ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

MARIA MOYAO,

Appellant.

Appellate Case No. 2014-002317

FINAL BRIEF OF RESPONDENT

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II.

The magistrate did not err in finding the State provided sufficient notice of its intent to prosecute Appellant for DUAC, and the issue is not preserved for review.

STATEMENT OF THE CASE

Appellant Moyao was charged with driving under the influence (DUI). Prior to trial, the State provided notice pursuant to S.C. Code Ann. § 56-5-2933 and S.C. Code Ann. § 56-5-2930(J) that the State intended to try Appellant for driving with an unlawful alcohol conncentration (DUAC). Appellant proceeded to a jury trial on Wednesday, March 13, 2013, before the Honorable Charles Garrett and was found guilty of DUAC. Magistrate Garrett ordered Appellant to pay a $425 fine. Appellant appealed her conviction to circuit court, where it was subsequently affirmed by the Honorable Robin B. Stillwell.

STATEMENT OF FACTS

On September 4, 2011, Deputy Jonathan Jackson spotted Appellant's vehicle weaving in its lane and crossing over the dotted line between lanes. R. p. 25, lines 19-24. Deputy Jackson initiated a traffic stop. R. p. 26, lines 1-2. Deputy Jackson noticed a strong odor of alcohol from the vehicle when Appellant rolled down her window. R. p. 27, lines 1-6. Deputy Jackson requested Appellant step out of her vehicle so Deputy Jackson could conduct standardized field sobriety testing. R. p. 34, lines 15-18.

Deputy Jackson testified he operates under a federal grant and his primary responsibility is working the night shift and detecting impaired drivers. R. p. 24. Deputy Jackson explained the field sobriety tests he administered were standardized tests approved by the National Highway Transportation Safety Administration (NHTSA). He is certified in advanced DUI and is an instructor for classes on the standardized field sobriety testing. R. pp. 24-25. As explained by Deputy Jackson, these tests are used nationally. He explained, "There was a lot of research done into which were the best

tests. Several different tests were looked at and these were chosen by the NHTSA as the most accurate. And so, they are standardized in the way that they're given and in the cues and clues that we look for." R. p. 28, lines 3-8.[1] Deputy Jackson explained "people that are not impaired do not have trouble passing these tests." R. p. 28, lines 14-15.

Deputy Jackson first administered a horizontal gaze nystagmus (HGN) test. R. p. 29, line 14. Deputy Jackson explained that during the HGN test, officers look for six clues to determine whether a person is impaired. R. p. 29, lines 16-18. Deputy Jackson found all six clues present when the HGN test was conducted on Appellant, indicating Appellant was impaired. R. p. 33, lines 1-2.

The second sobriety test is called the "nine-step walk and turn." R. p. 31, lines 5-6. While being instructed regarding the nine-step walk and turn, Appellant struggled with her balance and sidestepped several times when moving to the position requested by Deputy Jackson. R. p. 35, lines 12-16. Appellant failed to touch her heel to her toe as instructed and stepped off the line. R. p. 35, lines 16-19. Deputy Jackson testified not only the subject's ability to balance, but the subject's ability to listen and follow the instructions are clues as to whether or not the subject is impaired: "If a person is not struggling with impairment, they will stand there and listen to the test – and again, I see this every night. They can perform it. It's not a challenge." R. pp. 34-35 (direct quote, p. 35, lines 7-11). The roadside video shows not only Appellant's balance issues, but also her difficulty following directions when taking the nine-step test.

The third field sobriety test, like the nine-step walk and turn test, is a divided

[1] Deputy Jackson explained that when all three tests are administered, law enforcement will make correct arrest decisions in 95% of those cases while the subjects in the other 5% of cases should have been arrested and were not. R. p. 70, lines 18-25.

attention test.[2] R. p. 36, line 5. It requires drivers to lift one foot six inches off the ground and point their toe forward for thirty seconds while remaining balanced on the other foot. R. p. 36, lines 5-18. Appellant failed the test because she needed to touch her foot to the ground to avoid falling. R. p. 37, lines 1-3. Following Appellant's failure of all three sobriety tests, Deputy Jackson placed Appellant under arrest for driving under the influence. R. p. 37, lines 11-12. Deputy Jackson testified he had no doubt in his mind Appellant was under the influence of alcohol. R. p. 40, lines 14-17. The video of Appellant's driving and subsequent performance of the three field sobriety tests were played for the jury at trial. R. p. 39, line 16.

Following her arrest, Deputy Jackson brought Appellant to the Law Enforcement Center for a breath test. R. p. 40, line 25-R. p. 41, line 5. Appellant elected to take the test; she had a .10 blood alcohol concentration (BAC). R. p. 47, lines 8-11. Deputy Jackson testified that before the test is administered to a person, the machine goes through a series of self-tests. If the machine malfunctions, it will shut down and not be operable until SLED investigates the malfunction. R. p. 44. No evidence was presented that the machine was not functioning properly.

Prior to trial, Appellant moved to dismiss the case, asserting the roadside video did not comply with the video requirements of S.C. Code Ann. § 56-5-2953. R. p. 7, lines 11-13. Counsel complained the satellite coordinates at the bottom of the video screen covered Appellant's feet during the nine-step test. R. p. 7, lines 20-25. Upon viewing the

[2] The divided attention tests are used because impaired persons have difficulty focusing their attention in two places, but people who are not impaired have no difficulty in carrying out the tasks. R. p. 28, lines 9-20. Divided attention testing is also a pragmatic means of determining if a driver is impaired because driving a vehicle is a divided attention task. R. p. 28, line 24 – p. 29, line 12.

video, Judge Garrett overruled the defense's objection to the videotape. R. p. 14, lines 22-23. In his return, Judge Garrett found "substantially all of that test as well as the other tests were clearly visible as was the Defendant's conduct." R. p. 4. The video was later admitted at trial **without objection**. R. p. 38, line 17 – p. 39, line 2.

ARGUMENT

I.

The magistrate did not err in denying Appellant's motion to dismiss the charge of driving with an unlawful alcohol concentration (DUAC) because the video comported with the requirements of S.C. Code Ann. § 56-5-2953.

Appellant contends the State failed to comply with the mandatory video requirements imposed by S.C. Code Ann. § 56-5-2953, alleging portions of Appellant could not be seen on the video recording. However, the arresting officer complied with the plain and unambiguous requirements of section 56-5-2953 by recording prior to activating his blue lights, recording all field sobriety tests administered, and including Appellant's arrest in the video recording. Although Appellant's feet are occasionally obscured by the satellite coordinates at the bottom of the video frame, Appellant's entire body is wholly within the video frame and the viewer is able to observe her poor performance on all three field sobriety tests. Therefore, the field video is highly probative; it conveys the danger Appellant presented to herself and others while she drove. The video's probative value outweighs any possible prejudicial effect.

If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). In interpreting a statute, the court will give words their plain and ordinary meaning and will not resort to forced construction that would limit or expand the statute. State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011).

The applicable section of the South Carolina Code provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 **must have his conduct at the incident site and the breath test site video recorded.**
>
> (1)(a) **The video recording at the incident site must**:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) **include any field sobriety tests administered**; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2012) (emphasis added).

All three of the field sobriety tests are included in the roadside video. Officer Jackson activated his car's video camera before he initiated his blue lights in order to capture video footage of Appellant's vehicle swerving. The video contains the entire HGN test, the nine-step walk and turn, and the divided attention test. Finally, the video clearly shows Officer Jackson placing Appellant under arrest and reading her Miranda rights to her upon her failure of all three sobriety tests. The video, therefore, wholly comports with the requirements of section 56-5-2953.

Appellant relies heavily on this Court's opinion in State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014). However, since Appellant submitted his brief, the Supreme Court reversed that opinion. State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015). In Gordon, the defendant complained that due to insufficient lighting, his head was not adequately visible during the HGN test. Id. The Supreme Court found the

defendant's face could be seen as well as the officer's arm and flashlight; therefore, the minimal requirements of the statute were met. Id. at 99-100, 777 S.E.2d at 378-79.

The Supreme Court further found dismissal was not the proper remedy where poor video quality makes admission of the HGN test more prejudicial than probative. Instead, the remedy would be to redact the HGN test from the video and exclude testimony about the test. Id. at 100, 777 S.E.2d at 379.

In the instant case, the quality of the video is sufficient to adequately show all field sobriety tests. It is uncontroverted the video recording of the HGN test is flawless. While Appellant's feet were marginally obscured by the satellite coordinates at the bottom of the screen during the nine-step walk and turn, the evidence still contained significant probative value. Appellant was visible throughout the test with minor interference with the view of her feet from the overlaid satellite coordinates. However, Appellant's feet were not obscured by the satellite coordinates during the several occasions she stepped off the line. Appellant's entire body was also visible throughout the divided attention test. During this last test, the satellite coordinates did not interfere with the view of Appellant's feet as she repeatedly put her foot down for balance and failed the test. Appellant's swaying was also visible throughout the divided attention test. Therefore, the prejudicial effect of seeing the Appellant fail all three sobriety tests was outweighed by its probative effect.

The Gordon Court found even if the remedy of exclusion were applied, sufficient evidence existed to present the case to the jury for a resolution. Id. That evidence included a breath analysis report, video of other field sobriety tests, and incriminating statements made by Gordon. Id.

In the instant case, even if the nine-step test was excluded, the State provided sufficient evidence to present the case to the jury. Appellant alleges no impropriety regarding the HGN test, which would still be presented to the jury. More importantly, the jury heard evidence of Appellant's .10 BAC which proves the case regardless of Appellant's performance during the field sobriety tests since the unlawful concentration, and not the resulting impairment, is the gravamen of the offense. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). "Harmless error rules . . . 'serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.'" State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) (quoting Chapman v. California, 386 U.S. 18, 22 (1967)).

Further, this Court should not review this issue as an evidentiary issue because Appellant failed to object to the roadside video when it was presented to the jury. "The general rule is that the failure to object to, or failure to move to strike, testimony renders such competent and accordingly entitled to be considered to the extent it is relevant." State v. Frank, 262 S.C. 526, 205 S.E.2d 827 (1974). A pre-trial ruling on the admission of evidence is not considered final and a party must renew his objection at the time the evidence is admitted. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Indeed, Appellant only argued for dismissal of the case, a remedy Gordon found inappropriate, and never moved to exclude the roadside video as "prejudicial." State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993) (The ground asserted on appeal must be supported

by the objection raised at trial). Appellant also did not seek to redact any "prejudicial" portions of the video. Since dismissal was inappropriate and no evidentiary objection was made, no issue actually remains to be reviewed.

Accordingly, this Court should affirm the conviction and sentence.

II.

The magistrate did not err in finding the State provided sufficient notice of its intent to prosecute Appellant for DUAC, and the issue is not preserved for review.

Appellant contends the circuit court erred in failing to grant a new trial because the State provided invalid notice before proceeding under DUAC. Appellant alleges three faults in the trial court's ruling regarding the adequacy of notice. First, Appellant claims notice of the DUAC charge was insufficient because the case was docketed, noticed, conferenced, and announced to be tried as a DUI. Secondly, Appellant contends the form providing notice to Appellant was ambiguous since it provided notice of both DUI and DUAC. Thirdly, Appellant contends he was never officially charged with DUAC and, therefore, any notice given was not effective under the statute. Appellant was provided clear and timely notice of the State's intent to proceed with a DUAC charge, and this Court should not review the issue because it is not preserved for review.

Appellant bears the burden of presenting an adequate record sufficiently complete so the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). An argument not raised to and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell,

345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

In the instant case, the prosecution announced it was going forward on DUAC. R. p. 15. Appellant asked the Judge Garrett, "Judge, may we object to that?" R. p. 15, lines 2-3. Then an off-record conference was held that was not recorded. R. p. 16. The only indication of what occurred during this off-conference discussion is found in the Magistrate's return, which notes the following:

> Prior to offering testimony, the State announced that it would be proceeding against the Defendant for DUAC pursuant to section 56-5-2933. Defense counsel objected whereupon the State produced a Notice to Defendant dated 2/6/12, acknowledged by [counsel], notifying Defendant that the State would be prosecuting her under section 2933. Finding that this notice was more than thirty days prior to trial, I overruled this objection.

R. p. 5. (Document entitled "Answer").

An objection made during an off-the-record conference and not made part of the record does not preserve the question for review. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In the instant case, none of the arguments now presented on appeal appear in the record. Indeed, the only indication is counsel conceded the issue when presented with the February 6, 2012 notice. State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1991) (finding issue was not preserved where defendant accepted the trial court's ruling without further objection). The record indicates counsel failed to provide any argument to Judge Garrett why the notice provided by the State was inadequate. Accordingly, this Court should not review this issue.

Even assuming the issue is reviewable, Judge Garrett did not err. As to

Appellant's first two arguments, the State provided effective, timely, and unambiguous notice of its intent to proceed with the case as a DUAC proceeding. On February 6, 2012, Appellant received a sheet entitled "Notice to Defendant." R. p. 129. The document contained the State's offer of a recommended sentence in exchange for a guilty plea, as well as a section that stated, "If one or more of the boxes below is checked, the following additional information applies to your pending criminal case." R. p. 129. Below that statement was a checked box that read "DUAC Notice." The DUAC notice section advised:

> Pursuant to 56-5-2933 and 56-5-2930 (J) of the South Carolina Code of Laws, you are hereby notified that the State intends to try this case as a violation of Driving with an Unlawful Alcohol Concentration. The case will appear on an upcoming trial docket no sooner than 30 days from the date of this notice.

R. p. 129.

The State later offered the same plea deal to Appellant again, and an identical sheet was sent to Appellant on February 8, 2013. R. p. 138. S.C. Code Ann. § 56-5-2933 (J) requires a person be provided at least thirty days notice of the State's intent to prosecute the case as a DUAC. In the current case, Appellant received notice on February 6, 2012, and February 8, 2013, of the State's intent to procecute her case as a DUAC. Both instances of notice extend beyond the thirty-day statutory requirement, as Appellant's trial date was set for the week of March 11, 2013. Furthermore, Appellant' s contention that the notice forms were ambiguous is meritless. The forms explicitly and unambiguously informed Appellant of the State's intent to proceed with her case as a DUAC prosecution.

As to Appellant's contention she was never officially charged with DUAC and therefore any notice given was not effective, S.C. Code Ann. § 56-5-2933(f) provides:

> A person charged for a violation of Section 56-5-2930 may be prosecuted pursuant to this section if the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest and reasonable suspicion existed to justify the traffic stop.

The above statutory requirements were met. Appellant was originally charged with driving under the influence, in violation of S.C. Code Ann. § 56-5-2930. The traffic stop occurred at 3:36 a.m. R. p. 26, lines 4-7. Appellant arrived at the police station at 3:53 a.m. and underwent a twenty-minute observation period before undergoing the breath test. R. p. 148. Appellant took the breath test at 4:14 a.m., which concluded at 4:16 a.m., within two hours of the 3:36 A.M. traffic stop. R. p. 148. Finally, Officer Jackson observed Appellant's vehicle swerving in the road, which provided him with reasonable suspicion to initiate a traffic stop. Because all the statutory factors for charging a person under DUAC who was originally charged with DUI are met, Appellant was adequately noticed that the trial would proceed on the charge of DUAC.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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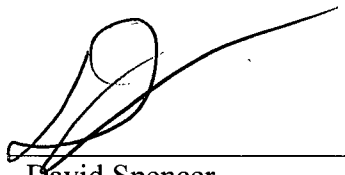
By: 
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