STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2012-213405

THE STATE,

Respondent,

v.

RAHEEM D. KING,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

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STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On March 8, 2011, the Charleston County Grand Jury indicted Appellant Raheem D. King on one count of attempted murder, one count of armed robbery, and one count of possession of a firearm during the commission of a violent crime. The charges arose from an incident on November 26, 2010, during which Appellant lured a cab to an address in Charleston County, and then robbed and shot at the cabdriver, Dario Brown ("Mr. Brown"). The case was called for trial on November 5, 2012, before the Honorable J.C. Nicholson, Jr., Circuit Court Judge.

Prior to trial, Appellant moved to suppress records from Cricket Wireless regarding a particular cell phone number associated with the case, asserting the affidavits submitted in support of the search warrants for the records were insufficient, and contained conclusory and misleading statements. The State argued the supporting affidavits contained more than sufficient information establishing probable cause to obtain the records. After reviewing the affidavits and search warrants, the circuit court denied the motion to suppress. (Trial Transcript [TT], pp. 59-69); Court's Exhibit 1 [Search Warrant] Record on Appeal [R.], pp. 2-12; 297).

Devin Parker ("Parker"), a Yellow Cab Company telephone operator, testified a call came in at 4:06 a.m. on November 26, 2010, requesting a cab at 1808 [redacted] Street, and he dispatched Mr. Brown to that address at 4:11 a.m. Parker stated the caller identified himself as Kevin, and the caller ID showed the call came from the number [redacted] 4849. (TT, pp. 145-152; State's Exhibit 2 [Dispatch Screen Sheet] R., pp. 44-51; 313).

Mr. Brown testified he arrived at 1808 Carlton within one or two minutes. He was familiar with Carlton Street because he lived there for several years, and his aunt lived on the street. When he arrived at 1808 [redacted], Mr. Brown saw a man walking out

of the yard across the street at 1809 [redacted] Street, which he knew was abandoned. (TT, pp. 163-165, 168-171; R., pp. 53-55, 58-61).

The man entered the cab's passenger side backseat. When he opened the cab door, the dome light came on, and Mr. Brown was able to see the man's facial features and attire. Mr. Brown asked the man why he came out of the yard of an abandoned residence, and the man replied it was his yard. (TT, pp. 170-172; R., pp. 60-62).

After the man shut the door, Mr. Brown made a U-turn at the dead end of the road. He heard a pistol cocking, looked back and saw the man raise a gun to his head. The man demanded money, and Mr. Brown gave him the "give away money," or "dummy money," which was a stack of one-dollar bills drivers keep under the seat or between their legs to give to robbers, but the man demanded more money. Mr. Brown testified he was basically begging for his life at this point, and was so scared his legs would not move. (TT, pp. 172-175; R., pp. 62-65).

Mr. Brown tried to use his forearm to move the gun away from his head three times, pleading with the man not to shoot him. The third time, the man shot Mr. Brown in the elbow and the bullet passed through his forearm. Mr. Brown described the gun as a .25 caliber automatic that ejects shells when fired. (TT, pp. 175-178, 205-207; R., pp. 65-68, 95-97).

After the man shot him, Mr. Brown got out of the cab and ran toward the dead-end of the street, screaming for help. With the man chasing him, Mr. Brown flipped headfirst over a three to four foot chain-link fence, and landed on his back, fracturing a vertebrae. Mr. Brown testified the man fired a shot during the pursuit, and after he flipped over the fence, the man pointed the gun over it and fired another shot. Mr. Brown was able to maneuver himself behind a burgundy van in the yard, approximately five to

ten feet away from the fence, and the man fired six or seven more shots. The man yelled he would stop shooting if Mr. Brown gave him the money. (TT, pp. 178-182, 188-189, 211, 214; R., pp. 68-72, 78-79,101, 104).

Mr. Brown used his cell phone to call the police, and the man fled the scene. Mr. Brown testified he clearly saw the man, and described him as having "brown skin, kind of heavy set with a round face, scruffy beard and an afro . . ." wearing a hoodie over his head, and he told law enforcement there was no doubt in his mind he could identify the man in a photo lineup. When law enforcement subsequently showed him a photo lineup of six individuals, he was able to identify Appellant as the shooter with "100 percent" certainty. (TT, pp. 183-184, 187-188, 196, 199, 214; R., pp. 73-74, 77-78, 86, 89, 104).

Officer Jennifer Butler ("Officer Butler"), with the North Charleston Police Department, was the first responding officer at the scene, arriving at approximately 4:21 a.m. She saw a cab had run into a pole on the side of the road, but no one was inside. Mr. Brown flagged her down from across the dead-end of the street, and he was very distraught, scared, and appeared to be in shock. He reported he had been dispatched to 1808 [redacted], and the man he picked up there robbed him and shot him in the forearm. (TT, pp. 220-224, 230, R., pp. 110-114, 120).

The responding officers did not know where the shooter went, and a canine unit came to try and track him if possible. Officer Butler and another officer canvassed houses in the area to determine if anyone saw or heard anything relating to the crime. The State asked Officer Butler if she was able to make contact with anyone in the area, and she responded they were able to speak to two people, who "were able to confirm . . ." At that point, the circuit court sustained Appellant's hearsay objection. (TT, pp. 224-225; R., pp. 114-115).

The State then asked Office Butler what she learned during the investigation she conducted that night. The circuit court overruled Appellant's second hearsay objection, stating Officer Butler could testify to what she learned in the investigation, Officer Butler testified she learned approximately three or four shots were fired that night. (TT, p. 225; R., p. 115).

Shawn Mitchell ("Mitchell"), a legal compliance analyst at New Star ("New Star"), a records production company, testified New Star maintains the phone records, including subscriber information and call logs, for Cricket Wireless subscribers. In response to a subpoena, Mitchell pulled the records for [redacted]-4849, which was the number from the call requesting the cab pickup at 1808 [redacted]. The records revealed a Cricket Wireless subscriber named "Kevin King," with the address 3440 Elliot Street, Charleston, South Carolina 29405-7332, and a 1991 date of birth (TT, pp. 253-257; R., pp.142-146).

Mary Wearing ("Wearing"), a custodian of driver's records at the South Carolina Department of Motor Vehicles ("SCDMV"), testified Appellant's most recent address on his driver's license was 3440-B Osceola Street, North Charleston, South Carolina 29405. Also, Appellant's driver's license reflected a 1991 birthdate. (TT, p. 275, 278-279, R., p.162, 165-166).

Detective Patricia Jourdan ("Detective Jourdan") testified she showed Mr. Brown a photo lineup on November 29, 2010. There were photos of six men in the lineup, but Mr. Brown did not identify any of them as the shooter. (TT, pp. 281-287; R., pp. 168-174). Detective Mark Evans ("Detective Evans") testified the only information investigators had initially was the cell phone number from the call to the cab company. They learned it was a Cricket Wireless number, which was registered to Kevin King,

3440 Elliott Street, with a 29405 zip code and a 1991 date of birth. They determined the street address given to Cricket Wireless did not exist, and Elliott Street was in the 29401 zip code area. Using driver's license records, they then tried matching up people in the area with the last name King and the 1991 birthday. They found Rakeem King (Appellant) with the same 1991 birthday given to Cricket Wireless, and an address of 3440 Osceola Street with a 29405 zip code. (TT, pp. 305-308; R., pp. 192-195).

As a result of the information obtained from this investigation, Detective Evans recommended a second photo lineup with Appellant's photo. On December 3, 2010, Mr. Brown viewed the second photo lineup with six photos, including Appellant. Detective Walter Boone testified Mr. Brown immediately identified the third photo (Appellant), and was 100% sure Appellant was the man who robbed and shot him. (TT, pp. 289-297, 308-310; R, pp. 176-184, 195-197).

Appellant moved to suppress a compact disk containing recordings of telephone calls Appellant made while in custody at the Detention Center (the "CD"), arguing relevancy and unfair prejudice due to the language used and difficulty understanding what was said. The State argued the CD was highly relevant because it directly connected Appellant to the cell phone used to lure the cab to the scene. The circuit court denied the motion to suppress, but offered to redact portions Appellant believed were unduly prejudicial. Appellant then withdrew his request to redact portions of the CD. (TT, pp. 322-329; R., pp. 209-216).

Kevia Heyward ("Heyward"), Security and Administrative Supervisor at the Detention Center, testified the Detention Center has a recording system to record all inmate telephone calls. When booked into the Detention Center, each inmate receives a unique pin number for the system that must be used when they attempt to make a phone

call, and the system automatically records all completed calls, except those made to the inmate's attorney, into compact disk storage form. The inmate is advised all calls are recorded, and the recordings are maintained in the Detention Center's ordinary course of business. The Detention Center Call Log indicated Appellant called the cell phone at issue sixty-three times in one month. The cell phone was in the possession of an unknown third party, but Appellant and the third party made statements during the calls clearly indicating the cell phone belonged to Appellant. (TT, pp. 331-337, State's Exhibit 33 [CD], State's Exhibit 34 [Call Log]; R., pp. 218-224), 314. [1]

The circuit court charged the jury on the elements of attempted murder, the lesser included offenses of assault and battery of a high and aggravated nature ("ABHAN") and first degree assault and battery, armed robbery, attempted armed robbery, and possession of a weapon during commission of a violent crime. (TT, pp. 383-400; R., pp. 249-266). Appellant objected to the attempted murder jury charge on the ground attempted murder is a specific intent crime rather than a general intent crime. He also objected to the inference of malice from use of a deadly weapon charge. (TT, pp. 402-405; R., pp. 268-271).

The jury convicted Appellant of attempted murder, armed robbery and possession of a weapon during a crime of violence. The circuit court sentenced Appellant to concurrent prison terms of thirty years on the armed robbery conviction and ten years on the attempted murder conviction, with a consecutive five year term on the possession conviction. (TT, pp. 401, 428-429; R., pp. 267, 278-279). This appeal followed.

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1 State's Exhibit 33 has been transferred to the Court for consideration.

ARGUMENT

I. The circuit court properly charged the law regarding attempted murder and inference of malice from use of a deadly weapon.

Appellant asserts the circuit court erred in charging the jury attempted murder is a general intent crime requiring malice. He contends the circuit court should have instructed the jury attempted murder is a specific intent crime, and the charge given was confusing. In addition, Appellant argues the circuit court's jury charge that malice may be inferred from the use of a deadly weapon was reversible error under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Appellant's arguments are meritless.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216, 220 (2006). In reviewing jury charges for error, an appellate court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010).

"'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.'" *Id.* (*quoting* State v. Adkins, 353 S.C. 312, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (*citing* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)), and will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *Id.* at 584.

A. Attempted Murder Instruction

The current attempted murder statute is the functional equivalent of the common law offense of assault and battery with intent to kill ("ABWIK"). In State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), the Supreme Court first addressed the issue of whether

attempted murder was an offense in South Carolina, and noted the common law essentially equated ABWIK with attempted murder. *Id.* at 285.

South Carolina case law on the requisite intent to commit ABWIK was ambiguous. Foust, 479 S.E.2d at 50; *See also* McAninch and Fairey, The Criminal Law of South Carolina, 194-197 (3rd Ed.1996). ABWIK was an unlawful act of violent nature to the person of another with malice aforethought, either expressed or implied. Foust, 479 S.E.2d at 51. A specific intent was not required to commit ABWIK. Sutton, 532 S.E.2d at 285; Foust, 479 S.E.2d at 50-51(When South Carolina trial judges charge juries the law of ABWIK they should give a standard "intent" charge, but do not have to instruct the jury the defendant must have a specific intent to kill before being convicted of ABWIK).

In 2010, as part of an omnibus crime bill, the South Carolina Legislature enacted the attempted murder statute, which became effective June 2, 2010, which replaced the common law ABWIK offense. The statute provides "[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 (Supp. 2013).

Attempt is generally recognized as a specific intent crime. 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 that the defendant consciously intended the completion of acts comprising the choate offense." Sutton, 532 S.E.2d at 285.

In this case, the circuit court charged the jury on the definition of attempt and attempted murder as follows:

> **An attempt includes a specific intent to do a particular criminal act along with that act falling short of the act intended.** The State must show more than mere preparation and intent. It must be some overt act

> committed and the effort to commit the crime. **Intent means intending the results which actually occurred not accidentally or involuntarily.** Intent may be shown by acts and conduct of the defendant in other circumstances from which you may naturally and reasonably infer intent. **Attempted murder: a person with the intent to kill attempts to kill another person with [m]alice [a]forethought either expressed or implied commits the offense of attempted murder.** Malice is a hatred, ill will, or hostility towards another person is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury under circumstances that the law will infer as evil intent.

(TT, pp. 392-393; R., pp. 258-259) (emphasis added).[2] The court subsequently stated "a specific intent to kill is not an element of [a]ttempted murder, but it must be a general intent to commit serious bodily harm," and correctly defined intent as "intending the results which actually occur, not accidentally or involuntarily." (TT, pp. 394-395; R., pp. 260-261).

Appellant objected to the charge that attempted murder is a general intent crime, and requested the jury be charged it is a specific intent crime. Appellant acknowledged the attempted murder statute included "malice," but suggested the jury be charged attempted murder requires intent to kill, without a definition of malice. The circuit court reviewed the attempted murder statute language, and found the legislature intended the same general intent requirement for attempted murder as for murder. The court reasoned that making attempted murder a specific intent crime would create a higher standard for an attempted murder than murder, which could not have been the legislative intent when enacting the attempted murder statute. (TT, p. 402-404; R., pp. 268-270).

The circuit court's jury charge as a whole was substantially correct and adequately covered the applicable law. The mere fact the circuit court referred to

[2]While the court referenced the "attempt" charge in connection with attempted armed robbery, the attempted murder charge was immediately after the attempt charge.

attempted murder as a general intent crime at one point does not alter the fact the court correctly charged the statutory elements of attempted murder, including the "intent to kill" and "malice aforethought" requirements, and charged the jury an attempt requires "a specific intent to do a particular criminal act."

Appellant's contention the jury's question regarding the difference between attempted murder and ABHAN reveals the jury was confused by the original charge's general intent language is purely speculative. The re-charge indicated the basic difference between attempted murder and ABHAN is the malice requirement for attempted murder, which is a correct statement. Pursuant to the original charge, the jury still had to find the "intent to kill" element in order to convict Appellant of attempted murder. Even assuming some level of confusion on the jury's part, it does not warrant reversal when the jury charges are considered as a whole. *See,* State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41, 50 (Ct. App. 2007) aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010); State v. Kerr, 330 S.C. 132, 498 S.E.2d 212, 218 (Ct. App. 1998) *citing* State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994)).

B. Inference of Malice

A jury charge instructing malice may be inferred from the use of a deadly weapon is improper when evidence is presented that would reduce, mitigate, excuse, or justify the offense. Belcher, 385 S.C. 597, 685 S.E.2d 802, 803-804 (2009) (holding an inferred malice instruction was improper where evidence of self-defense was sufficient to reduce, mitigate, or justify the killing). If there is no evidence to reduce, mitigate, excuse, or justify the offense, an instruction on the inference of malice from the use of a deadly weapon is permitted. State v. Price, 400 S.C. 110, 732 S.E.2d 652, 654 (Ct. App. 2012), *cert. granted* March 5, 2014. Even if a court errs in charging the jury on an inferred

malice instruction, the error is subject to harmless error analysis, and harmless error may arise when evidence of malice is not limited to the use of a deadly weapon. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708, 714 (2013).

In Price, 400 S.C. 110, 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. Price, 732 S.E2d at 654. The defendant was charged with ABWIK, and the trial court instructed the jury "malice may be inferred from the conduct of a person if that conduct shows a total disregard for human life," and it "may arise when the deed is done with a deadly weapon." *Id.* The trial court also charged ABHAN as a lesser-included offense. *Id.*

On appeal, the defendant argued his theory that the shooting may have been part of a drug deal gone wrong precluded the deadly weapon inference charge. In rejecting that contention, the Court stated:

> It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. Therefore, if the jury believed Price is the person who shot Deon, Price is necessarily guilty of ABWIK.

Id.

In Stanko, the defendant argued the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon when the defendant had presented an insanity defense. 741 S.E.2d at 711. The Supreme Court held the defendant's evidence of insanity was sufficient to preclude the deadly weapon inference charge, but found the error in giving it was harmless. *Id.* at 713-714. In reaching its harmless error conclusion, the Court distinguished Belcher:

> The State presented uncontested evidence that Appellant shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. *See* Belcher, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").

Id.

The Court also analyzed the trial court's jury instructions as a whole and found they were consistent with the evidence presented. The court observed:

> The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." **The trial court also stated that malice "can be inferred from conduct showing total disregard for human life."** Appellant only contests the "deadly weapon" language. However, 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 715 (emphasis added).

In this case, the circuit court charged the jury malice may be inferred from conduct showing a disregard for human life, and may also arise when the deed is done with a deadly weapon. (TT, p. 394, R., p. 260). Appellant only objected to the deadly weapon inference charge based on Belcher, and argued the jury could find Mr. Brown caused the gun to fire by trying to move the gun away from his head with his forearm, which would mitigate, excuse or justify the offense. (TT, p. 403, R., p. 269). In overruling the objection, the circuit court stated: "I don't think there is any evidence for accident, voluntarily, manslaughter, or self-defense or any other facts that would justify imposing Belcher in this case." (TT, p. 405, R., p. 271).

As in Price, there was no evidence in this case that would reduce, mitigate, or justify the attempted murder offense. The evidence established Appellant pointed a loaded and cocked gun at Mr. Brown's head, and in fear for his life, Mr. Brown attempted to move the gun away from his head with his forearm. Appellant brought the gun **back** to Mr. Brown's head after his first two attempts to move it away, and on the third attempt, he shot Mr. Brown in the arm.[3] (TT, pp. 172-173; R., pp. 62-63). Even if Appellant's contention Mr. Brown's movement caused the gun to fire is true, it does not obviate the fact Appellant held a loaded and cocked gun to Mr. Brown's head, which, at a minimum, shows a total disregard for human life.

Further, after the shooting Mr. Brown in the cab, Appellant fired multiple shots while chasing him down the street as he tried to get away. Appellant then shot at Mr. Brown as he lay on the ground with a fractured vertebrae. (TT, pp. 180-183; R., pp. 70-73). Thus, Appellant's use of a gun was not the only evidence of his malice.

Appellant also argues the circuit court's jury charges on the lesser included crimes of ABHAN and first degree assault and battery indicate the court necessarily found there was evidence to reduce, mitigate, excuse or justify the shooting. Appellant's argument presumes the lesser included offense charges were warranted, which the State disputes.

The charge conference was not on the record, so the State's position on the lesser included charges is not reflected in the record. In his closing argument, however, the solicitor argued the lesser included charges "do not apply," and Appellant's conduct was nothing less than attempted murder. (TT, pp. 367-370; R., pp. 239-242). The State

[3] Mr. Brown's attempt to move the gun from his head probably saved his life by causing the bullet to enter his arm rather than his head.

submits the lesser included jury charges were not warranted based on the evidence presented at trial.

Appellant held a loaded and cocked gun to Mr. Brown's head, and after he shot Mr. Brown, he chased him down the street, and continued shooting at him, even after Mr. Brown was flat on his back on the ground. Appellant's contention Mr. Brown himself caused his gunshot wound by trying to knock the gun away from his head does not reduce, mitigate, excuse or justify the offense of attempted murder.[4] *See* Price 732 S.E.2d at 654 (defendant's claim that shooting was result of drug deal gone bad was not sufficient to warrant lesser included offense charges in face of evidence the shooter raised the gun, pointed it at victim, approached victim and shot him in the neck at close range).

Finally, any alleged error in the circuit court's jury instructions was harmless. *See* Belcher, 685 S.E.2d at 809 ("Errors, including erroneous jury instructions, are subject to harmless error analysis."). The State presented ample evidence Appellant exhibited a total disregard for human life. As discussed above, Appellant pointed a loaded and cocked gun at Mr. Brown's head. After he shot Mr. Brown inside the cab, he shot at him several more times while chasing him down the street, and then again when Mr. Brown was flat on his back. Based on the evidence, the jury could easily find Appellant's conduct showed a total disregard for human life, and he "could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice." Stanko, 741 S.E.2d at 715.

[4]In essence, Appellant's theory of the case is that Mr. Brown was the author of his own misfortune, which is inherently offensive.

The circuit court charge as a whole was substantially correct and adequately covered the applicable law. Accordingly, the circuit court should be affirmed on this issue.

II. The circuit court properly admitted a police officer's testimony regarding what she learned during the course of the investigation.

Appellant contends the trial judge erred in admitting Officer Butler's testimony regarding what her investigation after the crime revealed. Officer Butler testified she canvassed the surrounding neighborhood that night and learned approximately three or four shots were fired. Officer Butler's testimony was not inadmissible hearsay, but even if this Court finds it was inadmissible, any error in admitting it was harmless.

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, 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, 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, 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, 710 S.E.2d 55, 58 (2011).

A. Hearsay.

Hearsay is "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." Rule 801(c), SCRE. In South Carolina, hearsay is inadmissible "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Testimony of a police officer regarding his conclusions from an investigation is not hearsay. State v. Weaver, 361 S.C. 73, 602 S.E.2d 786, 792-93 (Ct. App. 2004), *aff'd as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007) (officer's testimony that all the evidence gathered at the scene, including interviews with witnesses, led to the defendant was not inadmissible hearsay; officer never repeated statements made to him by individuals at the crime scene, or testified to any specific statements identifying the defendant). Even if an officer's testimony regarding parts of his investigation is considered "some form of indirect hearsay," admitting it is not an abuse of discretiuon if the officer does not repeat the out of court statements. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 498 (2013).

Similar to the police officer in Weaver, Officer Butler merely testified about what her investigation at the crime scene revealed. She did not repeat any specific statements made by the people she interviewed, and nothing she related identified Appellant as the shooter. Therefore, her testimony was not inadmissible hearsay.

B. Harmless Error.

Even if improper hearsay evidence is admitted, any error in admitting it is subject to a harmless error analysis, and reversal is warranted only if it results in actual prejudice. State v. Weston, 367 S.C. 279, 625 S.E.2d 641, 646 (2006). Appellate courts generally will not set aside a judgment based on insubstantial errors not affecting the result. State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) ("While we agree there was error, appellant cannot show sufficient prejudice from it to warrant reversal.") State v. Sherard, 303 S.C. 172, 399 S.E.2d 595, 597 (1991).

If an error in the admission is found, the appellate court must review the evidence considered at trial other than the erroneously admitted evidence. Baccus, 625 S.E.2d at

223. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445, 448 (2003); *see* State v. Wiley, 387 S.C. 490, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

Even if the circuit court erred in admitting Officer Butler's testimony in this case, any error was harmless in light of the other evidence presented during trial. As noted above, Officer Butler's testimony regarding what she learned during her investigation did not implicate Appellant in the crime, or even mention Appellant in any context. Further, her testimony regarding the number of shots fired that night was cumulative to Mr. Brown's testimony Appellant fired six or seven shots that night. (TT, p. 179-180; R., pp. 69-70). *See* State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645, 662 (2013) ("'Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.'") (*quoting* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91, 93–94 [2011]).

Appellant contends the jury's hypothetical question regarding whether pointing a gun at someone's head and not pulling the trigger would be attempted murder somehow proves a juror did not believe any other shots were fired that night. While the contention is wildly speculative, even if true, it establishes the harmless nature of Officer Butler's testimony regarding the number of shots fired. If the jury was focused on the one shot fired inside the cab, and what led up to it, it was not focused on the number of shots fired.

The circuit court did not abuse its discretion in admitting Officer Butler's testimony regarding what she learned during her investigation. Even if the testimony at issue was erroneously admitted, however, any error was harmless. Therefore, Appellant's convictions should be affirmed.

III. The circuit court properly admitted phone records revealing subscriber information for the phone number used to summon the cab because Appellant did not have a reasonable expectation of privacy regarding the information.

Appellant asserts law enforcement conducted an illegal warrantless search without an exception to the warrant requirement when they obtained his subscriber information from Cricket Wireless, which led to the inclusion of his photo in a photo lineup. As a threshold matter, this issue is not preserved for appellate review. Even if preserved, Appellant's assertion is meritless.

A. Preservation

An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118, 120 (1997). Specific ground for objection must be raised at trial to preserve issue for appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). A defendant may not argue one ground below and another on appeal. State v. Beekman, 405 S.C. 225, 746 S.E.2d 483, 489 (Ct. App.) (citing State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 231 [2000]). Failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. State v. Burton, 326 S.C. 605, 486 S.E.2d 762, 764 (Ct. App. 1997).

Appellant's motion to suppress the Cricket Wireless information was based **solely** on alleged insufficiencies of the affidavit used to obtain a search warrant for the Cricket Wireless information two years after Appellant's arrest. Specifically, he contended the affidavit contained conclusory and misleading statements. He never asserted the investigators' original actions in obtaining the subscriber information without a warrant were unconstitutional, even after the State specifically noted the investigators "went to the Cricket Wireless store and just asked them who is the subscriber for this

information," and "[i]t wasn't a search warrant.[5] (TT, pp. 59-69; R., pp. 2-12). Further, Appellant did not object to Detective Evans' testimony about getting the subscriber information from Cricket Wireless early in the investigation, exactly what information was received, and how that information led to the photo lineup with Appellant's photo. (TT, pp. 306-309; R., pp. 193-196). Accordingly, he cannot challenge the constitutionality of the investigators' actions for the first time on appeal, and the issue is not properly before this Court.

B. Merits

Even if the constitutional issue Appellant now raises was preserved, however, Appellant's argument is meritless. Simply stated, Appellant did not have a reasonable expectation of privacy in the subscriber information he voluntarily conveyed to Cricket Wireless.[6]

The Fourth Amendment provides, in relevant part, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is reasonableness. Katz v. United States, 389 U.S. 347, 360 (1967).

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[5]As discussed below, the solicitor's statement that the information investigators got from Cricket Wireless was inadmissible without the subsequent search warrant was inaccurate.

[6] The State notes Appellant only argues the State conducted an unconstitutional, warrantless search under the Fourth Amendment to the United States Constitution. The only protection afforded the information at issue is provided by federal statutory law, which provides limitations on the types of electronic communication information government officials can obtain from third parties, but the standard differs from a Fourth Amendment analysis. *See,* 186 S.C.A. §§ 2701-12 (Stored Communications Act); *see also* State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (discussion of federal and state law regarding obtaining electronic communication records).

Since Katz, courts have deployed a two-part test to determine whether a particular law enforcement practice constitutes a Fourth Amendment search. *Id.* at 361 (Harlan, J., concurring). Courts first determine whether an individual has a subjective expectation of privacy, and, second, whether the expectation is objectively reasonable. *Id.* In this case, the first inquiry is questionable, but the second inquiry is dispositive.

An individual assumes the risk of disclosure of information **voluntarily conveyed** to a third party. *See e.g.*, Smith v. Maryland, 442 U.S. 735, 742 (1979); United States v. Miller, 425 U.S. 435, 443 (1976); *see also,* Southern Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 409 S.E.2d 775 (1991) (Caller ID device does not violate the rights of people whose names and numbers are displayed because there is no right to privacy in telephone numbers). Smith and Miller are still the prevailing law, even with technological advancements in electronic communications. *See* United States v. Jones 132 S.C. 945, 957, 962 (2012) (Sotomayer, J., concurring) (Alito, J., concurring). Thus, Appellant did not have a reasonable expectation of privacy in the cell phone records he voluntarily conveyed to Cricket Wireless when he purchased the cell phone and set up the account.

Appellant argues his expectation of privacy is evidenced by the fact he placed the call to the Yellow Cab Company using his own cell phone. This argument is belied by the fact Appellant gave **false** information to Cricket Wireless, clearly indicating some level of knowledge the information he provided was not private. In any event, the most Appellant asserts is a questionable **subjective** expectation of privacy in the information he voluntarily conveyed to Cricket Wireless, not an expectation of privacy society recognizes as reasonable.

The investigators obtained subscriber information the Appellant voluntarily gave Cricket when he purchased the pre-paid phone. Significantly, the only information they

obtained at that time was the subscriber's name, address and date of birth, which is not constitutionally protected, and they quickly determined the information provided to Cricket Wireless was false, at least in part. Thereafter, the investigators used public records to identify people in the area with the same date of birth. Based on that investigation, they identified Appellant as a possible suspect, and put his driver's license photo into a photo lineup, from which Mr. Brown positively identified him as the shooter. The investigators did not need a warrant to obtain the basic subscriber information in 2010, and Appellant's convictions should be affirmed [7]

[7]In addition to the subscriber information, the subsequent search warrant sought communication records, session time and duration records, incoming and outgoing call detail, length of services, and types of services utilized, etc. The information sought in in 2012 went far beyond the basic subscriber information obtained in 2010, and legal process was required to obtain the information for trial purposes.

IV. The circuit court properly admitted the CD with recordings of calls Appellant made from the Detention Center to the cell phone number used to summon the cab, because the calls established Appellant's ownership of the phone, and the probative value outweighed the prejudice to Appellant.

Appellant contends the circuit court erred in admitting the CD with the recordings of his calls from the Detention Center because the unfair prejudice outweighed any probative value, and it improperly called Appellant's character into question. Appellant's assertion the CD was inadmissible character evidence under Rule 404(b), SCRE, is not preserved for appellate review. Further, any prejudice to Appellant from the CD's content does not outweigh the CD's probative value in establishing Appellant's ownership of, and authority over, the cell phone.

A. Preservation of Rule 404(b) Issue

An argument not raised and ruled on by the trial court is not preserved for appeal. Nichols, 481 S.E.2d at 120. A party cannot argue one ground at trial and a different ground on appeal. Beekman, 746 S.E.2d at 489.

Appellant moved to suppress the CD "under Rule 403 that the probative value is outweighed by the unfair prejudice from difficulty to understand what is being said and the language that is being used." He did not object on the ground it improperly brought his character into question, or even mention Rule 404(b). (TT, pp. 322-329; R., pp. 209-216). Thus, the character evidence issue is not preserved for appellate review.

B. Probative Value

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." State v. Dickerson, 395 S.C. 101, 716 S.E.2d 895, 903 (2011). A trial court has particularly wide discretion in ruling on Rule 403 objections. *See* State v. Adams, 354 S.C. 361, 580 S.E.2d 785, 794 (Ct.App.

2003) (trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances, and the appellate court is obligated to give great deference to the trial court's Rule 403 judgment); State v. Collins, 398 S.C. 197, 727 S.E.2d 751, 754 (Ct. App. 2012).

"[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). Probative value is the measure of the importance of that tendency to the outcome of a case. Collins, 727 S.E.2d at 754. Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. *Id.*

The conversations on the CD were highly probative of Appellant's ownership of, and authority over, the cell phone from which the call to the cab company originated. Appellant agrees the State's objective in introducing the CD was to connect him to the cell phone, but contends his willingness to stipulate he made calls to the cell phone was sufficient to satisfy the State's objective. (Brief of Appellant, p. 23). Such a stipulation may have established Appellant made calls **to** the cell phone, but it would not establish Appellant's control **over** it. Rather, the conversations during the calls established his control.

When the third party Appellant called, who clearly had possession of the cell phone while Appellant was in jail, attempted to place a call from the cell phone to Appellant's mother during their conversation, Appellant gave him the cell phone's password because the third party stated he could not get the phone to work, and they talked about getting Appellant's mother to put more minutes on the cell phone. (TT, p.

324, State's Exhibit 33 [CD]; R., p. 211). These facts eliminated any possibility the cell phone actually belonged to the unidentified third party rather than Appellant. Neither Appellant's proposed stipulation, Heyward's testimony, nor the Call Log, even combined, could rule out that possibility.

C. No Unfair Prejudice to Appellant

The probative value of the CD must be balanced against the "danger of unfair prejudice" to the Appellant. "'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 206 [Ct.App.2008]). "**All** evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct.App.1998) (emphasis added) (*quoting* United States v. Rodriguez–Estrada, 877 F.2d 153, 156 [1st Cir.1989]). In determining whether the danger of unfair prejudice outweighs the probative value of evidence, the court must consider the entire record, and the determination will turn on the facts of each case. Lyles, 665 S.E.2d at 206 (*citing* State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 [2007]).

Appellant argues the prejudicial impact of the CD substantially outweighed any probative value. He asserts the CD was prejudicial because he used profanity and racial slurs, and referenced his previous times in jail. Significantly, Appellant refused the circuit court's repeated offers to redact the CD, which arguably waived his claim of unfair prejudice. (TT, pp. 322-329; R., pp. 209-216).

While the language Appellant used during the conversations may have been prejudicial, it did not render the CD **unfairly** prejudicial, and the language used did not outweigh the CD's highly probative value. On the contrary, Appellant repeatedly **denied**

his involvement in the crime throughout the conversations, which was actually beneficial to him.

When the CD is viewed in light of all the evidence presented at trial, it was highly probative to the jury's determination of guilt or innocence because it established the extent of Appellant's connection with the cell phone, but it was not alone determinative of the jury verdict. Accordingly, the circuit court did not abuse its discretion in admitting the CD, and the ruling should be affirmed.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's convictions should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401

BY: Deborah R.J. Shupe
DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 8, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2012-213405

THE STATE,

Respondent,

v.

RAHEEM D. KING,

Appellant.

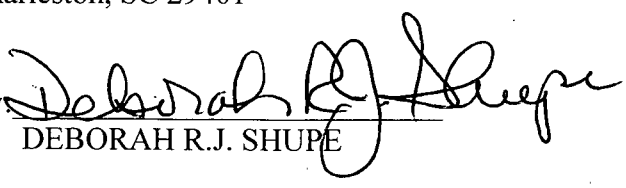
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Rulings."

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401

By: 
DEBORAH R.J. SHUPE

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

Jenny L. Barwick, Esquire (2 copy)
650 E. Washington Street
Greenville, SC 29601

Robert M. Dudek (1 copy)
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 8th day of July, 2014.

Sally B. Ellison

SALLY B. ELLISON
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727