JENNY L. BARWICK, P.A.

Attorney at Law

650 E. Washington Street, Greenville, SC 29601 · T (864) 546-7601 · F (864) 672-1406
jenny@jennybarwicklaw.com · jennybarwicklaw.com

June 6, 2014

VIA EMAIL AND US MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Rakeem D. King
Appellate Case No. 2012- 213405

Dear Ms. Kitchings:

Per our conversation today, I have enclosed a Redacted Initial Brief of Appellant along with the Certificate of Counsel and Affidavit of Service for filing. I did not include a Redacted Designation of Matter, as there is nothing in the original Designation of Matter that needs to be redacted.

Please let me know if there is anything else I need to do to resolve this matter.

Sincerely,

Jenny L. Barwick

cc via email and US Mail:
Robert J. Dudek, Esquire
Deborah R.J. Shupe, Esquire

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.

REDACTED INITIAL 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

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Question IV: Did the trial court err 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?

Statement of the Case

Procedural Facts

On December 4, 2010, the State arrested Rakeem King on the charges of attempted murder in violation of S.C. Code Ann. § 16-3-29, armed robbery in violation of S.C. Code Ann. § 16-11-330(A), and possession of a firearm during the commission of a violent crime in violation of S.C. Code Ann. § 16-23-490. The appellant was tried on November 5, 2012 through November 7, 2012 before the Honorable J.C. Nicholson, Jr. and a jury. The appellant was convicted of all three crimes and sentenced to thirty years on the armed robbery, five years consecutive on the possession of a firearm during the commission of a violent crime, and ten years concurrent on the attempted murder charge. The Notice of Appeal was timely filed on November 15, 2012.

Factual History

During the early morning hours of November 26, 2010, Dario Brown, a driver for the Yellow Cab Company, responded to a dispatch call to 1808 [redacted] Street. Trial at 163, ll 2-17. Mr. Brown testified that it took him between one and two minutes to arrive to that address. Trial at 168, ll 1-12. When Mr. Brown arrived at the address, the fare came from the yard of the residence across the street, which is 1809 [redacted] Street. Trial at 170, ll 8-11. Mr. Brown was familiar with the street, as he used to live on the street for several years and had an aunt that lived on the street. Trial at 163-164, ll 18-24. After the fare got into the back seat and because of Mr. Brown's familiarity with the street, Mr. Brown began questioning the fare why he was coming out of the yard of an abandoned residence. Trial at 170, ll 14-24 to 171, ll 13-17. The fare responded that it was his yard. Trial at 171, ll 6-7.

Because the street was a dead-end, Mr. Brown proceeded to make a U-turn in the road. Trial at 172, ll 16-18 to 173, ll 8-11. At this time, Mr. Brown heard a pistol cocking, turned around

and saw a gun raised, and heard the fare demand money. Trial at 172, ll 18-21. Mr. Brown gave the fare "give away money", which Mr. Brown described as a stack of ones that is carried by cab drivers just in case they are robbed. Trial at 174, ll 4-10. Mr. Brown estimated that there were between fifteen and twenty ones. Trial at 207, ll 10. Mr. Brown had already made eighty-three dollars in fares earlier in his shift. Trial at 199, ll 17-19.

When the fare demanded more money, Mr. Brown tried to move the gun away from the back of his head by moving the gun with his elbow and forearm, telling the fare "he doesn't have to rob me." Trial at 174, ll 5, 23-25 to 175, ll 2-4. Mr. Brown testified that he tried to move the gun three different times and that his hands were up. Trial at 206, ll 14-15 and 19-20. The gun went off and Mr. Brown was struck in the elbow, while his arm was back. Trial at 177, ll 15-19. Mr. Brown described the gun as a .25 caliber automatic, with a clip, that ejects shells upon firing. Trial at 205, ll 20-25 to 206, ll 1-5.

Mr. Brown then exited the cab, ran towards the dead-end, and hopped over a three or four foot chain-link fence, landing on his back, causing a fractured vertebrae. Trial at 179, ll 15-25; 180, ll 1-5; 188, ll 22-23; 212, ll 1-2. Mr. Brown testified that while he was running towards the dead-end, the fare was about two steps behind him and fired another shot. Trial at 178, ll 24-25; 211, ll 20-22. Mr. Brown claimed after hopping the fence and while lying on his back, the fare fired another round. Trial at 180, ll 10-14. Mr. Brown then claimed that he was able to crawl behind a van in the yard, at which point the fare tried to shoot Mr. Brown by firing six or seven rounds. Trial at 180, ll 16-19. Mr. Brown estimated the van to be about five to ten feet away from the fence. Trial at 214, ll 3-4. Mr. Brown testified that as he was behind the van, the fare said that "he is not going to shoot me anymore if I just give him the money." Trial at 183, ll 9-13. Mr. Brown also testified that the fare knew he went behind the van. Trial at 183, ll 23-25. Mr. Brown

then was able to use his cell phone to call law enforcement. Trial at 184, ll 16-19. It took sixty seconds for law enforcement to arrive. Trial at 214, ll 18-19. Mr. Brown had only been shot once, which was the shot to the arm he received while inside the cab. Trial at 189, ll 1-3.

The Yellow Cab Company's telephone operator testified that the call came in requesting a cab at 4:06:06 a.m. and that the dispatcher dispatched the cab driver out at 4:11:46 a.m. Trial at 145, ll 25, to 146 ll 1-12. The operator testified that the number that showed on his caller I.D. was XXX-4849. Trial at 146, ll 24-25, to 147, ll 1-3.

Jennifer Butler, a patrolman with the North Charleston Police Department, was the first responding officer. Trial at 224, ll 10-12; trial at 230, ll 3-4. Officer Butler testified that she was dispatched to the scene at approximately 4:20 a.m. and arrived at approximately 4:21 a.m. Trial at 220, ll 12-17. Officer Butler did not see the shooter on scene, did not see anyone running away, and did not see anybody picking up shell casings off the ground. Trial at 223, ll 1-7; trial at 229, ll 11-18. However, Officer Butler testified that a shell casing was found inside the cab. Trial at 225, 25 to 226, ll 1-7.

Kelly Murphy, the crime scene technician who was called out to the scene at approximately 4:30 a.m., testified that she has responded to over a thousand crimes scenes over a course of five years. Trial at 233, ll 8-11; trial at 235, ll 19. Officer Murphy also testified that a shell casing, which was "just kind of laying [sic] there on the rear seat" was retrieved from the cab. Trial at 237, ll 16-19; trial at 247, ll 14-15. Officer Murphy stated that she and her supervisor were able to follow a blood trail through a yard at the end of [redacted] Street, but that despite a thorough search, which took a little over two hours, Officer Murphy and three to four other officers were unable to find any other shell casings, other than the one found in the cab. Trial at 240, ll 6-9; trial at 242, ll 1-2; trial at 249, ll 7-13; trial at 250, ll 4-23.

On November 29, 2010 Mr. Brown was presented with a photo lineup, but was unable to identify any of the photos presented as being that of his fare. Trial at 282, ll 14-16; trial at 286, ll 20-21.

Because no identification was made in the first photo lineup, North Charleston Police Department focused its attention on investigating the number that called the Yellow Cab Company to request a dispatch to [redacted] Street on the November 26, 2010. Trial at 306, ll 1-21. Detectives used internet sources to determine the number belonged to Cricket Wireless cell phone company. Trial at 306, 12-16. The detectives then were able to find out the name of the subscriber was Kevin King, that the subscriber's date of birth was X/X/91, and that the address of the subscriber was listed as 3440 Elliott Street. Trial at 306, ll 19-25, to 307, ll 1-3. The State, during the appellant's pretrial search warrant suppression hearing, explained to the trial court that detectives found out the above information when they went to Cricket Wireless store and asked for the information, which was given without a search warrant. Trial at 67, ll 8-25, to 68, ll 1-5.

The detectives were not able to find a Kevin King living at 3440 Elliott Street, but were able to research the name King with the date of birth provided by the cell phone company and came up with the name Rakeem King, date of birth X/X/91. Trial at 307, ll 23-25, to 308, ll 1-5. Detectives then looked up Rakeem King's driver's license and discovered that his listed address was 3440 Osceola Street. Trial at 308, ll 10-12. Based on this information, detectives compiled a photo line-up and presented it to Mr. Brown on December 3, 2010. Trial at 308, ll 23-24; trial at 73, ll 11-14. Mr. Brown selected Rakeem King as the person who robbed and shot him. Trial at 309, ll 21-23. That photo-lineup identification completed the investigation and warrants were taken out on Rakeem King the next day. Trial at 310, ll 25, to 311, ll 1-2. It is undisputed that the only evidence presented placing the appellant at the scene is Mr. Brown's photo identification.

Although fingerprints and DNA were found at the scene, the fingerprints and DNA did not belong to the appellant. Trial at 243, ll 11-25, to 245, ll 1-21.

On February 10, 2012, North Charleston Police Department obtained a search warrant directed to the Custodian of Record for Cricket Communications, Inc. regarding telephone number XXX-XXX-4849 for the subscriber's name and mailing/billing address, call details, and other information. (Court's Exhibit 1). The Affidavit accompanying the search warrant 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 appellant." (Court's Exhibit 1).

Argument

Question I

Did the trial court err 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 is not a general intent crime, but a specific intent crime.

During its closing, the State argued to the jury the following: "The Judge will tell you[,] you do not have to intent to kill in order to be guilty of this offense [of attempted murder]. You must have the requisite [m]alice. The Judge will tell you that; don't just take it from me." Trial at 366, ll 19-22. At this point, the defense objected based on the charge conference, and the objection was overruled. Trial at 366, ll 25, to 367, ll 1-5.

The trial court instructed the jury that attempted murder occurs when "a person with the intent to kill attempts to kill another person with [m]alice [a]forethought[,] whether expressed or implied[,] commits the crime of Attempted Murder. Trial at 393, ll 3-6. The trial court went on

to instruct the jury that "[a] specific intent to kill is not an element of Attempted Murder but it must be a general intent to commit serious bodily harm." Trial at 394, ll 22-24. The trial court went even further in instructing that "[i]ntent may also be inferred when it is demonstrated the appellant voluntarily and willfully commits and act in a natural tendency which is to destroy another's life." Trial at 395, ll 8-11. The defense took exception to the charge on attempted murder, stating that it was a specific intent crime. Trial at 402, ll 10-13, 18-25. The trial court ruled that attempted murder is a general attempt crime requiring only a showing of malice. Trial at 404, ll 9-21.

During deliberations, the jury came back with a question stating: "We'd like further clarification of the difference between attempted murder and assault and battery of a high and aggravated nature." (Court's Exhibit 2). The hypotheticals presented by the jury in Court's Exhibit 2 clearly demonstrate that the jury struggled with general intent (malice) versus specific intent (intent to kill): "If someone points a gun at a person's head, but does not fire, does that fulfill the definition of attempted murder?"

The Court explained to the jury that "[t]he basic difference between attempted murder and assault and battery of a high and aggravated nature is assault and battery of a high and aggravated nature does not require malice. Malice is a hatred, ill will or hostility towards another person and is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict injury or under circumstances that the law would infer as evil intent." Trial at 407, ll 10-17. The trial court had previously instructed the jury that "[a] person commits the offense of Assault and Battery of a High and Aggravated Nature if the person unlawfully injures another and great bodily injury to another person results when the act is accomplishe[d] by means likely to produce death or great bodily injury." Trial at 395, ll 13-18. The defense objected to the trial court's answer to

the jury and was again overruled. Trial at 408, ll 14-25, to 409, ll 1-4. The charge book was in the possession of the jury during the entire length of deliberations. Trial at 409, ll 5-7.

Attempted murder is defined by statute as: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). This statute became effective on June 2, 2010 and replaced the former common law statute of assault and battery with intent to kill, formerly S.C. Code Ann. §16-3-620 (see legislative history of S.C. Code Ann. § 16-3-29).

"To prove attempt, the State must prove that the appellant had the specific intent to commit the underlying offense, along with some overt act, beyond mere preparation, in furtherance of the intent." *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011). "In the context of an attempt crime, specific intent means the appellant intended to complete the acts comprising the underlying offense." *Id.* According to S.C. Code Ann. § 16-3-10, "'Murder' is the killing of any person with malice aforethought, either express or implied." It follows from the logic in *State v. Reid*, that in order to attempt to kill someone, one must intend the killing of that person. One cannot accidently attempt to commit a crime.

Also, when the trial court gave the charge for the attempted armed robbery, the court instructed the jury that "[a]n attempt includes a *specific intent* to do a particular criminal act along with the act falling short of the act intended." Trial at 392, ll 19-21. The trial court went further in explaining to the jury that "[i]ntent means intending the results which actually occurred not accidentally or involuntarily." Trial at 392, ll 23-25. By the trial court's own instruction on the charge of attempt, attempt is a specific intent crime where the result (death) must be intended.

In *State v. Sutton*, the appellant was convicted of assault and battery with intent to kill [ABIK], attempted murder, and possession of a firearm during the commission of a violent crime.

340 S.C. 393, 532 S.E.2d 283 (2000). The Supreme Court, in its decision, affirmed the Court of Appeals decision to vacate the appellant's attempted murder conviction, but declined to follow the Court of Appeals reasoning that ABIK and attempted murder are the same offense. *Sutton*, 340 S.C. at 396, 532 S.E.2d at 285. The Supreme Court held that "*[a]ttempted murder would require the specific intent to kill and conduct towards that end.* ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not. However, simply because convictions for both offenses would not violate double jeopardy, we are not constrained to recognize the offense of attempted murder." The Supreme Court held that the "common law offense[] of ABIK . . . adequately cover[s] the conduct which attempted murder would include." *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285 (emphasis added). Since the holding in *Sutton*, the South Carolina Legislature enacted the attempted murder statute. S.C. Code Ann. § 16-3-29 (*effective* June 2, 2010).

b. The "use of a deadly weapon" implied malice instruction should not have been given when there was evidence presented that would reduce, mitigate, excuse or justify the killing.

The trial court explained to the jury that "[m]alice is a hatred, ill will, or hostility towards another person [and] is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury [or] under circumstances that the law will infer as evil intent." Trial at 393, ll 6-10. The trial court, in answering the jury's question (Court's Exhibit 2), put in the words it originally left out in its jury instruction on malice: "[m]alice is a hatred, ill will or hostility towards another person *and* is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict injury *or* under circumstances that the law would infer as evil." Trial at 407, ll 13-17 (emphasis added). The trial court, in its original jury instruction, went on to instruct

the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." Trial at 394, ll 4-5. The defense objected to the "use of a deadly weapon" implied malice instruction and cited *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

According to *State v. Belcher*, the Court held that such an instruction "has no place in a murder (or assault and battery with intent to kill) prosecution where *evidence is presented* that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." *Belcher*, 385 S.C. at 610, 685 S.E.2d at 809 (emphasis added). In reversing the appellant's conviction, the Court went on to state that such a charge cannot be considered harmless and that "[i]t is entirely conceivable that the only evidence of malice was [the appellant's] use of a handgun." 385 S.C. at 612, 685 S.E.2d at 810.

Mr. Brown testified that he tried to move the gun away from the back of his head by moving the gun with his elbow and forearm three different times and that Mr. Brown's hands were up. Trial at 174, ll 23-25; Trial at 206, ll 14-15 and 19-20. The gun went off and Mr. Brown was struck in the elbow, while his arm was back. Trial at 177, ll 15-19. The defense, in its closing argument, makes a very probable argument that the fare was merely using the gun as a scare tactic to successfully receive money from Mr. Brown, that the fare never intended the gun to fire, and that the gun only fired when Mr. Brown was trying to move the gun with his elbow and forearm. Trial at 380, ll 10-24. If the gun was accidently fired, this certainly reduces, mitigates, excuses or justifies Mr. Brown being shot in the arm.

The argument that the error in the instruction was harmless because malice could have been inferred from multiple gun shots holds no weight. The jury could quite possibly have not believed Mr. Brown when he testified there were additional shots fired after he left the cab. Other than Mr. Brown's testimony, there is no admissible evidence that the fare fired more than the one time inside

the cab (*see* Question II, *infra*, on improperly admitting a witness to testify as to the amount of shots non-testifying witnesses heard). In fact, it may be inferred from the jury's hypotheticals in its questions to the trial court regarding the difference between attempted murder and assault and battery of a high and aggravated nature that at least one member of the jury did believe any other shot was fired other than the one inside the cab: "If someone points a gun at a person's head, but does not fire, does that fulfill the definition of attempted murder?" (Court's Exhibit 2). There was evidence presented that gun was only fired once. Only one shell casing was discovered, despite a thorough search for more (two hour search with four to five trained officers searching). Trial at 237, ll 16-19; trial at 250, ll 4-23. The State tried to justify the absence of any shell casings by pointing out that it was dark outside during the search and the shell casings were small. Trial at 249, ll 7-13; trial at 250, ll 4-23. However, Officer Murphy was able to locate a blood trail under the same conditions. Trial at 240, ll 6-9.

The argument may be attempted that the fare was able to pick up the additional seven to eight shell casings before law enforcement responded, but it very possible the jury was not convinced of this either. The Yellow Cab Company's phone operator testified that the cab driver was not dispatched until 4:11:46 a.m., Mr. Brown testified that it took him between one and two minutes to drive to the location, the first responding officer, Officer Butler, testified that she was dispatched at approximately 4:20 a.m. and arrived at approximately 4:21 a.m. Trial at 145, ll 25, to 146, ll 1-12; trial at 168, ll 1-12; trial at 220, ll 12-17. Officer Butler testified that when she arrived, she did not see the shooter, did not see anyone running away, and did not see anyone picking up shell casings. Trial at 223, ll 1-7; trial at 229, ll 11-18. The entire incident, from the time Mr. Brown arrived on scene to the time the first responding officer was dispatched, took only seven minutes. It would be unreasonable to believe that the fare was able to locate seven to eight

shell casings in the dark within mere minutes. If the fare was going to attempt to hide the shell casings, he would have went to the cab first, where the casing was "just kind of laying [sic] there on the rear seat." Trial at 237, ll 16-19. Therefore, there was evidence presented that Mr. Brown was only shot at once, and that that only shot could have been accidental.

The trial court gave lesser included charges for assault and battery of a high and aggravated nature and assault and battery 1st degree. Trial at 395, ll 12-15 to 396, ll 1-14. When the defense requested that the trial court also charge on assault and battery 2nd degree, the trial court refused, reasoning that a gunshot wound is not moderate bodily injury. Trial at 403, ll 5-10; trial at 404, ll 9-12. "A trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the appellant committed the lesser included of the crime charged." *State v. Heyward*, 350 S.C. 153, 157, 564 S.E.2d 379, 381 (Ct. App. 2002). The trial court must have found evidence of the lesser included crimes of assault and battery of a high and aggravated nature and assault and battery 1st degree, otherwise the lesser included offenses would not have been charged. Therefore, the trial court must have found evidence that could reduce, mitigate, excuse, or justify the crime of attempted murder in the jurors' minds. The appellant in *Belcher* argued that when "a jury is asked to consider a lesser included offense . . . the permissive inference charge violates our common law . . . against charging juries on the facts." *Belcher*, 385 S.C. at 602, 685 S.E.2d at 804. The Court, in agreeing with Belcher's argument, stated that the "permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the appellant has committed murder (or assault and battery with intent to kill)." *Belcher*, 385 S.C. at 612, 685 S.E.2d at 810. Because lesser included charges were given, the permissive inference malice charge should not have been given, as it was a charge on the facts.

For these reasons, the Court should reverse and remand this case for a new trial.

Question II

Did the trial court err in allowing a witness to testify as to the amount of shots non-testifying witnesses heard?

When the State asked Officer Jennifer Butler, the first responding officer, whether she made contact with anyone in the area during her "knock and talks", Officer Butler replied: "Yes sir, we were able to speak to I believe it was two people and they were able to confirm---." Trial at 225, ll 4-5. At this point, the defense objected on hearsay grounds and the State volunteered to rephrase the question, which the trial court permitted. Trial at 225, ll 6-10. The State then asked: "What did you learn as you did those knock and talks?" Trial at 225, ll 11-12. Officer Butler began to answer, again drawing a defense objection based on hearsay. Trial at 225, ll 14. The trial court ruled that "she can testify to what she learned" and overruled the objection. Trial at 225, ll 15-16. Officer Butler testified that she learned that approximately three of four shots were fired. Trial at 225, ll 22. The State pointed out to the jury in its closing that "there were other witnesses at the scene *that said* they heard three, four or more shots." Trial at 362, ll 19-20 (emphasis added). Again, the defense objected and was overruled. Trial at 362, ll 21-25

Under Rule 801(c) of the South Carolina Rules of Evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible except as provided by the rules of evidence, by statute, or by ruled prescribed by the S.C. Supreme Court. Rule 802, SCRE.

Officer Butler changing her wording from "we were able to speak to . . . two people and they were able to confirm" to "I learned" from the knock and talks, does not change the fact that

what was admitted into evidence was inadmissible hearsay. The only way Officer Butler was able to "learn" from her knock and talks that there were three of four gunshots was from speaking with two people during the knock and talks who told her this information. The statement was introduced to show that there was more than one gunshot, which would confirm Mr. Brown's testimony and strengthen the State's argument for the existence of malice. This intent to introduce statements made by non-testifying witnesses for the truth of the matter asserted was made clear in the State's closing argument: "there were other witnesses at the scene *that said* they heard three, four or more shots." Trial at 362, ll 19-20 (emphasis added). "The Sixth Amendment guarantees a criminal appellant the right "'to be confronted with the witnesses against him.' The right of confrontation 'is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial.'" *State v. Dinkins*, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (citing U.S. Const. amend. VI; *State v. Martin,* 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). By introducing this hearsay evidence, the Appellant's right to confrontation has been violated.

Therefore, the Court should reverse and remand this case for a new trial and order that the cell phone records and photo lineup be suppressed.

Question III

Did the trial court err in admitting phone records, which led to a 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?

Detectives with the North Charleston Police Department went to a Cricket Wireless store, without a search warrant, and asked for subscriber information, including the subscriber's name, date of birth, and address. Trial at 67, ll 22-25, to 68, ll 1-2; Trial at 306, ll 19-25, to 307, ll 1-3.

Detectives used this information to put together a photo lineup, in which Mr. Brown identified the appellant on December 3, 2010 as his assailant. Trial at 73, ll 11-14; trial at 74, ll 11-24; trial at 308, ll 23-24; trial at 309, ll 21-23. The search warrant for the subscriber's information was obtained on February 10, 2012. (Court's Exhibit 1).

In *State v. Dupree*, 319 S.C. 454, 456-57, 462 S.E.2d 279, 281 (1994), the Supreme Court stated the following: "'We have long held [w]arrantless searches are *per se* unreasonable unless an exception to the warrant requirement is present. The burden is upon the State to justify the warrantless search. We have specifically recognized several exceptions to the warrant requirement. These include (1) search incident to a lawful arrest, (2) 'hot pursuit', (3) stop and frisk, (4) automobile exceptions, (5) the "plain view" doctrine, and (6) consent. *State v. Bailey,* 276 S.C. 32, 35–36, 274 S.E.2d 913, 915 (1981) (internal citations omitted); *see also State v. Peters,* 271 S.C. 498, 248 S.E.2d 475 (1978)." At trial, the State did not cite an exception to the warrant requirement or attempt to justify the warrantless search.

The South Carolina Supreme Court in *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594 (2004), a drug trafficking case, provided an outline for the appropriate circumstances when one may claim a search was conducted in violation of the U.S. Constitution: "The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. To claim protection under the Fourth Amendment of the U.S. Constitution, appellants must show that they have a legitimate expectation of privacy in the place searched." *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the appellant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as

reasonable. *Oliver v. United States,* 466 U.S. 170, 177, 104 S.Ct. 1735, 1741 (1984) (citing *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967) (Harlan, J., concurring))."

In *Katz v. U.S.*, the U.S. Supreme Court, in deciding that "the Fourth Amendment protects people, not places" explained that "[t]o read the Constitution more narrowly is to ignore the vital role the public telephone has come to play in private communication." *Katz v. U.S.*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512 (1967). In 1967, the U.S. Supreme Court recognized that the Constitution must keep up with modern times and recognize the "vital role" new technology "has come to play in private communication." *Id.*

It is evident that the appellant had an expectation of his cell phone records not being discoverable, otherwise he would not have allegedly placed the call to the Yellow Cab Company using his own cell phone. Surely, in this day and age, the appellant was aware that most, if not all, phones have caller identification capabilities, especially a dispatch center for a widely known cab company. The expectation of privacy in a person's cell phone records is certainly one that society recognizes as reasonable. While home telephone numbers, with subscriber names and addresses, are often listed in phone books, cell phone numbers are not listed in phone books. There is no public way for someone, to look up a cell phone number and attach it to a subscriber's name, address, and date of birth. In fact, the State, in explaining why it got a search warrant for information it already had in its possession over a year before, told the trial court the information "would not have been admissible in court, unless we got the search warrant so we went back and got the search warrant. So that's why we are here." Trial at 68, ll 2-5.

Merely because the State went back and got a search warrant for records it had already attained more than a year previous, does not cure the illegal search and the photo line-up that was developed based solely on that illegal search. The affidavit accompanying the search warrant

stated the following: "[d]uring the course of the investigation[,] the aforementioned phone number was determined to be a Cricket Wireless number which belonged to the appellant." (Court's Exhibit 1). Therefore, the probable cause stated in the affidavit to obtain a search warrant is also based on an unconstitutional search and, therefore, the search warrant itself is invalid and the phone subscriber information should not have been entered into evidence.

For these reasons, the Court should reverse and remand this case for a new trial and order that the cell phone records and photo lineup be suppressed.

Question IV

Did the trial court err 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?

The State introduced into evidence a compact disc containing several phone calls that allegedly the appellant made to an unknown third party from December 4, 2010 through January 4, 2011. The entire compact disc was entered into evidence, over the appellant's objection. Trial at 329, ll 4-25, to 330, ll 1-3; State's Exhibit 33. The State told the trial court that it wanted to play two phone calls to the jury, each lasting fifteen minutes. Trial at 20-21. However, based on the transcript, the only portion of the compact disc that was ever published to the jury was one phone call from the detention center to XXX-XXX-4849 on December 5, 2010 at 8:28 a.m., which lasted approximately fifteen minutes. Trial at 322, ll 16; 336, ll 9-12. This is the same number that called the cab company on November 26, 2010. Trial at 146, ll 24-25, to 147, ll 1-3. However, the phone call is not reflected on State's Exhibit 34, which is the detention center's phone logs for calls placed with the appellant's inmate identification number. Neither the State nor the defense transcribed the compact disc prior to trial. At trial, the court reporter did not transcribe the compact disc.

The appellant objected to the introduction of the compact disc based on relevancy and unfair prejudice. Trial at 322, ll 17-20; trial at 329. 22-25. Both the appellant and the State admitted that portions of the compact disc were difficult to understand. Trial at 322, ll 25, to 323, ll 1; trial at 327, ll 16-18; trial at 329, ll 24-25.

The State cited the following reasons the compact disc was relevant: (1) to connect the appellant to the XXX-XXX-4849 telephone number; (2) that the appellant gave the unknown third party the passcode for the phone and claimed the phone was his; (3) that the appellant spoke about explaining away his involvement; (4) that the appellant stated he did not know why he was picked out of a photo lineup; (5) the unknown third party stated that the appellant could have left a hair; (6) that the unknown third party stated that the appellant could say that the appellant took a cab from the appellant's house to the third party's house; (7) that the appellant and the third party were trying to get the appellant's story straight; (8) the appellant spoke about the circumstances of the crime; and (9) that the appellant spoke about his cousin getting Mr. Brown to take back his photo identification. Trial at 324, ll 1-16; trial at 328, ll 23-25, to 329, ll 1-2. The State told the trial court that the most important reason to admit the compact disc was to connect the appellant with the telephone number. Trial at 324, ll 16-18. Yet, when the trial court asked the State if it would accept the appellant stipulating that the detention center calls were made to the XXX-XXX-4849 rather than admitting the compact disc, the State refused. Trial at 328, ll 19-25, to 329, ll 1-3.

The trial court refused to listen to the compact disc before the State published it to the jury Trial at 329, ll 4-13. Before publishing the phone call for the jury, the State introduced the detention center's phone logs for telephone calls made from the appellant's inmate number. State's Exhibit 34. Sergeant Kevia Heyward, the person in charge of detention center phone calls, testified

for the State that the appellant called XXX-XXX-4849 sixty-three times during the time period from December 4, 2010 through January 4, 2011. Trial at 336, ll 9-13.

To address the State's argument as to the relevancy of the compact disc, it must be stated that at the time these arguments were made, the State told the trial court that it intended to publish two phone calls to the jury. However, only one phone call was actually published to the jury. It is also important to note that the phone call that was published to the jury was, for the most part, impossible to understand, despite repeatedly listening to the compact disc and playing it a slower pace. For the sake of addressing the State's argument as to relevancy only, the Appellant will not contest that that the Appellant was the person making the phone call from the detention center.

The State's main objective in introducing the calls was to connect the appellant to the phone number XXX-XXX-4849. Trial at 324, ll 16-18. However, this was accomplished with the phone log (State's Exhibit 34) and Sergeant Heyward's testimony. At the very beginning of the phone call, the appellant states that his phone has been turned on, but the other party is not even picking up. State's Exhibit 33, time :16. When the third party was attempting to place a call to the appellant's mother, the third party said he could not get the appellant's phone to work and the appellant gave the third party a code. State's Exhibit 33, time 2:07. Despite repeatedly listening to the compact disc, I was not able to hear anything giving credence to State's argument that the appellant attempted to explain away his involvement. Throughout the phone call, the appellant adamantly denied his involvement. The appellant stated that he did not know why he was picked out of a photo lineup. State's Exhibit 33, time 3:23. The State's argument claiming that the third party stated that the appellant could have left a hair is misleading. What was actually said was: "[inaudible] find a piece of hair or shit like that [inaudible] on seat that's all it takes some boy come up with some shit like that [inaudible] that's why I take cab from my house to your house.

Just like that." State's Exhibit 33, time 4:03. The State was incorrect in stating that the third party told the appellant that the appellant could say that the appellant took a cab from the appellant's house to the third party's house. At no point did I hear anything in this phone call on which the State could surmise that the appellant and the third party were trying to get the appellant's story straight or that the appellant spoke about his cousin getting Mr. Brown to take back the photo identification. Perhaps this is in the second phone call that the State was intending to publish for the jury, but never did. The only portions of the telephone call that could be interpreted as the appellant speaking about the circumstances of the crime is when the appellant says "they ain't even have no gun or nothing" (State's Exhibit 33, time 6:58) and when the third party says "You gotta get to the bottom of this. You gotta see how the fuck you got cut off." State's Exhibit 33, time 7:14. The appellant replied, "I know, that's why I'm waiting for my preliminary hearing." State's Exhibit 33, time 7:15. The phone call conversation mostly involved the appellant's bond, preliminary hearing, getting the appellant in contact with his mother, and getting the appellant money for his detention center account.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. Also, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Rule 404(a), SCRE. Also, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rules 404(b), SCRE.

There are several portions of the telephone call that are unfairly prejudicial and present inadmissible evidence of the appellant's character to the jury. These portions are, for the most part, clear and easily audible. At the very beginning of the published phone call, the appellant

stated: "My nigger, my nigger, my dog, my mother fucking nigger, my dog." The appellant also asked the third party: "Do you know what song popped up in my head?" The appellant proceeds to sing the following words to the third party: "And I've been here before. And I told myself I wasn't gonna come back here no more." When talking about the appellant getting a bond on his current charges, the third party stated: "You just come clean off of [inaudible] and you know when you get charges like that back to back them boys be trying to charge a motherfucker with menace to society and all that bullshit and the solicitor be bringing up the shit what you do in the streets and this and that. You know?" The appellant replied in the affirmative and the third party responded: "[Inaudible] good ass lawyer." State's Exhibit 33, time 13:57.

The danger that the jury would consider the appellant being in jail before, having just come off bond, having similar charges "back-to-back", and the use of racial slurs and curse words, substantially outweighs the little probative value of the information coming from the actual *content* of the phone call that was published for the jury. The probative value of the phone call is to link the appellant with the telephone number XXX-XXX-4849, which the State more than accomplished through Sgt. Heyward's testimony and the calls logs documented in State's Exhibit 34.

CONCLUSION

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

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

June ___, 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 Redacted Initial Brief of Appellant complies with Rule 208, SCACR.

June 5th, 2014

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

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AFFIDAVIT OF SERVICE

Personally appeared before me Jenny L. Barwick who, after being duly sworn, deposes and says that on June 6, 2014, send one copy of the Redacted Initial Brief of Appellant by U.S. Mail in the above case to Deborah R.J. Shupe, Office of the Attorney General.

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

SWORN to and Subscribed

Before me this 10th day

of June, 2014.

Tiffany L. Healy

Notary Public for South Carolina
My Commission expires: 4/9/24