STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal From Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2015-001278

The State, Petitioner/Respondent,

v.

Raheem D. King, Respondent/Petitioner.

PETITIONER/RESPONDENT'S BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In November 2012, a Charleston County jury convicted Respondent/Petitioner on one count of attempted murder, one count of armed robbery, and one count of possession of a weapon during a crime of violence. By published opinion filed April 22, 2015, the South Carolina Court of Appeals affirmed the armed robbery and possession of a firearm during commission of a violent crime convictions, but reversed the attempted murder conviction, finding the circuit court erred in charging the jury attempted murder is a general intent crime, and in allowing certain testimony from a police officer. After the Court of Appeals denied both parties' Petitions for Rehearing, Respondent/Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, which this Court granted in part by Order dated March 28, 2016.[1]

[1]Petitioner/Respondent State of South Carolina also filed a Petition for Writ of Certiorari to the Court of Appeals on two issues, which this Court granted in full, and Petitioner/Respondent briefed those issues separately.

STATEMENT OF FACTS

On March 8, 2011, the Charleston County Grand Jury indicted Respondent/Petitioner Raheem D. King ("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 King 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, King 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. (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 (Mr. Brown's) head. The man demanded money, and Mr. Brown gave him the "give away money," or "dummy money," which is 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 tall 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 King 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 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 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 King'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 King'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 ("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 843-642-4849, which was the number from 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 King's most recent address on his driver's license was 3440-B Osceola Street, North Charleston, South Carolina 29405. Also, King'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 people in the area with the last name King and the 1991 birthday. They

found a Raheem King with 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 King's photo. On December 3, 2010, Mr. Brown viewed the second photo lineup with six photos, including King. Detective Walter Boone testified Mr. Brown immediately identified the third photo (King), and was 100% sure King was the man who robbed and shot him. (R, pp. 176-184, 195-197).

King moved to suppress a compact disk containing recordings of telephone calls King 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 King 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 King believed were unduly prejudicial. King then withdrew his request to redact portions of the CD. (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 King 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 King and the third party made statements during the calls clearly indicating the cell phone belonged to King. (R., pp. 218-224), 314).[2]

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. (R., pp. 249-266). King 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 King of attempted murder, armed robbery and possession of a weapon during a crime of violence. The circuit court sentenced King 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.

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 King'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

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

neighborhood canvass was inadmissible hearsay, and the error in admitting it was not harmless. (Joint Appendix, pp. 1-14).

King petitioned for rehearing, which the Court of Appeals denied by Order filed June 5, 2015. (Joint Appendix, pp. 15-23, 36). King then filed a Petition for Writ of Certiorari to the Court of Appeals raising three issues, and this Court granted his Petition as to two of the issues by Order dated March 28, 2016.[3]

[3]King did not seek rehearing or certiuorari on the affirmance of his armed robbery and possession of a weapon during a crime of violence convictions.

ARGUMENT

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

King 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.[4] 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*

[4]If this Court affirms the Court of Appeals' reversal of King's attempted murder conviction on the basis of the jury charge regarding intent required for attempted murder, this issue is moot because it goes only to the attempted murder conviction, and the case will be retried.

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). King 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 (sic), 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 King 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. King 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.[5] (R., pp. 62-63).

Even if King'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 King'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, King

[5] 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 lay on the ground. (R., pp. 70-73). Regardless of the number of shots fired at Mr. Brown, however, the evidence fully supported a finding King exhibited a disregard for human life.[6]

King 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. King'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 King'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.[7]

The evidence at trial established King lured the cab to an abandoned residence early in the morning while it was still dark, held a loaded, cocked gun to Mr. Brown's head and

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[6]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 the cab, **not** the number of shots fired.

[7] 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 King money inside the cab. Therefore, if the jury believed King 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.

demanded money.[8] Mr. Brown testified King also shot at him as he ran away from the cab, even after Mr. Brown was flat on his back on the ground.[9] King'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 King's conduct in any way.[10] *See* Price 732 S.E.2d at 654 (defendant's claim that shooting was result of a 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, King lured the cab to his location, pointed a loaded, cocked gun at Mr. Brown's head, and repeatedly brought the gun back to Mr. Brown's head when Mr. Brown tried to push it away, and ultimately shot Mr. Brown. Based on the evidence, the jury could easily find King's conduct inside the cab showed a total disregard for

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[8]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 the first shot. 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 King took those affirmative steps before aiming the gun at Mr. Brown's head.

[9]King speculates the State will contend he picked up the additional shell casings at the scene before law enforcement arrived. (Brief of Petitioner, 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 King discussed it in depth during closing argument. (R., pp. 245-249).

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

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.

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.

II. The Court of Appeals properly held the circuit court did not abuse its discretion in allowing publication of phone calls King made from the detention center because the calls were relevant, and did not unfairly prejudice King.

King contends the Court of Appeal erred in affirming the circuit court's admission of the CD with recordings of his calls from the jail because the unfair prejudice outweighed any probative value. He further contends the circuit court abused its discretion by failing to exercise any discretion at all.

"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 regarding King's ownership of, **and authority over**, the cell phone from which the call to the cab company originated. King 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 from the jail, 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 King made calls **to** the cell phone, but did not establish King'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 King called, who clearly had possession of the cell phone while King was in jail, attempted to place a call from the cell phone to King's mother during their conversation, King 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 King's mother to put more minutes on the cell phone. (State's Exhibit 33 [CD]; R., p. 211).[11] These facts eliminated **any** possibility the cell phone actually belonged to the unidentified third party rather than King, a possibility the proposed stipulation, the officer's testimony, and the jail's phone call log, even combined, could not rule out. Without the contents of the conversations, King could have easily argued the State failed to prove the cell phone belonged to him rather than the unknown third party, and the unknown third party was the actual perpetrator.

The probative value of the CD must be balanced against the "danger of **unfair** prejudice" to King. "'Unfair prejudice means an undue tendency to suggest a decision on an improper

[11]While there were multiple calls on the CD, the State only published one call to the jury.

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, 646 S.E.2d 872, 876 [2007]).

King 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, King **refused** the circuit court's repeated offers to redact the CD, which arguably waived any claim of unfair prejudice. (R., pp. 209-216). While portions of the recorded conversation published to the jury may have been somewhat prejudicial because of profanity and racial slurs, those portions did not render the CD **unfairly** prejudicial, and the language used did not outweigh the CD's highly probative value. On the contrary, King repeatedly **denied** his involvement in the crime throughout the conversations, which was actually beneficial to him.[12]

King also contends the conversation content was inadmissible character evidence. This issue was not raised in the circuit court, and therefore, it is not preserved for appellate review. An

[12]King speciously asserts the one 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. (Brief of Petitioner, p. 16). On the contrary, the fifteen minute call is plainly listed in the log. (R., p. 316). The only feasible reason for King'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.

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). Nichols, 481 S.E.2d at 120. A party cannot argue one ground at trial and a different ground on appeal. State v. Beekman, 405 S.C. 225, 746 S.E.2d 483, 489 (Ct. App. 2013) (*citing* State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 231 [2000]) *cert. granted* July 25, 2014.

King 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). (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.

Finally, King asserts the circuit court failed to exercise **any** discretion simply because the court would not listen to the entire CD prior to ruling on its admissibility. King made this assertion for the first time in his Petition for Rehearing in the Court of Appeals, and therefore, it is not properly before this Court. (Final Brief of Appellant, pp. 22-26; Joint Appendix, pp. 19-20).

Pursuant to South Carolina law, an appellant's argument on appeal is ordinarily limited to the issues raised in the **initial brief**, and issues **not** raised in that brief are deemed to be abandoned. *See* Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *see also* Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal."); Gold Kist, Inc. v. Citizens & S. Nat'l Bank of South

Carolina, 286 S.C. 272, 276, 333 S.E.2d 67, 70 (Ct. App. 1985) (instructing issues not raised in an appellate brief are deemed to be abandoned). After an appellant selects the issues he wishes to pursue on appeal and files an initial brief, he is precluded from using a reply brief, a final brief, an oral argument, a petition for rehearing, or a petition for a writ of certiorari to raise new, previously-unraised issues. *See* Rule 211(b), SCACR (instructing final briefs must be identical to initial briefs in every respect except with respect to references to the record and the correction of typographical errors); see also Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may **not** raise an issue for the first time in a petition for rehearing.") (emphasis added).

When the telephone call published to the jury 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 beyond a reasonable doubt the cell phone belonged to King. It was not alone determinative of the jury verdict, however, particularly in light of Mr. Brown's 100% positive identification of King as the man who robbed and shot him. Accordingly, the circuit court acted within its discretion, and the Court of Appeals properly affirmed the circuit court ruling.

CONCLUSION

Based on the foregoing, Petitioner/Respondent submits the Court of Appeals decisions as to these two issues should be affirmed.

Respectfully submitted,

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May 27, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal From Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2015-001278

The State,

Petitioner/Respondent,

v.

Raheem D. King,

Respondent/Petitioner.

CERTIFICATE OF SERVICE

I, Sally B. Ellison, hereby certify I served the Petitioner/Respondent's Brief of Petitioner/Respondent on Respondent/Petitioner by placing three copies in the United States Mail Service, postage pre-paid, addressed as follows:

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

This 27th day of May, 2016.

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