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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2023-001843

The State, ...Respondent,

v.

Kendrick Montrez Lee, ...Appellant.

INITIAL BRIEF OF APPLLANT

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Did the trial court err by not quashing the State's notice of intent to seek life without parole when the enhanced sentences was based on a conviction involving marijuana when Ken Lee objected to this charge being used to enhance the sentence when South Carolina

has decriminalized marijuana and marijuana one day likely will be legal throughout the United States?

STATEMENT OF CASE

This appeal arises out of the trial of Kendrick ("Ken") Lee, a black male, before an all-white jury, in Abbeville, South Carolina, the self-proclaimed "cradle and deathbed of the confederacy."

For an incident occurring on October 6, 2020, the State charged Ken Lee and his Uncle Travis Lee with attempted murder. R. *.[1] On February 16, 2021, the State noticed its intent to seek life without the possibility of parole in the event of a conviction of Ken Lee for attempted murder or the lesser included offense of assault and battery of a high and aggravated nature ("ABHAN"). R. *. On March 3, 2021, the Honorable Frank R. Addy, Jr. granted bond, noting Mr. Lee "turned himself in to the authorities," "attempted murder is clearly and overcharge," and "it's not like the alleged victim's involvement was wholly innocent." R. *.

On August 8, 2023, the State noticed its intent to seek life without the possibility of parole in the event of a conviction of Mr. Lee for the offense of ABHAN. R. *. On September 8, 2023, the State indicted Mr. Lee and his uncle for ABHAN. R. *. From September 25-28, 2023, the State tried Ken Lee and Travis Lee before Judge Addy and an all-white jury. Micah Black and Yates Brown represented the State. Undersigned counsel represented Ken Lee, and Jamison Tinsley represented Travis Lee. On September 28, 2023, the jurors convicted Ken and Travis Lee of ABAHN, and Judge Addy deferred sentencing. Tr. *, R. *.

[1] The State initially indicted Mr. Lee and his uncle for attempted murder. R. *.

On October 19, 2023, Judge Addy sentenced Ken Lee to life imprisonment without the possibility of parole and Travis Lee to seven years imprisonment. Tr. 53-54. On October 30, 2023, Ken Lee moved for a new trial and, alternatively, for Judge Addy to reconsider the sentence. R. *. On November 21, 2023, Judge Addy denied the new trial motion and declined to reconsider the sentence. R. *. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

Before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). "Whether an error is harmless depends on the circumstances of the particular case. 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. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (internal quotations omitted) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). This Court does "not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (citing *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). In cases like this one,

when "credibility" is the "most critical determination" for jurors to make in the case, the error is not harmless. *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011).

STATEMENT OF FACTS

The trial court selected an all-white jury. The trial court seated two white men as alternates. Tr. 19-27. Pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), Ken Lee and Travis Lee moved for the prosecution to explain its strike of Juror 191, a black male and the sole black person presented for possible selection on the jury. The Lees noted—just as they had noted in Chambers prior to jury selection—that number of black people appearing for jury services was fraction of number of black people summoned for jury duty. Of the 200 jurors summoned, 41 (20.5% of the number summoned)[2] were black. Twenty-nine black jurors did not respond to their summons.[3] Four jurors returned their juror summons to the Court but did not appear for jury service. Three jurors were excused. Of the 41 black people summoned, only five appeared for service. The Lees argued the problem was not with the original list of jurors summoned, but rather the number of black people lost between the summonses and service in court. Only two black people remained in the jury pool after jury qualification and voir dire. The Lees argued, "Statistically that 20 percent [of the original list summoned] should have stayed constant throughout, but it didn't." Tr. 27-35.

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[2] According to the 2020 census, 25.9% of Abbeville County is black or African American. https://www.census.gov/quickfacts/fact/table/abbevillecountysouthcarolina,US/PST045222 (last viewed June 10, 2024).

[3] Abbeville County did not do anything to follow up on the jurors not returning their summonses other than check to see if the Auditor's Office had a different address for the non-responding jurors. Tr. 34.

The Solicitor explained that Juror 191 had disorderly conduct convictions in 1985 and 1989 and a criminal domestic violence conviction in 2003. The prosecution disclosed its knowledge that Jurors 186 and 188 also had criminal convictions. The Lees called the trial court's attention to *State v. Stewart,* 413 SC 308, 775 S.E.2nd 416 (Ct. App. 2015) where this Court "reversed because the State used criminal histories to justify striking certain jurors, but also sat jurors that had criminal histories that were deemed to be similarly situated." The prosecution attempted to distinguish the criminal histories of the different jurors. The trial judge announced a preference "for juries to be racially balanced . . . if for no other reason than perception" because "it's always best to have as wide a cross section of the community if at all possible." The trial court urged the prosecution to accept Juror 191 as an alternate. The prosecution eventually relented and allowed Juror 191 to be seated. Tr. 35-53.

When the jury panel returned to the courtroom, the trial judge learned that Juror 191 could "only hear out of one ear" and changed his mind about seating Juror 191 as an alternate. At a sidebar, prior to excusing the jury panel, the Lees objected to the trial court's change of mind about Juror 191 without determining whether the juror's hearing impediment could be accommodated. Tr. 53-60. The trial court swore the jurors subject to the Lees' objection. Tr. 25.

Mr. Lee argued "the best thing to do is – is to try this case in front of a jury when we can have a fair cross section" of the community and moved "to quash this jury" and "for a continuance." The trial court denied the motion. Tr. 16-19.

During opening comments, the trial court informed the jurors of their obligation to find the "true facts." Tr. 33, 34. Mr. Lee objected pursuant to *State v. Beaty*, 423 S.C. 26,

813 S.E.2d 502 (2018) and *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), and moved for a mistrial. Tr. 35, 59-64. The trial court gave a curative instruction, to which Mr. Lee objected because it is impossible to "unrig the bell." Tr. 35-36, 63-64.

Renee Guillebeaux testified about a conversation she had with Travis Lee about her son, Tobias Hughey, burglarizing and stealing from Miesha Cobb, who is Ken Lee's girlfriend. Travis Lee wanted to confront Mr. Hughey about the crime. Ms. Guillebeaux told Travis Lee to "talk to" Mr. Hughey, "smack him around, handle him a little rough, but not leave him for dead." Tr. 11-14, 27-28.

Tobias Hughey testified about the altercation he had with Ken Lee and Travis Lee.[4] He encountered Travis Lee in the parking lot of the apartment complex. Ken Lee came up to them and hit Mr. Hughey with a stick-like, wooden object. He claimed he was hit "[a]bout 20 times." He went to the apartment where Michael Shane Floyd lived.[5] Mr. Hughey asked Mr. Floyd to call Mr. Hughey's mother, Renee Guillebeaux, rather than EMS. Mr. Hughey testified about his injuries, being airlifted to Greenville, his hospitalization, and his stay in a rehabilitation facility. Tr. 8-37. On cross-examination, Mr. Hughey acknowledged his extensive criminal record and his pending charges. Tr. 49-61, 66-70.

[4] Eric Phillips testified about witnessing a portion of the altercation and then lying to the police. Tr. 17-88.

[5] Mr. Floyd testified about Mr. Hughey coming to his apartment, his observation of Mr. Hughey's injuries, calling Mr. Hughey's mother rather than EMS, his pending charges, and how Mr. Hughey would bring possibly stolen items to him to trade or pawn. Tr. 44-73.

Ms. Guillebeaux testified about picking up Mr. Hughey at Mr. Floyd's apartment, taking him to her apartment, calling 911,[6] and her observations of her son's injuries. Tr. 14-20. Abbeville Police Officers Brian Singleton and Forrest Crowe responded to Ms. Guillebeaux's residence and discovered her son "Tobias Hughey on the couch unresponsive [with] lacerations on his forehead." They administered first aid until EMS arrived and Mr. Hughey was airlifted to the hospital. Tr. 49-59, 65-74, 85-86, 122-34.

Officer Crowe, Investigator John Martin, Investigator Steven Cogdill, and Investigator Ricky Bulchin testified about the law enforcement investigation, including the videotape evidence admitted during the trial. Tr. 74-81, 83-121, 181-233.

Dr. Kristen Spoor, an emergency room physician, testified about Mr. Hughey's injuries and medical treatment. Tr. 135-62. Dr. Andy Donlan, a medical doctor, testified about Mr. Hughey's rehabilitation therapy. Tr. 163-77.

The trial court convened a charge conference. Mr. Lee requested a jury instruction based on *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930), *overruled by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999), regarding the juror's obligation to resolve any doubt between the greater and lesser offenses, in favor of the accused. Mr. Lee noted that although *Brightman* overruled *King*, to the extent *King* mandated the instruction, *Brightman* did not prohibit the instruction. Tr. 36-45. Mr. Lee also objected to the proposed verdict form and suggested an alternate form. Tr. 47-49.

The trial court instructed the jurors on ABHAN and the lesser-included offenses of first-degree assault and battery and second-degree assault and battery. Tr. 121-23. In his

[6] Ashley Giles authenticated the 911 call. Tr. 233-39.

closing argument, Mr. Lee asked the jurors to find him guilty of first-degree assault and battery or second-degree assault and battery. Tr. 108-112.

The jurors convicted Ken Lee and Travis Lee of ABHAN, and the trial judge deferred sentencing. Tr. 132-33, 142-49.

At the sentencing hearing, Mr. Lee argued it "fundamentally unfair to consider a proximity conviction for marijuana as a strike" and that people of color are disproportionally affected by inequities in drug sentencing. He also argued that marijuana is legal in a lot of states and South Carolina has decriminalized marijuana. Tr. 28-30. Mr. Lee asked the State to withdraw the notice of intent to seek life without parole and allow the trial court to exercise discretion in sentencing. Tr. 50-51. The trial judge sentenced Mr. Lee to life without the possibility of parole. Tr. 54.

ARGUMENTS

Question I

Did the trial court err by requiring Ken Lee, a black man, to face trial by an all-white jury and denying his timely request for a continuance to a term of court when the pool of jurors actually appearing for jury service reflected a cross-section of the community?

Abbeville, South Carolina embraces its dark history of race relations. Even today, the City of Abbeville embraces the Civil War:

> Abbeville has experienced many exciting and turbulent events. The city played a key role during the Civil War, and that legacy remains pristinely preserved. Abbeville is known the "Birthplace and Deathbed of the Confederacy." On what is now known as Secession Hill, the meeting which launched the state's secession from the Union took place on Nov. 22, 1860. Five years later in 1865, Jefferson Davis and his cabinet decided to dissolve

the Confederacy at the Burt-Stark Mansion, a stately home right off from Abbeville's Historic Court Square.[7]

Of the 191 Racial Terror Lynchings documented by the Equal Justice Initiative as having occurred in South Carolina, five occurred in Abbeville County.[8] From July 2001 to February 2023, the South Carolina Chapter of the League of the South owned property on the square in Abbeville.[9] According to the Southern Poverty Law Center, the League of the South is an Alabama based Neo-Confederate hate group.[10]

Against this backdrop, the State of South Carolina tried Ken Lee and his Uncle Travis Lee, in front of all-white jurors. During juror qualifications, Mr. Lee expressed his concerns about lack of diversity reflected by the jurors who appeared for jury duty.[11] Tr. *. During the selections of jurors, the prosecution struck the only black juror drawn for this case. Tr. *. Concerned about the negative appearance of all-white jurors sitting in judgement of two black men, the trial court "strong-armed" the prosecution into accepting the sole black male drawn for service in this case. After great hesitation—the length of

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[7] https://www.abbevillecitysc.com/209/Abbevilles-History#:~:text=Abbeville%20is%20known%20the%20%22Birthplace,22%2C%201860. (last viewed Oct. 27, 2023).

[8] https://lynchinginamerica.eji.org/explore/south-carolina (last viewed October 27, 2023). Of the 191 documented Racial Terror Lynchings, 37 occurred in the Eighth Judicial Circuit—the most of any judicial circuit in South Carolina. *Id*.

[9] https://qpublic.schneidercorp.com/Application.aspx?AppID=613&LayerID=10508&PageTypeID=4&PageID=4485&Q=2001389540&KeyValue=109-13-05-019 (last viewed Oct. 27, 2023).

[10] https://www.splcenter.org/hate-map?state=AL (last viewed Oct. 27, 2023).

[11] Mr. Lee requested this Court have the Clerk of Court print a list of the jurors, identifying the jurors' races, who appeared for jury duty, the jurors who were qualified, and the jurors who remained after voir dire.

which is unlikely to be reflected in the typed transcript—the prosecutors reluctantly acquiesced to the trial court's pressure. Tr. *. Ultimately, the trial court deemed the sole black juror selected for this case to be unqualified for service because of hearing issues, even though this Court never inquired with the juror whether his hearing issues could be accommodated. Tr. *.

Because of errors in qualifying and selecting jurors, Mr. Lee moved the trial court to order a new trial for the following three reasons:

1. He timely moved for a continuance to a term of court when the pool of jurors actually appearing for service reflected a cross-section of the community.

2. The prosecution's violation of *Batson v. Kentucky,* 476 U.S. 79 (1986) and *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015), when the prosecutors impermissibly relied on criminal history to strike the sole black juror while sitting white jurors with criminal records.

3. The trial court failed to determine whether the sole black juror's hearing issues could be accommodated.

R. *.

The "adjudicative power of the [circuit] court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). Mr. Lee timely moved the trial court to continue the case to a term of court where the potential jurors in attendance reflected a cross-section of the community. Tr. 16-19. In the post-conviction relief context, the Supreme Court urges trial courts to liberally grant continuances to avoid prejudice to the State. *Love v. State*, 428 S.C. 231, 245, 834 S.E.2d 196, 203 (2019) (Kittredge, J., concurring) ("If, however, the proposed amendment is complicated (factually or legally) and would truly prejudice the

State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

"[A] motion for a continuance is addressed to the sound discretion of the trial judge, and his ruling will not be disturbed by this court absent a showing of abuse of discretion." *State v. Beckham*, 273 S.C. 755, 757, 259 S.E.2d 610, 611 (1979). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Hawes*, 423 S.C. 118, 126, 813 S.E.2d 513, 517 (Ct. App. 2018). "To warrant reversal, an error must result in prejudice to the appealing party." *Id.*

Here, the denial of the continuance was both an error of law and not supported by the records. The trial judge correctly recognized the perception of trying two black men before an all-white jury. Racial discrimination in the administration of justice "strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979). Because "the power of the State weighs most heavily upon the individual" in criminal cases, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964),"discrimination on the basis of race, odious in all respects, is especially pernicious." in that context, *Rose,* 443 U.S. at 555; *see also Pena-Rodriquez v. Colorado*, 580 U.S. 206, 223 (2017) (quoting *Rose*, 443 U.S. at 555); *Buck v. Davis*, 580 U.S. 100, 124 (2017) (same). Therefore, in criminal cases, courts "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin*, 379 U.S. at 192. This is nowhere more true than in jury selection. The jury's indispensable role as "a criminal defendant's fundamental protection of life and liberty against race or color prejudice," *Pena-Rodriquez*, 580 U.S. at 223 (quoting *McCleskey v. Kemp*, 481 U.S. 279,

310 (1987)) (internal quotation marks omitted), means that racial discrimination in jury selection threatens the gravest of harms to criminal defendants.

Additionally, despite Mr. Lee's request, the trial judge never determined whether Abbeville County took appropriate action to ensure the summoned jurors received their summons. The trial judge determined the jury panel did not reflect a cross section of the community. Tr. 16-19. The trial judge should have continued the case. This Court should reverse the trial court and order a new trial.

Question II

Did the trial court err by denying Ken Lee's *Batson* motion when the prosecution impermissibly relied on criminal history to strike the sole black juror while seating white jurors with criminal records?

Both the U.S. Supreme Court and the S.C. Supreme Court have repeatedly and consistently recognized prohibitions against racial discrimination in jury selection under *Batson* and its progeny are designed to serve multiple ends: "to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice." *State v. Haigler*, 334 S.C. 623, 628–29, 515 S.E.2d 88, 90 (1999); *see also State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (S.C. 2006).

Prospective jurors who are excluded from serving on a jury because of their race are deprived of one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers*, 139 S. Ct. at 2238 ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991). Jury

service provides citizens with an opportunity to participate in the legal system and enhances their regard and understanding of the legal system, the judiciary, and the jury system.[12] Unlawful exclusion of citizens from jury duty, therefore, forsakes significant opportunities to strengthen and deepen our democracy.

Perhaps, most significantly, the harm from discrimination affecting the composition of the jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 556; Buck, 580 U.S. at 124 ("[Such discrimination] injures not just the defendant, but 'the law as an institution . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'") (quoting *Rose*, 443 U.S. at 556). Such doubt, in turn, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been "given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413; see also Foster, 578 U.S. at 523. In short, "[a]ctive discrimination by a prosecutor" during jury selection "invites cynicism respecting the jury's neutrality and its obligations to adhere to the law," and it "cannot be tolerated." *Powers*, 499 U.S. at 412.

An all-White jury, especially in a trial where the defendant is Black and the victim is White, sustains cynicism about the jury's neutrality. Justice Thomas, concurring in *Georgia v. McCollum*, 505 U.S. 42 (1992), highlighted how a jury's racial composition affects perceptions of its fairness:

> The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of Whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in

[12] *See* Shari Seidma Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, In VERDICT: ASSESSING THE CIVIL JURY SYSTEM 285–86 (Robert E. Litaned.,1993).

> our society and that it may influence some juries. Common experience and common sense confirm this understanding.

Id. at 60 (footnote omitted).

Thus, it is imperative that court remain diligent in ferreting out racial discrimination in jury selection procedures. Failure to do so not only risks inflicting grave harm on not only the defendants and the citizens that are unlawfully excluded from jury duty, but also the community at large by undermining the public's confidence in the criminal justice system and, therefore, weakening the foundations of our multiracial democracy.

As seen above, Mr. Lee relied on *State v. Stewart*, which is a case that is factually indistinguishable from the case at bar. The trial judge recognized the problem he urged the prosecution to accept the black juror it struck. The trial judge ultimately erred in denying Mr. Lee's *Batson* motion. This Court should reverse the trial court and order a new trial.

Question III

Did the trial court abuse its discretion when it failed to determine whether the sole black juror's hearing issues could be accommodated?

As seen above, the State struck Juror 191, but the trial judge persuaded the prosecution to seat the juror as an alternate. However, when the trial judge learned Juror 191 had a hearing problem in one year, the trial judge changed his mind and allowed the State's strike to stand. Mr. Lee objected and moved the trial judge accommodate Juror 191's hearing impediment. The trial judge overruled that request. Tr. 53-60.

"The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law." *State v. Wise*, 359 S.C. 14, 22, 596 S.E.2d 475, 479 (2004) (citing S.C. Code Ann. § 14-7-1010). The trial judge accordingly had the discretion to qualify or not qualify Juror 191. However,

"[a] failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (citing *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997)). Here, the trial court did not even inquire into whether Juror 191 could be accommodated, even though the juror stated he could hear out of one ear. This Court should reverse the trial court and order a new trial.

Question IV

Did the trial court err by not granting a mistrial after making improper opening remarks to the jurors that violated *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) and *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012)?

As seen above, during opening comments, the trial court informed the jurors of their obligation to find the "true facts." Tr. 33, 34. Mr. Lee objected pursuant to *State v. Beaty* and *State v. Daniels* and moved for a mistrial. Tr. 35, 59-64. The trial court gave a curative instruction, to which Mr. Lee objected because it is impossible to "unring the bell." Tr. 35-36, 63-64. See, e.g., *State-Rec. Co. v. State*, 332 S.C. 346, 356, 504 S.E.2d 592, 597 (1998) ("it is difficult, if not impossible, to 'unring a bell'") (quoting *United States v. Davis,* 904 F.Supp. 564, 569 (E.D.La.1995)).

Beaty held "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." 423 S.C. at 34, 813 S.E.2d at 506. The trial judge was correctly recognized the error, but the curative instruction called more attention to the error, rather than cure it. Failure to provide an adequate curative instruction can be a reason to reverse a trial court. *See, e.g, State v. Smith*, 290 S.C. 393, 350 S.E.2d 923 (1986) ("In instructing jury to disregard incompetent evidence, the jury should be specifically instructed to disregard evidence, and not to consider it for any purpose during deliberations;

mere general remark excluding evidence does not cure error."); *State v. White*, 371 S.C. 439, 446, 639 S.E.2d 160, 164 (Ct. App. 2006) ("While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced.").

Even with the trial court's curative instruction, the jurors likely viewed their role as finding the "true facts." As will be discussed below, the prejudice to Mr. Lee was compounded by the trial court's "cascading" verdict form and failure to provide a *King* charge. The jurors likely viewed their role as determining the "true" charge rather than resolving reasonable doubt in favor of Mr. Lee. This Court should revoerse the trial court and order a new trial.

Question V

Did the trial court err by not providing an instruction pursuant to *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930), regarding the jurors' obligation to resolve any doubt between the greater and lesser offenses, in favor of the accused, when that jury instruction was not required but permissible?

"The law to be charged to the jury is determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), *holding modified and extended by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

As seen above, Mr. Lee requested a jury *State v. King*, regarding the juror's obligation to resolve any doubt between the greater and lesser offenses, in favor of the accused. Mr. Lee noted that although *Brightman* overruled *King*, to the extent *King*

mandated the instruction, *Brightman* did not prohibit the instruction. Tr. 36-45. Mr. Lee also objected to the proposed verdict form and suggested an alternate form. Tr. 47-49. In the verdict form, the trial judge "created a cascading consideration" between ABAHN, first-degree assault and battery, and second-degree assault and battery. Mr. Lee argued the "cascading approach" is the reason why a *King* charge was necessary in this case, noting that strictly following the "cascading approach" prohibits the jurors from considering the charge as a whole. Absent a *King* charge, the verdict form guided the jurors to a verdict of guilty of ABHAN because the jurors were not allowed to consider resolving any doubt between the greater offenses and the lesser included offenses. This error was magnified by the trial judges opening remarks regarding the jurors' obligation to find the "true facts." This Court should reverse the trial court and order a new trial.

Question VI

Did the trial court err by providing the jurors a "cascading" verdict form, rather than structuring the verdict form in the manner requested by Ken Lee, which would have mitigated the trial court's error in the opening instructions and ensured the jurors gave due consideration the lesser included offenses?

As seen above, the verdict form "created a cascading consideration" between ABAHN, first-degree assault and battery, and second-degree assault and battery, and Mr. Lee objected to the "cascading approach." In the civil context, the Supreme Court observed:

> [A] special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error. 9A Wright & Miller, *Federal Practice and Procedure,* Civil 2d § 2508, p. 193. In evaluating the prejudicial effect of a defective special verdict question or special interrogatory, the court must consider the question or interrogatory along with the instructions given to the jury. *Fortune v. Gibson,* 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct.App.1991) (finding that special interrogatories and instructions must be considered together). The

> prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions. *See State v. Covert,* 368 S.C. 188, 214, 628 S.E.2d 482, 496 (Ct.App.2006); *State v. Myers,* 344 S.C. 532, 536, 544 S.E.2d 851, 853 (Ct.App.2001).

S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 907-08 (2007).

As argued above, the trial court could have cured the defect by providing a *King* charge, but it did not do that. Another way the trial could have cured the defect was to eliminate the "cascading" format and provide the jurors with a choice between ABAHN, first-degree assault and battery, second-degree assault and battery, and not guilty, as Mr. requested. As seen above, Mr. Lee argued the "cascading approach" is the reason why a *King* charge was necessary in this case, noting that strictly following the "cascading approach" prohibits the jurors from considering the charge as a whole. Absent a *King* charge, the verdict form guided the jurors to a verdict of guilty of ABHAN because the jurors were not allowed to consider resolving any doubt between the greater offenses and the lesser included offenses. This error was magnified by the trial judges opening remarks regarding the jurors' obligation to find the "true facts." This Court should reverse the trial court and order a new trial.

Question VII

Did the trial court err by not quashing the State's notice of intent to seek life without parole when the enhanced sentences was based on a conviction involving marijuana when Ken Lee objected to this charge being used to enhance the sentence when South Carolina has decriminalized marijuana and marijuana one day likely will be legal throughout the United States?

At the sentencing hearing, Mr. Lee argued it "fundamentally unfair[13] to consider a proximity conviction for marijuana as a strike" and that people of color are disproportionally affected by inequities in drug sentencing. He also argued that marijuana is legal in a lot of states and South Carolina has decriminalized marijuana. Tr. 28-30. He also argued a life sentence under these circumstances would be cruel and unusual punishment.[14] Tr. 34. Mr. Lee asked the State to withdraw the notice of intent to seek life without parole and allow the trial court to exercise discretion in sentencing. Tr. 50-51. The trial judge sentenced Mr. Lee to life without the possibility of parole. Tr. 54.

"The Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime." *State v. Harrison*, 402 S.C. 288, 293, 741 S.E.2d 727, 729 (2013) (citing *Solem v. Helm,* 463 U.S. 277 (1983)). *Harrison* held:

> [I]n analyzing proportionality under the Eight Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality. If no such inference is present, the analysis ends. In the rare instance that this threshold comparison gives rise to such an inference, intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions. Courts should use this comparative analysis to confirm the gross disproportionality inference, and not to develop an inference when one did not initially exist. *See Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 ("The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither 'eviscerates' *Solem,* or 'abandons its second and third factors.' ").

402 S.C. at 299–300, 741 S.E.2d at 733.

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[13] U.S. Const. Am XIV; S.C. Const. Art. I, § *.

[14] U.S. Const. Am VIII; S.C. Const. Art. I, § *.

In South Carolina a prior conviction for marijuana offense cannot be used to enhance a subsequent conviction for a non-marijuana offense in most situations. S.C. Code Ann. § 44-53-470. This decimalization of marijuana raises an inference of disproportionally when a marijuana offense is used to enhance any other non-drug related offense. Marijuana is fully legal in 24 states. Marijuana is partially legal, such as for medical use, in an additional six state. Marijuana is fully illegal in only six states—South Carolina, North Carolina, Kansas, Nebraska, Wyoming, and Idaho.[15] But for his prior marijuana offense, Mr. Lee would not have been eligible for life without parole. This Court should rule that using a marijuana related conviction to enhance a sentence for a subsequent offense to life without parole violates due process and the prohibition against cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and order a new trial. Alternatively, this Court should vacate Ken Lee's sentence and remand for re-sentencing.

Respectfully Submitted,

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[15] https://www.cbsnews.com/news/legal-weed-map-states/ (last viewed June 10, 2024)