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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2019-001007

THE STATE, ...RESPONDENT,

v.

DONALD RAY RICHBURG,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II. The trial judge properly prohibited defense counsel from cross-examining the lead investigator on Appellant's second statement to police because it was not presented during the State's case and it not admissible pursuant to Rule 106, SCRE.

STATEMENT OF THE CASE

Appellant was indicted by the Sumter County Grand Jury for four counts of first-degree assault and battery and one count of discharging a firearm into a dwelling. On June 10–12, 2019, Appellant proceeded to a jury trial before the Honorable George M. McFaddin. Assistant Solicitor Tyler Brown, Esquire, represented the State; Jason Bridges, Esquire, represented Appellant. The jury found Appellant guilty as charged on all counts and the trial judge sentenced him to ten years' incarceration for each count with all sentences running concurrently.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Prior to trial, a Jackson v. Denno[1] hearing was held to determine the admissibility of statements made by Appellant to police. On June 20, 2018, Investigator Randall Stewart of the Sumter County Sheriff's Office was investigating a drive-by shooting that occurred on June 17, 2018 and discovered that Appellant had been with the believed culprit, Ronnie Smith, in the hours prior to the shooting and decided to schedule an interview with Appellant to find out what potential information about the crime he might have. The following day, After issuing Appellant Miranda[2] warnings, Investigator Stewart questioned Appellant about his recollection of that night. Appellant admitted he had been with Smith earlier that night and even part of the day. Notably, Appellant recalled sitting next to Smith in the latter's vehicle during the day when Smith had waived a gun at one of the victims of the drive-by and made threatening statements. Later, at a party, Smith began handling his firearm and began making statements that he was going to do something "reckless." After leaving the party, Appellant told Smith he did not wish to go with him if he was going to do something stupid or reckless, so he went with his girlfriend Chelsea to Camden for the night and was not with Appellant when the drive-by occurred. Appellant put these claims into a written statement for police. After the interview, Investigator Stewart thanked Appellant for his help and allowed him to leave the sheriff's office. (Tr.p.32, line 1–Tr.p.42, line 9; State's Exhibit 4)

However, as Investigator Stewart continued his investigation, he discovered Appellant's statement was inconsistent with other evidence he was uncovering. After Smith was taken into custody, he told officers that Appellant was, in fact, present during the drive-by shooting. As a

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[1] 378 U.S. 368 (1964)

[2] Miranda v. Arizona, 384 U.S. 436 (1966)

result, Investigator obtained arrest warrants for Appellant around August 15, 2018. Investigator Stewart attempted to contact Appellant and notify him there were warrants for arrest, but was never able to obtain a response. The officer was, however, able to get in contact with Appellant's mother and his probation officer. Investigator Stewart also contact Appellant's girlfriend, Courtney Huggins and asked the local news to air a segment asking viewers for information regarding Appellant. Still, Appellant never contacted Investigator Stewart or turned himself in to authorities. (Tr.p.42, line 10–Tr.p.44, line 17)

Eventually, Appellant was taken into custody by the Sheriff's Office, and a few months after that Appellant contacted Investigator Stewart to provide him with a second statement about the events surrounding the drive-by. On November 27, 2018, Appellant and his attorney, at the former's request, met with Investigator Stewart and provided a second statement in which he admitted to being present at the shooting, but unaware of Smith's intentions for the event until after the shooting began. Appellant did not challenge the admissibility of the second statement; he only challenged the admissibility of the first statement to police because the video recording for that first statement was not available, and without such a recording the defense did not know "totality of the circumstances" surrounding the first statement and it should thus be excluded. Ultimately, the trial judge found both statements were voluntarily given to Investigator Stewart, given the evidence in the record that Appellant was advised of his Miranda rights on both occasions and the statements were freely and voluntarily given. (Tr.p.44, line 18–Tr.p.52, line 16; State's Exhibit 6)

The trial judge also allowed the parties to debate the admissibility of the video recording depicting Appellant's arrest (Arrest Recording). Trial counsel objected to the admission of the video, arguing it was more prejudicial than probative for the case, arguing nothing in the video

advanced the State's theory of the case regarding the drive-by incident. Specifically, trial counsel objected to the Arrest Recording because it depicted officers threatening to send Huggins's child to DSS and arresting her for hiding Appellant from authorities. Additionally, trial counsel believed the image of pulling Appellant out of a ceiling to place him in handcuffs and the child crying would further prejudice the jury. (Tr.p.52, line 17–Tr.p.55, line 3; Tr.p.56, line 17–Tr.p.57, line 15; State's Exhibit 7)

In response, the State noted that flight is evidence of guilt and the Arrest Recording depicted Appellant's knowledge that police were trying to arrest him and his attempt to evade capture. The State also argued the recording showed Appellant was willing to put the freedom and security of his girlfriend and their child at risk in his extreme efforts to evade law enforcement. To support its argument, the State cited to State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013). The State also noted that the purpose of the recording was to show that Appellant was not merely unknowingly avoiding law enforcement or simply not turning himself in; instead, Appellant was hiding in the ceiling of his hotel room and did not move from his hiding spot until a federal task force went in and removed him. Accordingly, Appellant's extreme method and decision to hide from law enforcement was significant evidence of flight relevant to the determination of his guilt for the charged offense. (Tr.p.55, line 4–Tr.p.56, line 16; Tr.p.57, line 16–Tr.p.58, line 6)

The trial judge ultimately decided to allow the Arrest Recording into evidence, explaining that Appellant's extreme actions were relevant evidence of flight and Appellant's guilt. (Tr.p.58, lines 7–10)

Trial Evidence

Ted Spencer, an owner and operator of a sign-making business, Spencer Signs, lived at 432 Wilkie Street in Sumter, South Carolina on the night of the shooting. Prior to the event, Spencer had encountered issues with people stealing from his home and business so he decided to install security cameras in and around his property. One of these cameras, pointed towards his driveway, was also pointed towards 435 Holloway Street, the Victims' home. After the drive-by shooting, Spencer met with Investigator Stewart and allowed him to view the security footage of the driveway and Holloway Street recorded the night in question. In the recording, a white vehicle can be seen committing the drive-by shooting of the Victims' home. (Tr.p.87, line 11–Tr.p.96, line 7; State's Exhibit 83)

Evelyn Brinson was asleep on the sofa in her living room on the night/morning of June 17, 2018. Around 4:00 a.m., she was startled awake by gun shots. As soon as she verified everyone in the home was alright, she called the police. Evelyn estimated she heard more than ten gun shots that night, recalling that bullets hit three motor vehicles, a boat, and several more entered the home. One bullet flew just over Evelyn's head while she lay on the couch. (Tr.p.97, line 20–Tr.p.107)

Jeremy "Ty" Brinson was also in the home that night. He was fast asleep when the gun fire woke him. After the firing stopped, Ty ran out of his room and dumped into his father Barry. The two men exited the house and saw the tail lights of a vehicle fleeing the scene. Ty thought he recognized the tail lights, but he was sure he recognized the sound of the vehicle as the white truck belonging to Ron Smith. According to Ty, Ron's truck made a distinctive noise as a result of issues with his muffler. Ty had heard this sound on several occasions in the past, including during a confrontation at a gas station approximately a day before the shooting. The

men spoke, and Ty had hoped the issues between the men were resolved. However, the afternoon of the following day (hours before the shooting), Jeremy was driving and saw Smith and Appellant following him in Smith's truck. (Tr.p.110, line 9–Tr.p.120, line 6)

Tabitha Browder, Ty's second cousin, met Appellant during the evening of July 16, 2018, just hours before the shooting. Both Smith and Appellant had been invited to the residence at 1033 Babette Street in Cherryvale, South Carolina, where Browder was staying at the time. Browder quickly observed Smith had a firearm because he was showing it off to the people at the house. Appellant appeared to be in a "fair mood," but Smith was upset about an ongoing feud with someone he refused to name. Still, Appellant supported Smith and told him they were "boys" and he "[had] his back." The two men stayed at the home for some period of time and did not leave until approximately 3:40 a.m. on July 17, minutes before the shooting occurred. (Tr.p.127, line 25–Tr.p.134, line 22)

Smith himself also testified during Appellant's trial. Smith, who had already been convicted for his participation in the crime, initially claimed he could not recall his conversations with law enforcement following his arrest. After being shown copies of his written statement and the recording of his police interview, Smith admitted that he recalled getting pulled over by a State Trooper shortly before the shooting occurred, and that Appellant was the passenger in his car when that occurred. However, when the men approached the victims' residence, Appellant moved over to the driver seat while Smith shot at the house. When Smith was asked to come in and speak with law enforcement about the shooting, he and Appellant fled for "the lake." Smith also testified that his truck, a white Ford Ranger, had a distinct muffler sound that was louder than normal. (Tr.p.139, line 20–Tr.p.144, line 2; Tr.p.161, line 2–Tr.p.167, line 2)

After the shooting, Smith and Appellant sold the gun to avoid getting caught. Smith admitted he and Appellant went to the Brinson home that night with the intention of shooting up cars, and Appellant drove the truck while he fired on vehicles and residence. After the shooting, Appellant texted Appellant about getting rid of the shell casings from the gun that were in the truck following the shooting. (Tr.p.167, line 3–Tr.p.172, line 1)

Corporal Orlando McCray, an officer with the South Carolina Highway Patrol, pulled over Smith at 3:35 a.m. on June 17, 2018, approximately a half-hour before the shooting , while accompanied by Trooper Darold Brown.. They observed Appellant weaving around the roadway and believed he could be driving under the influence. A warning ticket was issued to Smith. Corporal McCray, and observed the passenger in the vehicle while Trooper Brown interacted with Smith. Later, Investigator Stewart contacted Corporal McCray about the traffic stop and asked whether he could identify the person sitting in the passenger seat in the vehicle. Corporal McCray identified Appellant as the passenger after picking him out of a photo lineup. (Tr.p.207, line 16–Tr.p.218, line 16)

Sergeant Ronald Dodson, Jr., a deputy with the Sumter County Sheriff's Office, is a liaison with the US Marshal's Task Force for locating U.S. Fugitives. On August 17, 2018, he was involved with the efforts to find Appellant for his charged crimes. He received information that Appellant was staying at the America's Inn in Sumter County and solicited the help of several officers before initiating the arrest. (Tr.p.220, line 18–Tr.p.224, line 11)

Sergeant Dodson and the rest of officers who arrested Appellant wore body cameras that night. The body camera footage recorded by the officers—the Arrest Recording debated by the

parties during the pretrial hearing—was presented in conjunction with his testimony.[3] Sergeant Dodson found Courtney Huggins, Appellant's girlfriend, in a room at the hotel. Huggins, who was uncooperative, was told that if she did not cooperate she would be arrested and DSS would be called to take her child into custody. Sergeant Dodson confirmed it is standard practice for DSS to take custody of children when their parents are arrested. Meanwhile, officers noticed that ceiling tiles in the room were out of place and indicated they had been deliberately moved. Based on this information, officers realized Appellant was hiding in the ceiling. After officers revealed to Appellant they knew where he was hiding, he eventually agreed to come down. Appellant was taken into custody for his charged crimes, and Huggins was arrested for obstruction of justice. Although Huggins was ultimately charged for her actions, Sergeant Dodson allowed Huggins to call her mother and have her take custody of the child. (Tr.p.224, line 12–Tr.p.229, line 1; State's Exhibit 7)

Investigator Stewart testified about his collection of the evidence against Smith and Appellant. In addition to the testimony and evidence highlighted above, Investigator Stewart found other evidence connecting the men to the crime. For example, Investigator Stewart found empty cartons of Newport Cigarettes from Smith's truck, the same brand of cigarette as those found in the grass outside the victims' home. (Tr.p.234, line 25–Tr.p.266, line 4)

Investigator Stewart also testified about his recorded interviews with Appellant. Appellant's first interview occurred on June 21, 2018. After being advised of his Miranda rights, Appellant claimed that on the night/morning of the shooting, he was with Smith most of the night, including the trip to 1033 Babette Street in Cherryvale. While the men were at the home,

[3] Trial counsel renewed his objection to the recording during the trial on the same grounds he objected to the Arrest Recording during the pretrial hearing. Following Sergeant Dodson's testimony, he also moved for a mistrial based on the recording's admission. (Tr.p.225, lines 4–13; Tr.p.231, line 5–Tr.p.232, line 17)

Smith became more and more agitated about Ty and wanted to go do something "reckless." Appellant claimed he did not wish to join Smith on this destructive endeavor, and instead was picked up by Chelsea Blankenship and spent the remainder of the evening with her in Camden, South Carolina. Appellant did not see Smith until the following evening, at which point he heard about the shooting. After providing his verbal statement to Investigator Stewart, Appellant memorialized his story into a written statement. When The State attempted to enter this written statement into evidence, trial counsel renewed his pretrial objection to its admission. However, due to the evidence of Investigator Stewart's advisement of rights, the trial judge again found Appellant's first statement to police was admissible evidence. (Tr.p.266, line 5–Tr.p.276, line 5; State's Exhibit 4)

During a break in the trial, the State placed on the record that it had elected not to introduce Appellant's second statement into evidence. The State claimed that Appellant's second statement, in which he admitted to being present at the shooting but being unaware of Smith's intentions until after it began, was trial counsel's "clear" defense strategy throughout trial. Further, the second statement did not add any substantive evidence to the State's case. The State argued the defense could address the second statement if it so desired, but to do so would require the defendant testifying. Absent Appellant testifying, the State asseverated that Rule 106, SCRE prohibited trial counsel from cross-examining Investigator Stewart because it would confuse the jury and cause them to speculate about why this second statement was not presented by the State when it had legitimate reasons for not doing so. (Tr.p.288, line 11–Tr.p.289, line 18)

The State cited to two cases to support its argument: State v. Tennant, 383 S.C. 245, 678 S.E.2d 812 (Ct. App. 2009); and State v. Oglesby, 384 S.C. 289, 681 S.E.2d 620 (Ct. App.

2009). The State explained that in both cases, the rule of completeness was found to require the full details of specific statements presented at trial, but did not require the State to discuss statements occurring "wholly distinct" from those the State decided to present. (Tr.p.289, line 19–Tr.p.291, line 16)

In response, trial counsel noted he did not plan to enter the video recording of the second statement on cross-examination, or specific substantive parts of the statement. Instead, trial counsel only wished to ask Investigator Stewart whether Appellant admitted during that statement that he was at the scene of the shooting. Trial counsel did not believe this "could be considered self-serving." Trial counsel stated he wanted to introduce this information to clarify to the jury that he was not "putting up an alibi defense." In response, the State asseverated that Appellant's statement was, without question, self-serving because they are trying to use it to rehabilitate Appellant to the jury. It further noted the determination of whether something is "self-serving" or inculpatory is not determined by the party-opponent or the party offering the evidence as a party opponent. In the situation at trial, the defense wanted to admit the second statement to benefit the defense's position at trial, and therefore the statement was, by nature, self-serving. The trial judge agreed with the State's position and did not permit the defense to cross-examine Investigator Stewart about the second statement. (Tr.p.291, line 17–Tr.p.294, line 5)

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). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "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." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "[T]he appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008).

ARGUMENT

I.

The trial judge properly admitted the video recording of Appellant's arrest into evidence because it was probative of guilt. It demonstrated Appellant's knowledge that police were after him and his willingness to take extreme actions to evade arrest.

Appellant argues the trial judge erred in permitting the State to introduce the video recording of his arrest because during the recording officers threatened to arrest Appellant's girlfriend and place their child in the custody of DSS. The State disagrees with this allegation of error. The trial judge properly allowed the introduction of the recording because it was important evidence of Appellant's flight: Appellant hid in the ceiling of the hotel room and refused to exit the spot and comply with law enforcement's request for an extended period of time. Appellant's extreme actions were clear evidence of his guilty conscience and acknowledgment he participated in the drive-by shooting. Further, admission of the recording was not unfairly prejudicial because it did not suggest guilt on an improper basis: the video was not submitted for the purpose of discrediting Appellant's relationship with his girlfriend or child, but to demonstrate his knowledge of the officers' presence and his willingness to remain in hiding while officers were at the hotel room.

Analysis

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

"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 (defining relevant evidence as "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"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). However, even 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." Rule 403, SCRE. "Unfair prejudice," as used in the rule allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, means an undue tendency to suggest decision on an improper basis. State v. Saltz 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001).

"Flight from prosecution is admissible as guilt." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006). "Flight evidence is relevant when there is a nexus between the flight and the offense charged." Id. However, "[t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." State v. Beckham, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999). "This totality test and its components assist the trial court in determining the relevance of evidence of evasive conduct, as well as in weighing the probative value of that evidence against its prejudicial effect." State v. Martin, 403 S.C. 19, 28, 742 S.E.2d 42, 47 (Ct. App. 2013). "It is sufficient that circumstances justify an inference that

the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Flight or evasion of arrest is a circumstance to go to the jury." Pagan, 369 S.C. at 209, 631 S.E.2d at 266.

Initially, the State notes that Appellant does not dispute that evidence of his flight was relevant to the State's case. Appellant only claims that method of presentation, the video recording, was an improper vehicle for introducing said evidence. Thus, this Court should accept that there is no dispute over the probative value of this evidence.

Appellant cites to State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) to support his proposition that the officers' statements regarding DSS and arresting Huggins. However, Corns involves an issue separate and distinct from the one presented by Appellant: in Corns, this Court found officer's testimony that they informed Corns his wife could be arrested, charged with a marijuana offense, and that their child would be taken out of their custody amounted to improper influence rendering his incriminating statements involuntary. Id. at 552, 426 S.E.2d at 327. Here, the officer's statements to Appellant did not solicit an involuntary statement. In fact, the statements did not impact Appellant's behavior: he was hiding in the ceiling of the room before they were made and he remained in hiding after they were made. Appellant only exited the ceiling after extended efforts by law enforcement and their announcements that officers would enter the ceiling to retrieve him.

Instead, the video recording was submitted to help establish that Appellant both was aware law enforcement was after him and that he was going to great lengths to avoid capture. In fact, Huggins' interaction with police in the recording was additional evidence that Appellant was aware law enforcement was after him: Investigator Stewart testified he contacted Huggins about Appellant and told her he sought to arrest Appellant. Still, Huggins is found at the same

hotel room in which Appellant is ultimately discovered and denied knowledge of his location. Huggins' knowledge of the arrest warrant, along with her efforts to help Appellant hide from police, are strong evidence of his flight from law enforcement.

In fact, this Court has affirmed the admission of even "graphic and disturbing" autopsy photographs when they are relevant to the determination of issues at trial. In State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017), this Court upheld the admission of a victim's autopsy photographs following his death through child abuse at the hand of Thompson and the victim's father. The photographs consisted of those taken of the child at the crime scene on the day of his death and some taken during his autopsy. These "graphic" photographs showed deep lacerations on the inside of the victim's lower lip and bruising found all over his body. This Court found admission of those photographs "helped the jury to understand the nature and extent of Victim's injuries as well as his condition near death. Moreover, **the photographs were highly probative of Appellant's awareness** of [the] [v]ictim's injuries." Id. at 214–15, 802 S.E.2d at 634–35 (emphasis added).

The video recording did not present "unfair evidence" of Appellant's guilt; it was not graphic or disturbing nor did it show any evidence of acts or decisions unrelated to the jury's determination of Appellant's guilt. The video showed that both Huggins and Appellant had knowledge of the warrant for his arrest and that both worked in concert to hide him from officers. Further, it showed that Appellant did not merely hide behind a door or in a separate room, but that he climbed into the ceiling of a hotel room and remained there for a period of time in direct non-compliance with the officers sent to arrest him. Considering this Court has admitted even autopsy photographs when they are relevant to the determination of an issue at

trial, admission of this video recording which established Appellant's efforts to flee from law enforcement was, without question, a proper decision by the trial judge.

II.

The trial judge properly prohibited defense counsel from cross-examining the lead investigator on Appellant's second statement to police because it was not presented during the State's case and it not admissible pursuant to Rule 106, SCRE.

Appellant argues the trial judge erred in preventing trial counsel from cross-examining Investigator Stewart about Appellant's second statement to his police, the one offered after his arrest, even though it was not presented during the State's case-in-chief. The State disagrees with this allegation of error. Notably, this issue is not preserved for appellate review because at trial, Appellant did not argue that his first statement was "incomplete" pursuant to Rule 106, SCRE; instead, Appellant argued introduction of the second statement was proper as a means of clarifying that the defense was not presenting an alibi defense at trial. Regardless, the trial judge properly found Appellant's second statement was not admissible pursuant to Rule 106, SCRE because it was not part of the first statement, but an entirely separate additional statement made approximately six months after the first statement. Accordingly, trial counsel could have presented the second statement had it chosen to present evidence, but it could not compel the inclusion of the second statement into the State's case through Rule 106, SCRE.

Issue Preservation

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628

S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

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, 912–13 (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 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). Moreover, a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

As mentioned supra, this issue is not preserved for appellate review. At trial, Appellant never argued the second statement was required to complete the jury's understanding of the first statement. Instead, trial counsel argued he sought to admit the second statement to clarify for the jury that he was not presenting an alibi defense. This is a critical distinction: trial counsel never claimed Appellant's first statement, as presented by the State, was itself incomplete or taken out

of context. Because Appellant's current argument was never raised it to the trial judge, it is not preserved for review by this Court. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584..

Analysis

Should this Court determine this issue is preserved for Appellate review, it is still a meritless claim for relief. Appellant's second statement to police was not admissible pursuant to Rule 106, SCRE because it was and independent and separate statement from the first; made six months after the first statement, it did not clarify or "complete" the initial statement. Instead, it was a retraction of Appellant's statements to Investigator Stewart and an attempt to mitigate his potential punishment for his involvement in the drive-by shooting.

Pursuant to Rule 106, SCRE:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106 is a procedural rule that governs the timing of the completion of evidence and is designed to affect the order of proof. State v. Taylor, 333 S.C. 159, 170-71, 508 S.E.2d 870, 876 (1998). There is no requirement that the writings or recordings be contemporaneous or responsive to one another. State v. Tennant, 394 S.C. 5, 14, 714 S.E.2d 297, 302 (2011). The Supreme Court explained in Tennant that "[t]he standard here is 'fairness,' not responsiveness." Id. Tennant quotes, with approval, the Fed.R.Evid. 106 advisory committee's note as follows: "The [corresponding federal] rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."

To support his argument, Appellant cites to two prior South Carolina cases: State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975), and State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). However, neither case is comparable to Appellant's situation at trial. In Jackson, the Supreme Court of South Carolina found that a trial judge properly allowed the State to cross-examination a defense witness, a police officer, who spoke with and observed three witnesses who identified Jackson in a line-up and expressed some hesitation over their identification of him. Notably, the State asked the witness about other statements and behaviors exhibited by the witnesses during the line-up process. The court explained that "[w]hen **part of a conversation** is put into evidence an adverse party is entitled to prove the **remainder of the conversation**, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited." Id. at 283–84, 217 S.E.2d at 796–97n (emphasis added)

Similarly, in Cabrera-Pena, the Supreme Court found that after the State examined an officer who had interviewed the defendant, defense counsel was entitled to cross-examine that officer on other written and oral statements made during that interview because "justice required that [Cabrera-Pena's] remaining statements tending to explain or qualify those statements should have been considered in connection therewith." Id. at 361 S.C. 378–79, 605 S.E.2d at 525. Further, the Court noted that Cabrera-Pena's case was "not a case in which the defendant gave numerous written and oral statements to police over several hours, days or weeks. To the contrary, this was a one-hour conversation with police wherein Cabera-Pena 'gave a statement—a written statement and vocal statements.'" Id.

Appellant fails to acknowledge that both Jackson and Cabrera-Pena explained that Rule 106, SCRE applies only to written and oral statements considered to be part of the same interaction or conversation. Further, Appellant fails to acknowledge any of the cases subsequent

to Cabrera-Pena which reinforce those opinions. In State v. Oglesby, 384 S.C. 289, 681 S.E.2d 620 (Ct. App. 2009), this Court further clarified Cabrera-Pena and noted "only that portion of the remainder of any statement which explains or clarifies the previously admitted portion should be allowed into evidence." Id. at 294, 681 S.E.2d at 622.

In the instant case, Appellant's second statement to police was nothing like the statements at issue in Jackson, Cabrera-Pena, and Oglesby: those statements were critical portions of witnesses' interactions with law enforcement which either clarified or added context to statements already admitted into evidence. Appellant's second statement did not clarify or "complete" his first statement: it was a self-serving retraction of the first statement made after Appellant's arrest which occurred nearly six months later. Accordingly, the trial judge properly refused to allow trial counsel to reference the second statement during the State's case.

CONCLUSION

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

Respectfully submitted,

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August 6, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2019-001007

THE STATE, ...RESPONDENT,

v.

DONALD RAY RICHBURG,.....APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to:

Adam S. Ruffin, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served this 6th day of August, 2020.

Shana Montgomery

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Good Afternoon,

Attached please find a copy of the Initial Brief of Respondent in the State V. Richburg. Please confirm receipt. This document will be submitted to the Court of Appeals through our AIS system. As written in the proof of service, in addition to this email a hard copy of this document will be deposited in today's mail.

Thank You.

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