules of Criminal Procedure: Rule 20, SCRCrimp. However, when asked whether any parties had objections to the jury charges, the Appellants clearly responded in the negative: "No, no objection and no complaint, Your Honor." *See* R. p. 197, lines 15-16. In addition, Appellants simply

commented that "I feel like they need some constitutional law and I would suggest a summary of the *Edwards* case, Your Honor." *See* R. p. 197, lines 16-17.

Clearly, Appellants failed to raise any contemporaneous objections to the trial court's jury instructions, and their failure to do so constitutes a waiver of the issue on appeal. *See State v. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("By failing to contemporaneously object to the jury charges, [the party] has waived his right to allege error on appeal."). Indeed, as the circuit court previously explained, "there was no objection to the trial court's charge. Any subsequent statements or suggestions made by the Clarks did not rise to the level of a proper objection as required by Rule 20." (Order of April 14, 2016, p. 3). Because a specific and timely objection was not made, the circuit court correctly ruled that the issue was not preserved for appellate review.

II. EVEN IF THE APPELLANTS HAD RAISED A CLAIM OF A SUBSTANTIAL BURDEN UNDER THE SOUTH CAROLINA RELIGIOUS FREEDOM ACT, APPELLANTS NEVERTHELESS FAILED TO ALLEGE AND PRESERVE FACTS IN THE RECORD TO SUPPORT SUCH A FINDING.

The purpose of the City of Columbia noise ordinance is to prohibit and otherwise make it "unlawful for any person to operate, or cause or permit to be operated, any instrument or sound-producing or sound-amplifying device so loudly as to unreasonably disturb persons in the vicinity thereof or in such a manner as renders the instrument or device a public nuisance." *Columbia, South Carolina Municipal Code* § 8-67(c). Likewise, the purpose of the South Carolina Religious Freedom Act is to

> (1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of a compelling state interest will be imposed on all state and

> local laws and ordinances in all cases in which the free exercise of religion is substantially burdened; and (2) provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.

S.C. Code Ann. § 1-32-30 (Supp. 1999).

In addition, the SCRFA provides that

> The state may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is: (1) in furtherance of a compelling state interest; and (2) the least restrictive means of furthering that compelling state interest.

S.C. Code Ann. § 1-32-40 (Supp. 1999). Finally, "[i]f a person's exercise of religion has been burdened in violation of his chapter, the person may assert the violation as a claim or defense in a judicial proceeding." S.C. Code Ann. § 1-32-50 (Supp. 1999).

Thus, to invoke the SCRFA as an affirmative claim or defense in a judicial proceeding, the Appellants would have had to first show that the ordinance placed a substantial burden on their exercise of a sincere religious belief. *See, e.g., Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (explaining that "a 'substantial burden' on religious exercise occurs when a state or local government, through act or omission, 'puts substantial pressure on an adherent to modify his behavior and to violate his beliefs'"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (a substantial burden is one that forces a citizen to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand"); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (a substantial burden is one that bears responsibility for causing religious exercise to be rendered impracticable). Assuming that the Appellants had successfully alleged that the ordinance created a substantial burden, the City would have been

subsequently required to justify the ordinance's restrictions by asserting a compelling government interest, e.g., the exercise of its police powers to protect the health, safety, and welfare of its citizens. Additionally, the City would then be required to show that it utilized the least restrictive means of furthering that compelling government interest. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 557 (4th Cir. 2013).

However, a careful review of the record shows that the Appellants failed to allege sufficient grounds to support the contention that the ordinance imposed a substantial burden on their exercise of religion. Instead, the Appellants simply alleged, rather unsuccessfully, that the ordinance infringed upon their fundamental rights to free speech because it was impermissibly vague. *See* R. p. 165 - 170. Furthermore, the record shows that to support their arguments, the Appellants did little more than generally cite to a random assortment of cases that purportedly distinguish ordinances of varying purposes (and which otherwise failed to support Appellant's position that the City's ordinance was unconstitutionally vague). *See, e.g.*, R. p. 167, lines 8-11 (addressing the Appellants, the Hon. Steven Dennis noted that "there's no doubt [that] *City of Houston* is a preeminent case in the vagueness field [but] it doesn't deal with a noise ordinance."). Consequently, both the trial court as well as the circuit court properly ruled in favor of the City, finding that the ordinance is not unconstitutionally vague; that the Appellant's had proper notice of prohibited conduct; and that the Appellant's First Amendment right to free speech did not otherwise trump the surrounding citizens' "rights to peace and general well-being." R. p. 125. More importantly, the Appellants failed to allege and preserve any facts or

preserve any facts or argument to show that the ordinance imposed a substantial burden on their free exercise of religion.

A. BECAUSE THE APPELLANTS FAILED TO SHOW THAT THE ORDINANCE IMPOSED A SUBSTANTIAL BURDEN, INTERMEDIATE SCRUTINY IS THE PROPER STANDARD OF REVIEW.

The First Amendment of the United States Constitution provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. Amend. 1; SC Const Art I § 21. The federal free exercise clause was applied to the states through the Fourteenth Amendment in *Meyer v. Nebraska*, 262 U.S. 390 (1923) (inferential incorporation) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (explicit incorporation). Although couched in absolute terms, this constitutional guarantee has never been interpreted as creating absolute protection for every religiously motivated act. *South Carolina Dep't of Soc. Servs. v. Father*, 294 S. C. 518, 366 S. E. 2d 40 (Ct. App. 1988). Rather, the extent of religious freedom depends on whether the challenged governmental interference affects a religious belief or religious conduct. *See Cantwell*, 310 U. S. at 303-04.

Likewise, the freedoms afforded under the First Amendment also permits the government to impose certain regulations on speech. *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014). Specifically, courts will apply "the time, place, and manner doctrine to determine whether restrictions placed on protected speech in public fora violate the First Amendment." *Id.* at 552. Accordingly, content-neutral restrictions that regulate the time, place, and manner of speech must satisfy an intermediate level of scrutiny. *Id.*

To satisfy the burden of intermediate scrutiny, a "time, place, and manner" restriction on speech must be justified without reference to the content of the regulated

speech, be "narrowly tailored to serve a significant government interest," and "leave open ample alternative channels for communication of information." *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). Moreover, for a content-neutral regulation to be narrowly tailored, "it must not burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Additionally, the regulation is not required to be the "least restrictive or least intrusive means of serving the government's interests." *Id.* at 798. Instead, the requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799. However, "so long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 801.

The case at bar clearly highlights the well-established principle that the government has a "substantial interest in protecting its citizens from unwelcome noise." *Id.* at 796. More importantly, "this interest is at its height when protecting the 'well-being, tranquility, and privacy of the home.'" *Frisby v. Schultz*, 487 U.S. 474 (1988) (internal citations omitted). In addition, "the government may act to protect even such public forums as city streets and parks from excessive noise." *Ward*, 491 u.S. at 796. Like the case in *Ward*, the ordinance in this case is designed to regulate "loud and

unseemly noise" and further reflects the Respondent's interests in protecting the citizenry's rights to privacy, peace, and general well-being.

Lastly, the "time, place, and manner" restrictions must leave open ample alternative channels of communication. Just like the cases in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) and *City of Beaufort v. Baker*, 315 S.C. 146 (1993), this requirement is easily satisfied because the City's ordinance does not prohibit any specific means of expression at any given time or place. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *City of Beaufort v. Baker*, 315 S.C. 146, 151 (1993).

B. EVEN IF THE APPELLANTS HAD SUCCESSFULLY SHOWN A SUBSTANTIAL BURDEN, THE RECORD REFLECTS SUFFICIENT FACTS TO PROVE THE ORDINANCE SATISFIES STRICT SCRUTINY.

The purpose of the South Carolina Religious Freedom Act is to (1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of a compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened. S.C. Code Ann. § 1-32-30 (Supp. 1999). Because a showing of a substantial burden triggers a strict-scrutiny analysis, even the ordinance's otherwise content-neutral provisions would fail unless the government "can prove that the restriction [or regulation] furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015). Thus, it is the City's burden to demonstrate that the language of the ordinance is clearly defined and limited in scope to support the City's substantial and compelling interest in safeguarding the health, safety, and welfare of its citizens. In the case at bar, the wording of the ordinance is clearly limited in scope such that it does not

unduly suppress more speech than is necessary. Ultimately, this standard of review was clearly applied by the trial court, which noted that "in order for the state to impose any restrictions, the scrutiny [must be] the highest level possible." *See* R. pp. 160-161, lines 23-3.

CONCLUSION

For the reasons stated, the Respondent respectfully requests that this Court dismiss the appeal or, in the alternative, affirm the judgment of the circuit court.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that she served a copy of *Brief of Respondent* upon the Appellant by placing it in the United States mail, first class postage prepaid to his attorney of record at his address at 1735 St. Julian Place, Suite 200, Post Office Box 61110, Columbia, SC 29260 on this 1st day of December, 2016:

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CERTIFICATE OF COUNSEL

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

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