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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Charleston County
The Honorable J. C. Nicholson, Circuit Court Judge
Appellate Case No. 2015-001278
(Opinion No. 5313, S.C. Ct. App., filed April 22, 2015)

THE STATE, Petitioner/Respondent,

v.

RAHEEM D. KING, Respondent/Petitioner.

RETURN TO RESPONDENT/PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF THE CASE

On March 8, 2011, the Charleston County Grand Jury indicted Respondent/Petitioner 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 Respondent/Petitioner lured a cab to an address in Charleston County, and then robbed and shot 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, Respondent/Petitioner moved to suppress records from Cricket Wireless regarding a particular cell phone number associated with the case, asserting the affidavit submitted in support of the search warrant for the records was insufficient, and contained conclusory and misleading statements. The State argued the supporting affidavit contained more than sufficient information establishing probable cause to obtain the records. After reviewing the affidavit and search warrant, the circuit court denied the motion to suppress. (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 Carlton 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 642-4849. (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 Carlton, Mr. Brown saw a man walking out

of the yard across the street at 1809 Carlton Street, which he knew was abandoned. (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. (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. (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. (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. (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 . . .," with 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 Respondent/Petitioner as the shooter with "100 percent" certainty. (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, and he was very distraught, scared, and appeared to be in shock. He reported he had been dispatched to 1808 Carlton, and the man he picked up there robbed him and shot him in the forearm. (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 Respondent/Petitioner's hearsay objection. (R., pp. 114-115).

The State then asked Office Butler what she learned during the investigation she conducted that night. The circuit court overruled Respondent/Petitioner'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. (R., p. 115).

Shawn Mitchell ("Mitchell"), a legal compliance analyst at 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 the phone number associated with the call requesting the cab pickup at 1808 Carlton. 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 (R., pp.142-146).

Mary Wearing ("Wearing"), a custodian of driver's records at the South Carolina Department of Motor Vehicles ("SCDMV"), testified Respondent/Petitioner's most recent address on his driver's license was 3440-B Osceola Street, North Charleston, South Carolina 29405. Also, Respondent/Petitioner's driver's license reflected a 1991 birthdate. (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. (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 Respondent/Petitioner, who had the same 1991 birthday given to Cricket Wireless, and an address of 3440 Osceola Street with a 29405 zip code. (R., pp. 192-195).

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

Respondent/Petitioner moved to suppress a compact disk containing recordings of telephone calls Respondent/Petitioner made while in custody at the jail (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 Respondent/Petitioner 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 Respondent/Petitioner believed were unduly prejudicial. Respondent/Petitioner then withdrew his request to redact portions of the CD. (R., pp. 209-216).

Kevia Heyward ("Heyward"), the jail's Security and Administrative Supervisor, testified the jail has a recording system to record all inmate telephone calls. When

booked into the jail, 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 jail's Call Log indicated Respondent/Petitioner called the cell phone number at issue sixty-three times in one month. The cell phone was in the possession of an unknown third party, but Respondent/Petitioner and the third party made statements during the calls clearly indicating the cell phone belonged to Respondent/Petitioner. (R., pp. 218-224, 314).[1]

The circuit court charged the jury on the elements of attempted murder, assault and battery of a high and aggravated nature ("ABHAN"), first degree assault and battery, armed robbery, attempted armed robbery, and possession of a weapon during commission of a violent crime. (R., pp. 249-266). Respondent/Petitioner 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. (R., pp. 268-271).

The jury convicted Respondent/Petitioner of attempted murder, armed robbery and possession of a weapon during a crime of violence. The circuit court sentenced Respondent/Petitioner 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. (R., pp. 267, 278-279). This appeal followed.

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[1]State's Exhibit 33 (CD) was transported to the Court of Appeals for consideration.

By published opinion filed April 22, 2015, the South Carolina Court of Appeals affirmed in part, reversed in part, and remanded the case to the circuit court for a new trial on the attempted murder charge. The Court affirmed Respondent/Petitioner's convictions for armed robbery and possession of a firearm during commission of a violent crime, but reversed his attempted murder conviction, finding the circuit court erred in charging the jury attempted murder is a general intent crime. The Court also found Officer Butler's testimony about what she learned during the neighborhood canvass was inadmissible hearsay, and the error in admitting it was not harmless. (Respondent/Petitioner's Appendix, pp. 1-14). By Order filed June 5, 2015, the Court denied the rehearing petitions of both the State and Respondent/Petitioner. (Respondent/Petitioner's Appendix, pp. 36-37).

On June 22, 2015, the State filed a Petition for Writ of Certiorari to the Court of Appeals, asking this Court to review and reverse the Court of Appeals opinion as to the attempted murder jury charge and admissibility of the police officer's testimony. On July 27, 2015, Respondent/Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, asking this Court to review and reverse the Court of Appeals opinion as to the armed robbery and weapon possession charges.

ARGUMENT

I. The Court of Appeals properly found the inference of malice from use of a deadly weapon jury instruction was appropriate where there was no evidence reducing or mitigating Respondent/Petitioner's conduct.

Respondent/Petitioner asserts 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), and the Court of Appeals erred in finding there was no basis for reducing, mitigating, excusing or justifying his conduct. His assertion is premised on two primary contentions: 1) there was evidence indicating only one shot was fired inside the cab; and 2) the circuit court instructed the jury on the lesser included offenses of ABHAN and first degree assault and battery, which necessarily required a finding there was evidence reducing, mitigating, or justifying the crime of attempted murder.

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]). The appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *Id.* at 584.

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. dismissed as improvidently granted,* 411 S.C. 92, 767 S.E.2d 202 (2014). Even if a court errs in charging the jury on an inferred malice instruction, however, 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, 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 the shooting may have been part of a drug deal gone wrong precluded the deadly weapon inference charge. In rejecting his contention, the Court of Appeals 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 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 Respondent/Petitioner shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Respondent/Petitioner 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 Respondent/Petitioner 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 Respondent/Petitioner'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."** Respondent/Petitioner only contests the "deadly weapon" language. However, if the jury rejected Respondent/Petitioner's insanity defense, which it did, **the jury could also find that Respondent/Petitioner's conduct showed a total disregard for human life.** Thus, Respondent/Petitioner 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. (R., p. 260). Respondent/Petitioner 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. (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." (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 Respondent/Petitioner pointed a loaded, 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. Respondent/Petitioner 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.[2] (R., pp. 62-63).

Even if Respondent/Petitioner's contention Mr. Brown's movement caused the gun to fire is true, it does not obviate the fact he held a loaded, cocked gun to Mr. Brown's head, which, at a minimum, shows a total disregard for human life, and but for Respondent/Petitioner's conduct, Mr. Brown would not have been shot at all. Further, Mr. Brown testified he ran away after he was shot inside the cab, Respondent/Petitioner

[2] 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.

fired multiple shots while chasing him down the street as he tried to get away, and then shot at him as he laid on the ground with a fractured vertebrae. (R., pp. 70-73). Regardless of the number of shots fired at Mr. Brown, however, the evidence fully supported a finding Respondent/Petitioner exhibited a disregard for human life.[3]

Respondent/Petitioner 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. Respondent/Petitioner'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 Respondent/Petitioner's conduct was nothing less than attempted murder. (R., pp. 239-242). The State submits the lesser included jury charges were not warranted based on the evidence presented at trial, and as in Price, the mere fact the circuit court gave the lesser included instructions does not mandate reversal.[4]

The evidence at trial established Respondent/Petitioner lured the cab to an abandoned residence early in the morning while it was still dark, held a loaded, cocked

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[3]During deliberations, the jury asked whether pointing a gun at someone's head and not pulling the trigger would be attempted murder. This question indicates the jury was focused on what happened inside, **not** the number of shots fired.

[4] Significantly, in addition to the armed robbery instruction, the circuit court also charged the jury on the lesser included offense of attempted armed robbery, even though the evidence was undisputed Mr. Brown actually gave Respondent/Petitioner money inside the cab. Therefore, if the jury believed Respondent/Petitioner was the person in the cab holding a gun to Mr. Brown's head and demanding money that night, the only appropriate charge was armed robbery, and the attempted armed robbery charge was also unwarranted.

gun to Mr. Brown's head and demanded money.[5] Mr. Brown testified Respondent/Petitioner also shot at him as he ran away from the cab, even after Mr. Brown was flat on his back on the ground.[6] Respondent/Petitioner's contention Mr. Brown caused his own gunshot wound by trying to knock the gun away from his head does not reduce, mitigate, excuse or justify Respondent/Petitioner's conduct in any way.[7] *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."). As discussed above, pointing a loaded, cocked gun at the victim's head constituted evidence Respondent/Petitioner exhibited a total disregard for human life. Based on the evidence, the jury could easily find Respondent/Petitioner's conduct inside the cab showed a total disregard for human life, and he "could not have

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[5]The gun was an automatic pistol, which requires the shooter to affirmatively rack a bullet into the chamber, and unlock the safety if there is one, before the pistol will fire. Once the shooter takes those steps, the gun will easily discharge if the shooter has a finger on the trigger. The fact the gun actually fired in this case established beyond any doubt Respondent/Petitioner took those affirmative steps before aiming the gun at Mr. Brown's head.

[6]Respondent/Petitioner speculates the State will contend he picked up the additional shell casings at the scene before law enforcement arrived. (Petition, p. 12). The State did not make such an argument at trial or before the Court of Appeals, and does not make it here. The fact no other shell casings were found at the scene was simply something for jury consideration, and Respondent/Petitioner discussed it in depth during closing argument. (R., pp. 245-249).

[7]In essence, Respondent/Petitioner's theory of the case is Mr. Brown was really the author of his own misfortune, which is inherently offensive.

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.

The circuit court charge as a whole was supported by the evidence, substantially correct, and adequately covered the applicable law. Accordingly, the Court of Appeals properly affirmed the circuit court on this issue, and the Petition should be denied on this issue.

II. The Court of Appeals properly found there was no abuse of discretion in the admission of cell phone records for the cell phone used to lure the victim because Respondent/Petitioner did not have a reasonable expectation of privacy in those records.

Respondent/Petitioner asserts the Court of Appeals erred in affirming the admission of his cell phone records, obtained pursuant to a search warrant, because law enforcement conducted an illegal warrantless search when they obtained his subscriber information from Cricket Wireless in 2010, which led to the inclusion of his photo in a photo lineup, and the search warrant was fruit of the poisonous tree. As a threshold matter, even though the Court of Appeals summarily addressed the merits of this issue, it is not preserved for appellate review. Even if preserved, however, Respondent/Petitioner'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).

Respondent/Petitioner's motion to suppress the Cricket Wireless records was based **solely** on alleged insufficiencies of the affidavit used to obtain the search warrant for the Cricket Wireless records two years after Respondent/Petitioner'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. (R., pp. 2-12).

Further, Respondent/Petitioner did not object to Detective Evans' testimony about getting the phone number subscriber's information from Cricket Wireless early in the investigation, what information he received, and how the information led to the photo lineup with Respondent/Petitioner's photo. (R., pp. 193-196). Accordingly, he cannot challenge the constitutionality of the investigators' actions for the first time on appeal, the issue was not properly before the Court of Appeals, and it is not properly before this Court.

B. Merits

Even if the constitutional issue Respondent/Petitioner now raises was preserved, his argument is meritless. Simply stated, Respondent/Petitioner did not have a reasonable expectation of privacy in the subscriber information he voluntarily conveyed to Cricket Wireless.[8]

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

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[8] The State notes Respondent/Petitioner 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 U.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).

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).

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, Respondent/Petitioner did not have a reasonable expectation of privacy in the subscriber information he voluntarily gave Cricket Wireless when he purchased the cell phone and set up the account.[9]

Respondent/Petitioner 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

[9]The solicitor's statement the information investigators got from Cricket Wireless early in the investigation was inadmissible without the subsequent search warrant was legally inaccurate. Therefore, the statement does not constitute "a classic articulation and judicial admission that the records were fruit of the poisoned tree." Petition, p. 17.

is belied by the fact Respondent/Petitioner gave **false** information to Cricket Wireless, clearly indicating some level of knowledge the information he provided was **not** private. In any event, the most Respondent/Petitioner 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.

Respondent/Petitioner overstates the scope of the United States Supreme Court opinion in Riley v. California, ____ U.S. ____, 134 S.Ct. 2473 (2014), and his reliance on it is misplaced. The only issue in Riley was the warrantless search of a cell phone incident to arrest, and the Court held law enforcement can seize the cell phone at the time of arrest, but absent exigent circumstances, must obtain a warrant to search the data contained **on the cell phone itself**. 134 S.Ct. at 2493-2495. Contrary to Respondent/Petitioner's contention, nothing in the opinion changes the well-established law regarding expectation of privacy in information voluntarily supplied to a third-party, such as subscriber information voluntarily supplied to a cell phone carrier.

The investigators obtained subscriber information the Respondent/Petitioner 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 their investigation, they identified Respondent/Petitioner as a possible suspect, and put his driver's license photo in a photo lineup, from which Mr. Brown positively identified him as the shooter.

Under prevailing law, the investigators did not need a search warrant to obtain the basic subscriber information in 2010, and if the issue raised on appeal was preserved, the Court of Appeals properly affirmed the circuit court ruling. Therefore, the Petition should be denied on this issue.[10]

[10]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 2012 went far beyond the basic subscriber information obtained in 2010, and includes the type of information addressed in Riley. Therefore, the State properly sought a search warrant to obtain the records for trial purposes.

III. The Court of Appeals properly found there was no abuse of discretion in allowing publication of phone calls Respondent/Petitioner made from the detention center because the calls were relevant, and did not unfairly prejudice Respondent/Petitioner.

Respondent/Petitioner contends the Court of Appeal erred in affirming admission of the CD with the recordings of his calls from the jail because the unfair prejudice outweighed any probative value, and the recordings improperly impugned his character. Respondent/Petitioner's assertion the CD was inadmissible character evidence under Rule 404(b), SCRE, is not preserved for appellate review. Further, any prejudice to Respondent/Petitioner from the recordings' content does not outweigh the recordings' probative value in establishing Respondent/Petitioner's ownership of, and authority over, the cell phone used to lure the cab to Carlton Street on November 26, 2010..

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.

Respondent/Petitioner 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 the recordings 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, and the Court of Appeals properly did not address it.

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 Respondent/Petitioner's ownership of, and authority over, the cell phone from which the call to the cab company originated. Respondent/Petitioner 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, combined with the jail officer's testimony and the jail phone call logs, was sufficient to satisfy the State's objective. The proposed stipulation, even combined with the testimony and call logs, merely established Respondent/Petitioner made calls **to**

the cell phone, but did not establish Respondent/Petitioner's **ownership of and control over the cell phone**, which was only established during the calls themselves, and went directly to his role in the events of November 26, 2010.

When the third party Respondent/Petitioner called, who clearly had possession of the cell phone while Respondent/Petitioner was in jail, attempted to place a call from the cell phone to Respondent/Petitioner's mother during their conversation, Respondent/Petitioner gave him the cell phone's password because the third party stated he could not get the phone to work. They also talked about getting Respondent/Petitioner's mother to put more minutes on the cell phone. (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 Respondent/Petitioner, a possibility the proposed stipulation, the officer's testimony, or the jail's phone call log, even combined, could not rule out.

C. No Unfair Prejudice to Respondent/Petitioner

The probative value of the CD must be balanced against the "danger of unfair prejudice" to the Respondent/Petitioner. "'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]).

Respondent/Petitioner 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, Respondent/Petitioner refused the circuit court's repeated offers to redact the CD, which arguably waived his claim of unfair prejudice. (R., pp. 209-216).

While the language Respondent/Petitioner 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, Respondent/Petitioner repeatedly **denied** his involvement in the crime throughout the conversations, which was actually beneficial to him.[11]

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 Respondent/Petitioner's connection with the cell phone, but it was not alone determinative of the jury verdict. Accordingly, the Court of Appeals properly affirmed the circuit court ruling, and the Petition should be denied on this issue.

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[11]Respondent/Petitioner makes the specious assertion the phone call published to the jury (December 5, 2010 at 8:28 a.m.) is not reflected on the jail's phone call log introduced as State's Exhibit 34. (Petition, p. 19). On the contrary, the fifteen minute call is plainly listed in the log. (R., p. 316). The only feasible reason for Respondent/Petitioner's assertion is an attempt to infer the State improperly published a recording of a phone call he did not make, which is patently refuted by the record.

CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, the State submits the Respondent/Petitioner's Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

Respectfully submitted,

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August 13, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable J. C. Nicholson, Circuit Court Judge
Appellate Case No. 2015-001278
(Opinion No. 5313, S.C. Ct. App., filed April 22, 2015)

THE STATE,

Petitioner/Respondent

v.

RAHEEM D. KING,

Respondent/Petitioner

PROOF OF SERVICE

I, Sally Ellison, certify I served the Return to Respondent/Petitioner's Petition for Writ of Certiorari to the Court of Appeals on Respondent/Petitioner by depositing copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify all parties required by Rule to be served have been served.

This 13th day of August, 2015.

Sally Ellison

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