THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Honorable J.C. Nicholson, Jr.

Case No. 2011-GS-10-1793
Case No. 2011-GS-10-1794
Case No. 2011-GS-10-1795

State of South Carolina.....Respondent,

vs.

Rakeem D. King.....Appellant.

Appellate Case No. 2012-213405

INITIAL REPLY BRIEF OF APPELLANT

Jenny L. Barwick
650 E. Washington Street
Greenville, SC 29601
(864) 546-7601
Bar #: 076128

Robert M. Dudek
Post Office Box 11589
Columbia, SC 29201
(803) 734-1330
Bar #: 001767

Attorneys for Appellant

Index

Table of Authorities

Cases:

Rules:

Constitutional Provisions:

Argument in Reply

I. The trial court erred in charging the jury that attempted murder is a general intent crime, requiring merely malicious intent, and that malice may be inferred from the use of a deadly weapon.

A. Attempted Murder Instruction Improper

The Respondent asserts that the circuit court properly charged the jury on the definition of attempt and attempted murder by citing the Trial Transcript at 392-394. However, the definition the circuit court gave the jury for attempt was restricted to the charge on Attempted Armed Robbery. Trial at 392, ll 14-25 and trial at 393, ll 1-2. The circuit court did not give the jury any instruction on attempt as it was related to the Attempted Murder charge. Trial at 393, ll 3-25; trial at 394, ll 1-25; and trial at 395, ll 1-11. The Respondent's argument that the court correctly charged the statutory elements of attempted murder, including the "intent to kill" and "malice aforethought" requirements, is faulty in that it places that one small portion of the jury charge in a vacuum without considering the other instructions, which completely contradicted specific intent, that were also presented to the jury both by the State in its closing arguments (against defense counsel's objection) and by the court in its charge. Trial at 366, ll 19-22; trial at 394, ll 22-24; and trial at 395, ll 8-11.

Clearly, the jury was confused by the court's contradictory statements, as is evident from the jury's questions listed in Court's Exhibit 2: "Furthermore, if a gun is not loaded but aimed at a person's head[,] this also seems to fulfil the definition of attempted murder. Does it?" "If someone points a gun at a person's head but does not fire, does that fulfill the definition of attempted murder?" The jury even wrote that the hypotheticals were "not relevant to the case but helpful in understanding the definition of attempted murder." In response to these questions, the court explained that it could not answer the hypotheticals without commenting on the facts. Trial

at 406, ll 24-25 ant trial at 407, ll 1-3. The court also answered the jury's questions as to the difference between Assault and Battery of a High and Aggravated Nature [ABHAN] and Attempted Murder by stating that the basic difference is ABHAN does not require malice. Trial at 407, ll 10-13. The court did not explain that the difference is that Attempted Murder requires the intent to kill.

B. Implied Malice Instruction Improper

The Respondent cites *State v. Price*, in which the Court of Appeals held the trial court did not err in instructing the jury malice could be inferred from the use of a deadly weapon. However, in the Court of Appeal's opinion, the Court of Appeals specifically pointed out in its Factual and Procedural History section that "[t]here was no evidence the shooting was unintentional". 400 S.C. 110, 111, 732 S.E.2d 652, 652 (Ct. App. 2012). Mr. Dario Brown testified at trial that the fare was in the back seat and had the gun pointed to the back of his head. Trial at 171, ll 13-17 and trial at 174, ll 18-20. Had the fare wanted to kill Mr. Brown, the fare could have easily shot Mr. Brown in the head. However, Mr. Brown was shot in the elbow as his arm was back, and only after the Mr. Brown moved the gun with his elbow and forearm three different times. Trial at 174, ll 23-25; trial at 177, ll 15-19; and trial at 206, ll 19-20. Unlike the facts in *Price*, in the present case there was evidence presented that the shooting was unintentional.

The Respondent cites *State v. Stanko* in its argument that if the deadly weapon implied malice instruction was in error, the error was harmless. 402 S.C. 252, 741 S.E.2d 708 (2013). In *Stanko*, the Court held that because there was evidence of defendant's insanity presented, which is a defense, the use of a deadly weapon implied malice instruction should not have been given to the jury. 402 S.C. at 263, 741 S.E.2d at 713-14. The trial court instructed the jury that malice

could be inferred when the "deed is done with a deadly weapon" and "from conduct showing total disregard for human life." *Id.* at 265, 741 S.E.2d at 714-15. The Court pointed out that "if the jury rejected Appellant's insanity defense, which it did, the jury could also find that Appellant's conduct showed a total disregard for human life. Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice." *Id.* at 265, 741 S.E.2d at 715. The Court in *Stanko* knew that the jury rejected Appellant's insanity defense since the jury had the option to find the Appellant not guilty by reason of insanity, but chose not to. *Id.* at 265, 741 S.E.2d at 714. In the case at hand, because the jury was instructed that they could infer malice from the use of a deadly weapon and because the jury was instructed that attempted murder did not require the specific intent to kill, there is no way to tell if the jury believed the shooting to be an accident. Consequently, even if the jury believed the shooting to be an accident, they could have convicted on the charge of attempted murder without ever discussing and unanimously deciding whether the fare's conduct showed a total disregard for human life. Therefore, the error cannot be deemed harmless.

II. The trial court erred in allowing a witness to testify as to the amount of shots non-testifying witnesses heard.

A. Inadmissible Hearsay Was Not Harmless Error

The State knew that Mr. Brown's credibility as to the fare chasing him down the street while continuing to fire shots would be in question. In fact, in its closing, the State told the jury that "they (the defense) want to try to make Dario look like a liar, like he's got something to hide for some reason." Trial at 364, ll 2-3. The State went on to say that "the fact of the matter is Dario is not lying to you when he tells you he went down the street. You've got a broken fence in these pictures that he showed you was where he went over this fence, where it collapsed underneath him, where he said the assault continued." Trial at 365, ll 6-11. "Look at that ground

out there. Look at those leaves out there. He says he was shot at right there three or four more times. Because they didn't find any more of those teeny tiny little shell casings does that mean that didn't happen? Absolutely not. They could still be there today." Trial at 365, ll 13-18.

In its harmless error argument for the deadly weapon inferred malice charge, Respondent in its Brief pointed out that after shooting Mr. Brown in the cab, "Appellant fired multiple shots while chasing [Mr. Brown] down the street as [Mr. Brown] tried to get away. Appellant then shot at Mr. Brown as he lay on the ground with a fractured vertebrae. Thus, Appellant's use of a gun was not the only evidence of his malice."

Because the deadly weapon inferred malice charge was improper, the only evidence of malice was the fare chasing Mr. Brown down the street while firing at Mr. Brown. If the inadmissible hearsay had not been admitted into evidence, there is a strong likelihood that the jury would have disbelieved this portion of Mr. Brown's testimony. This portion of Mr. Brown's testimony is questionable considering no additional shell casings were found on scene despite an extensive search and Mr. Brown was only shot the one time in the cab despite Mr. Brown's claim that as he was lying on the ground on his back with the fare standing immediately above him and firing another shot. Trial at 237, ll 16-19; trial at 250, ll 4-23; and trial at 180, ll 2-15. This is why the State argued in its closing that "there were other witnesses at the scene that said they heard three, four or more shots." Trial at 363, ll 19-20.

III. The trial court erred in admitting phone records, which led to photo identification, when the search warrant for those records was based on a previous warrantless search for the same information requested in the search warrant.

A. Preservation

At trial, Appellant, in his pretrial motion, argued that the phone records should be suppressed due to "a faulty affidavit and search warrant." Trial at 59, ll 19-20. The Appellant

pointed out that the affidavit was misleading in that it stated the following: "*During the course of the investigation* the aforementioned phone number was determined to be a Cricket Wireless number which belonged to the defendant" (emphasis added). Trial at 63, ll 17-21 and Court's Exhibit 1. This sentence is so offensively misleading that it is fair to classify it as a knowingly, intentionally, or recklessly made false statement in that it purposely leaves out how this information was obtained, which was unconstitutional per the Fourth Amendment. In fact, the State acknowledged that this information would not have been admissible without a search warrant. Trial at 67, 11 22-25 and trial at 68, ll 1-5. The misleading language used in the affidavit was merely the prosecution's attempt to retroactively correct the unconstitutionality of the search.

Appellant cited *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) to the court for the proposition that it "allows you to challenge misstatements in a search warrant affidavit." Trial at 64, ll 15-17. The Court in *Franks v. Delaware* held:

> Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676.

The Appellant objected to the phone records several times throughout the trial. Trial at 256, ll 5-19; trial at 258, ll 19-25; trial at 259, ll1-7; trial at 260, ll 25; trial at 261, ll 1-11; and trial at 266, ll 2-6. Because the Appellant objected to the faulty affidavit due to a false statement within that affidavit and because the false statement is directly related to the unconstitutionality of the original search, the Fourth Amendment issue is preserved for appeal.

IV. The trial court erred in allowing the State to publish detention center phone calls the appellant allegedly made, when the danger of unfair prejudice substantially outweighed any probative value.

A. Preservation of Rule 404(b) Issue

In Appellant's objection to the detention center phone calls, counsel states "[t]here is a lot of stuff discussed in the phone call; I don't think all of it is relevant. There is language used in there that I think would be unfairly prejudicial to Mr. King." Trial at 322, ll 17-20. As the Respondent stated in its Brief, "'[u]nfair prejudice means an undue tendency to suggest a decision on an improper basis.'" *State v. Stephens*, 398, S.C. 314, 728 S.E.2d 48, 71-72 (Ct. App. 2012). Because Rule 404(b), SCRE, states that "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," it is necessarily incorporated in the unfair prejudice and relevancy objections. To decide the guilt of a person based on other crimes, wrongs, or acts, would be to base that decision on an improper basis and, therefore, Rule 404(b), SCRE, is necessarily incorporated into Rule 403, SCRE.

b. Unfair Prejudice to Appellant

Respondent makes the argument that the Appellant waived his claim to unfair prejudice since he refused the circuit court's offer to redact the compact disc. Both the State and the Appellant explained to the circuit court that the compact disc was difficult to understand. Trial at 322, ll 25; trial at 323, ll 1; trial at 327, ll 16-18; and trial at 329, ll 24-25. The circuit court inquired if either party transcribed the compact disc, to which both parties replied in the negative. Trial at 327, ll 22-25 and trial at 328, ll 1-6. In response to the circuit court's inquiry as to what the Appellant wanted redacted, the Appellant's counsel responded: "I guess really I want you to suppress the whole thing, Your Honor. I think—I agree with Mr. Durant [State] it is difficult – the conversation is all over the place. There is some talks about him being in the old

jail and the guy on the other end said people with them big charges go to the old jail. He's talking about where he is at in the jail, about his upcoming preliminary hearing, about his bond; just things like that are all tied up into other statements that Mr. Durant [State] wants to admit. That's why I guess I am moving to suppress the whole conversation." Trial at 328, ll 8-18. The Appellant did not waive his claim to unfair prejudiced, he merely explained to the circuit court why redacting the compact disc would not cure the relevancy and unfair prejudice issues.

CONCLUSION

For these reasons, this matter should be reversed and a new trial ordered.

By: 

Jenny L. Barwick
650 E. Washington Street
Greenville, SC 29601
(864) 546-7601
jenny@jennybarwicklaw.com
SC Bar No.: 076128

Robert M. Dudek
Post Office Box 11589
Columbia, SC 29201
(803) 734-1330

Attorneys for Appellant

May 12th, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of General Sessions
Honorable J.C. Nicholson, Jr.

Case No. 2011-GS-10-1793
Case No. 2011-GS-10-1794
Case No. 2011-GS-10-1795

State of South Carolina.....Respondent,

vs.

Rakeem D. King.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Reply Brief of Appellant complies with Rule 208, SCACR.

By:

Jenny L. Barwick
650 E. Washington Street
Greenville, SC 29601
(864) 546-7601
jenny@jennybarwicklaw.com
SC Bar No.: 076128

Robert M. Dudek
Post Office Box 11589
Columbia, SC 29201
(803) 734-1330

Attorneys for Appellant

May 12th, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAHEEM D. KING,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Raheem D. King, #353110, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of May, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.