

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-001656

THE STATE,

Respondent,

v.

DONALD SCOTT ROBERTSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

STANDARD OF REVIEW.....7

ARGUMENT.....8

 The trial judge properly admitted testimony that Terri Johnson, Appellant’s alibi witness, returned a watch stolen during a home invasion after she was told that Appellant was charged with the crime because the evidence was relevant and the probative value was not substantially outweighed by the risk of unfair prejudice.

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases:

<u>Old Chief v. United States</u> , 519 U.S. 172 (1997)	9
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991).....	9
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	7
<u>State v. Collins</u> , 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012)	9, 10
<u>State v. Dickerson</u> , 341 S.C. 391, 535 S.E.2d 119 (2000).....	9
<u>State v. Douglas</u> , 369 S.C. 424, 632 S.E.2d 845 (2006).....	8
<u>State v. Fleming</u> , 254 S.C. 415, 175 S.E.2d 624 (1970).....	11
<u>State v. Freiburger</u> , 366 S.C. 125, 620 S.E.2d 737 (2005)	10
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002).....	7
<u>State v. Gilchrist</u> , 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998).....	10
<u>State v. Gillian</u> , 373 S.C. 601, 646 S.E.2d 872 (2007)	9
<u>State v. Hamilton</u> , 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).....	10
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 368 (1995).....	7
<u>State v. Lyles</u> , 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).....	10
<u>State v. Patterson</u> , 324 S.C. 5, 482 S.E.2d 760 (1997)	11
<u>State v. Torres</u> , 390 S.C. 618, 703 S.E.2d 226 (2010).....	7
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	9

Rules:

Rule 401, SCRE.....	6, 9, 11
Rule 402, SCRE.....	6, 8, 11
Rule 403, SCRE.....	8, 9, 10, 11

STATEMENT OF ISSUE ON APPEAL

The trial judge properly admitted testimony that Terri Johnson, Appellant's alibi witness, returned a watch stolen during a home invasion after she was told that Appellant was charged with the crime because the evidence was relevant and the probative value was not substantially outweighed by the risk of unfair prejudice.

STATEMENT OF THE CASE

Appellant was indicted during the October 2016 term of the Grand Jury for Spartanburg County for two counts of kidnapping (2016-GS-42-5528; 2016-GS-42-5529), burglary in the first degree (2016-GS-42-5530), two counts of armed robbery (2016-GS-42-5531; 2016-GS-42-5532), and possession of a weapon during the commission of a violent crime (2016-GS-42-5532). Appellant was later indicted during the July 2017 term of the Grand Jury for Spartanburg County for the possession of a firearm or ammunition by a person convicted of a violent crime (2017-GS-42-3586). Appellant proceeded to a jury trial before the Honorable R. Keith Kelly from July 24-26, 2017, in Spartanburg, South Carolina. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Kelly to consecutive life sentences for each count of armed robbery, kidnapping, and burglary in the first degree. Appellant was also sentenced by Judge Kelly to five years' imprisonment for the possession of a weapon by a person convicted of a violent crime, to be served consecutive to his other sentences. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On June 17, 2016, Geri Smith returned home to find that her home had been burglarized and that the intruder was still there. Tr. p. 68. Smith testified that she shared the residence with Albert Williams and that Williams was with her when she entered the home on June 17th. Tr. p. 68. Smith stated that, as she entered the home, the intruder grabbed her and threw her to the ground. Tr. p. 68. The intruder then instructed Smith and Williams to sit on the sofa. Tr. p. 68. After sitting down, Smith could see the intruder had a gun. Tr. p. 68. Smith described the gun as being a silver revolver with a white grip. Tr. p. 70. Smith noted the intruder was wearing a ski mask but she could tell he had, "crystal clear blue eyes." Tr. p. 69. The intruder demanded that Smith and Williams hand over their phones, cash, and credit cards. Tr. p. 68. The intruder also asked Williams to repair the home's back window with tape, because he broke the door's glass when breaking into the home. Tr. p. 68.

After taking Smith and Williams' cash and credit cards, the intruder asked Williams how much money he had in the bank and how much money he could withdraw without going inside of the bank itself. Tr. pp. 69. The intruder then forced Williams to call the bank and ask how much money he could withdraw from his account. After being told that he could withdraw any amount, the intruder directed Williams to write a check for \$4,100 and instructed him to drive to his bank to retrieve the money. Tr. p. 69. Williams then drove to the bank while Smith sat in the passenger seat and the intruder sat behind Williams. Tr. p. 70. Smith testified that when they were en route to the bank, she saw the intruder's face. Tr. p. 72. Smith stated the individual told her to look at a scar on his left arm he received during a police shootout and that, when she turned around, she saw the intruder's face because he had taken his mask off during the drive. Tr. p. 72. Smith testified, "I saw his, I saw his face, I saw that he had salt and pepper hair, that he was, you know, like people who work in the sun or whatever, a lotta wrinkles and just those clear

blue eyes.” Tr. p. 73. Smith specified the intruder was, “very tan.” Tr. p. 73. Smith noted she was able to look at the individual’s face for three or four seconds. Tr. p. 73. Williams subsequently drove through the bank’s drive-thru window, retrieved the \$4,100, and handed the money to the intruder. Tr. p. 72. Williams then asked the intruder where he would like to be dropped off and the intruder replied, “we’re going back to your house.” Tr. p. 73. As they approached the door of their home, Williams quickly pulled Smith inside the home before the intruder could re-enter, locked the door behind them, and ran to call 911. Tr. p. 74. While Williams called 911, Smith looked around the house and observed that a lot of things were out of place. Tr. p. 77. Smith noticed the intruder had tried to break into the home’s safe, and she noticed a watch that was sitting on her chest of drawers was gone. Tr. p. 77. Smith described her watch as, “gold with a white face, a little diamond chip at the top of the face and a rosette on each side.”¹ Tr. p. 81. Smith noted the intruder was ultimately unable to break into the safe. Tr. p. 80.

After Smith and Williams called 911, law enforcement arrived on the scene. Tr. p. 75. Smith was asked whether she saw the intruder well enough to provide a description for a composite sketch and she replied that she would be able to. When the finishing touches were being put on the sketch, Detective Thomas Clark of the Spartanburg County Sheriff’s Office arrived with a photographic lineup. Tr. pp. 83-85. When looking at the lineup, Smith picked out Appellant and identified him as the man that robbed her and held her at gunpoint. Tr. pp. 87-88. Smith testified that when she saw Appellant in the lineup she was one hundred percent sure that he was the culprit. Tr. p. 87.

Detective Thomas Clark was assigned to the violent crimes unit of the Spartanburg Sheriff’s Office in June of 2016. Tr. p. 248. After speaking with other investigators, Detective

¹ Albert Williams testified the watch in question was a gift from him to Smith and that it was, “a watch with a gold band, had two roses on either side, small diamond chip, black face.” Tr. p. 133.

Clark was able to develop a suspect who was known to live in the area that matched the description of the culprit provided by Smith. Tr. pp. 260. Detective Clark testified that Appellant was the individual identified as a potential suspect. Tr. p. 260. Detective Clark then generated a photo lineup that contained Appellant. Tr. p. 260. Detective Clark stated Smith, "immediately went to number 5, looked at him and went to number 5 and said that number 5 was the person that robbed them." Tr. p. 265. Appellant was later picked up by law enforcement. Tr. p. 266. Detective Clark interviewed Appellant at the Sheriff's Office. Tr. p. 266. Appellant told Detective Clark that he alternated between living in the woods and staying with a friend, Teri Johnson. Tr. p. 270. Detective Clark testified Appellant denied any involvement in the crime and claimed he spent the day with Teri Johnson at her mother's house on the day of the robbery. Tr. p. 271.

During his investigation of the robbery, Detective Clark went to a Days Inn Hotel to see if Appellant had been staying there. Tr. p. 274. Detective Clark testified he went to the Days Inn because he believed that a suspect who was homeless and recently came into a large quantity of cash may stay at a hotel. Tr. p. 274. Detective Clark showed a picture of Appellant to Mike Doshi, the manager of the Days Inn. Tr. pp. 283-84. After being shown Appellant's picture, Doshi produced a hotel registration form filled out by Terri Johnson. Tr. p. 284. After leaving the Days Inn, Detective Clark reached out to Johnson and was able to get in touch with her. Tr. p. 285. Johnson subsequently met with Detective Clark at the Sheriff's Office. Tr. p. 285. Detective Clark told Johnson that Appellant had been arrested for robbery, burglary, and kidnapping. Tr. p. 286. Johnson ultimately left the Sheriff's Office, as she was not charged with anything. Tr. p. 286. Johnson later contacted Detective Clark and brought in a gold women's watch with small

7

roses on each side of the band and a small diamond chip on the face. Tr. pp. 288-89. After receiving the watch, Detective Clark placed it into evidence. Tr. p. 289.

Prior to the State's admission of Mike Doshi and Detective Clark's testimony concerning Appellant's stay at the Days Inn and Teri Johnson's return of Smith's watch, Appellant offered an objection. Tr. p. 214. Appellant contended the evidence of the watch was not relevant, arguing that it was impossible to know how many times the watch could have changed hands in the eleven days between the robbery and when Johnson turned the watch over to Detective Clark. Tr. p. 214. Defense Counsel further contended that the State failed to link Appellant with Johnson and that all the State could prove was that they recovered the watch from Johnson after it was taken but there was no evidence directly linking Appellant. Tr. p. 215. In response, the solicitor noted that Appellant's own statements to law enforcement linked he and Johnson together, and that the jury could certainly draw inferences from the fact that Johnson returned the watch taken during the home invasion after being told Appellant was under investigation for armed robbery, burglary, and kidnapping. Tr. p. 216. The trial judge ruled that the testimony was relevant and admissible under Rule 401, SCRE and Rule 402, SCRE. Tr. p. 217.

STANDARD OF REVIEW

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). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). See State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.").

ARGUMENT

The trial judge properly admitted testimony that Terri Johnson, Appellant's alibi witness, returned a watch stolen during a home invasion after she was told that Appellant was charged with the crime because the evidence was relevant and the probative value was not substantially outweighed by the risk of unfair prejudice.

Appellant contends the trial judge erred by admitting Smith's watch into evidence because the watch was not relevant to prove any element of the charged crimes and that, even if relevant, the probative value of the evidence was substantially outweighed by its prejudicial effect. Specifically, Appellant avers the State failed to connect Appellant to the watch and the admission of the watch did not make it more probable Appellant committed the offense. Initially, the State would note Appellant's arguments based on Rule 403, SCRE, are not preserved for appellate review because Appellant's objection to the trial judge was purely on relevancy grounds. Error preservation concerns aside, Appellant's argument lacks merit because the watch was clearly relevant where the watch was taken from Smith during the robbery and Terri Johnson, Appellant's alibi witness, turned over the watch after being informed by law enforcement that Appellant was being charged with armed robbery, burglary, and kidnapping, and that a watch was taken during the robbery. This fact certainly makes Appellant's guilt of the charged offenses more probable. Further, the evidence's significant probative value was not outweighed by the risk of unfair prejudice.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is

not admissible.”). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ ”).

However, even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence’s tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev’d on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) (“The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”).

However, unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In Appellant's case, the trial judge did not abuse his broad discretion by admitting testimony about Johnson's return of the watch stolen during Appellant's robbery of Smith and Williams' home because the evidence was exceptionally relevant and its significant probative value was not substantially outweighed by the risk of unfair prejudice. Initially, the State would note that Appellant's arguments under Rule 403, SCRE, are not preserved for appellate review. If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”). Appellant’s arguments at trial focused exclusively on the relevancy of the evidence under Rule 401, SCRE, and Rule 402, SCRE. For the first time on appeal, Appellant makes an argument under Rule 403, SCRE, asserting that the watch’s probative value was substantially outweighed by its unfair prejudice to Appellant. Because Appellant’s Rule 403 arguments were not presented to and ruled upon by the trial judge, Appellant’s argument is not preserved for appellate review.

Error preservation concerns aside, the trial judge properly admitted Detective Clark’s testimony about Smith’s watch. Detective Clark’s testimony was exceptionally relevant where: (1) Smith testified that a gold watch with a rosette on each side of the band and a diamond chip at the top of the face was stolen during the robbery, (2) Appellant contended he was with Terri Johnson on the day of the robbery and stated that he sometimes lived with her, (3) Detective Clark was able to confirm Appellant and Johnson were staying at a Days Inn around the time of the robbery, (4) After Detective Clark informed Johnson that Appellant was facing a litany of criminal charges after stealing a number of items, including a gold watch, Johnson turned in a watch matching the description of the watch stolen from Smith. The fact that Appellant’s alibi witness was in possession of recently stolen property was exceptionally relevant in Appellant’s trial for charges pertaining to his robbery of Smith and Williams, as it made critical facts more probable than they would be without the evidence. The evidence thus had significant probative value, and that probative value was not substantially outweighed by the risk of unfair prejudice.

The only prejudice to Appellant resulted from the legitimate probative force of the evidence. Detective Clark's testimony about the watch certainly did not suggest a decision on an improper basis. The trial judge therefore properly admitted the relevant evidence. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 5, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-001656

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THE STATE,

Respondent,

v.

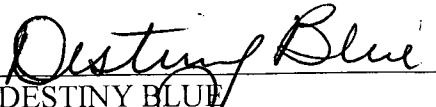
DONALD SCOTT ROBERTSON,

Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Initial Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 5th day of November, 2018.


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November 5, 2018

The Honorable Jenny A Kitchings
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Re: The State v. Donald Scott Robertson
Appellate Case No: 2017-001656

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondent along with proof of service in the above-referenced case.

Sincerely,

V. Henry Gunter
Assistant Attorney General
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VHR/db
Enclosures

cc: Robert M. Dudek, Esquire
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