THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

Case Nos. 2012-GS-10-40032 and 2012-GS-10-40033

Appellate Case No. 2013-001238

The State, ... Respondent,

v.

Brett D. Parker, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

DEFENDANT'S ARGUMENTS REGARDING THE "CIRCUMSTANTIAL EVIDENCE" INSTRUCTION ARE PRESERVED FOR THIS COURT'S REVIEW

The State contends that the arguments Appellant presented regarding the circumstantial evidence instruction are not preserved for this Court's review. (Rep. Br. pp. 20-22 and n. 18). The Court should not be persuaded by these assertions.

Error preservation rules are not so exacting as the State would have them be. Instead, "a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (2010) (noting error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review). The policies underlying the rules requiring issues to be raised and ruled upon below are to enable a trial judge to make a reasoned decision by appropriately developing issues by way of argument and to prevent or cure potential error. *State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (noting this policy as underlying the contemporaneous objection requirement). "Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law and arguments." *Queen's Grant II Horizontal Property Regime v. Greenwood Devel. Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

When the trial court has made its decision clear, counsel is not required to harass

the judge by making continued objections after an issue has been ruled upon. *See Dunn v. Charleston Coca–Cola Bottling Co.*, 311 S.C. 43, 45–46, 426 S.E.2d 756, 758 (1993) (noting that where a trial judge has fair opportunity to consider and rule upon an issue, it is not incumbent upon counsel "to harass the judge by parading the issue before [the trial judge] again"). *See also Bennett v. State*, 383 S.C. 303, 308, 680 S.E.2d 273, 276 (2009) (citing *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App.1995) for the rule that "so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again."); *State v. Liberte*, 336 S.C. 648, 652 n. 1, 521 S.E.2d 744, 746 n. 1 (Ct. App. 1999) (same). *Cf. Atlantic Coast Builders and Contractors, LLC, v. Lewis*, 398 S.C. 323, 332-333, 730 S.E.2d 282, 287 (2012) (Toal, CJ, dissenting) (Chief Justice Toal in dissent noted "an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice" and stated she believed "where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation; the majority noted it shared the Chief Justice's "concerns about a hypertechnical application of a procedural bar to appellate arguments")

Appellant's counsel repeatedly raised the request that the trial court give the circumstantial evidence instruction from *State v. Edwards*, anticipating the decision in *State v. Logan.* (Tr. pp. 2620, 2626, 2958-2959, 3009, 3032, 3216, 3228). As set forth in the Brief of Appellant, counsel preserved the "connecting up" language aspect of " to the exclusion of every other reasonable hypothesis" of the traditional *Edwards* circumstantial

evidence charge:

Mr. Whitlark:	We still - - we request - - we'll take -- we'll do the procedural exception on that.
The Court:	Okay.
Mr. Whitlark:	I don't know what is going to happen. I've got a gut feeling about this one, Your Honor.
The Court:	About the charge?
Mr. Whitlark:	About what is going to happen in the future. I've got a gut feeling about it.
The Court:	Okay.

(Tr. 3035, ls. 6-15).

At the Rule 19 stage at the close of state's evidence in chief (Tr. 2619); again at the close of all evidence on a motion for a directed verdict (Tr. 3010); at the jury charge conference prior to deliberations (Tr. 3035); after jury charge but before jury deliberation and verdict (Tr. 3216) and, lastly, in post trial motions after conviction (Tr. 3228), the defense maintained not simply the failure to present substantial circumstantial evidence itself but that the state's failure to connect the circumstantial evidence up through the "to the exclusion of every other reasonable hypothesis" language, as has long been precedent under *Edwards*, was prejudicial error.

The trial court repeatedly denied Appellant's arguments. The court also sustained objections the State made when Appellant's counsel attempted to argue the *Edwards* standard to the jury. (Tr. p. 3118). Everyone was well aware that the circumstantial evidence charge was hotly contested, and the trial court made it clear, in uncertain terms,

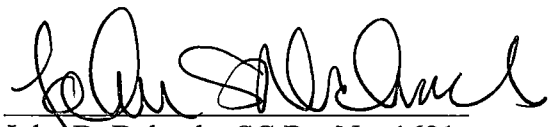
that it believed *Cherry* overruled *Edwards* and no amount of argument would persuade the court differently.

Accordingly, this Court should reject the State's contention that the arguments Appellant presents in his Brief of Appellant as to the jury instruction issue are not preserved for review.

CONCLUSION

For the reasons stated the Court should not refuse to address Appellant's arguments on error preservation grounds. Instead, the Court should reverse Appellant's conviction and remand the matter for a new trial.

Respectfully submitted,



April 13, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Reply Brief and Additional Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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April 13, 2015

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April 13, 2015

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Brett D. Parker
Case Tracking No.: 2013-001238

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Reply Brief of Appellant and Additional Designation of Matter to be Included in the Record on Appeal. I have also enclosed a Proof of Service upon counsel for the Respondent. Please return the additional filed copies to me via my courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

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Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Ernest L. Dessausure, Esquire
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