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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 REPLY BRIEF OF APPLLANT

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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 did not reflect a cross-section of the community?

The State argues the trial court did not abuse its discretion in denying the continuance because Mr. Lee cannot prove systematic and purposeful discrimination. Brief of respondent, pp. 20-22. The State does not deny that an anomaly occurred where most of the black jurors summoned did not appear for juror service. The State overlooks "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). Also, the State does not acknowledge that trial courts can abuse their discretion by denying a continuance request. *State v. McMillian*, 349 S.C. 17, 561 S.E.2d 602 (2002) (defendant was entitled to continuance of retrial, so he could obtain transcript of first trial, for use in impeaching victim's neighbor). Under the circumstances of this case, it was an abuse of discretion for the trial judge to deny the continuance request. This Court shold 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?

The State initially argues this issue is moot because the persecution agreed—albeit reluctantly and the result of coercion by the trial judge—to seat the sole black juror drawn for service on this case. Brief of Respondent, p. 22. This question is not moot because, but for the State striking this juror, this juror would have sat on the jury.

The State next argues "unlike in *Stewart*,[1] the State did not negate the racially neutral reason by allowing White jurors with criminal records to be seated because those jurors had distinctly different convictions that were not similar to ABHAN, instead having convictions for simple disorderly conduct and check fraud." Brief of Respondent, p. 24. The State is wrong for two reasons. First, this statement talks in circles. The reality is the seated jurors had similar convictions. Assault and battery of a high and aggravated nature is very different from simple assault and battery. S.C. Code Ann. § 16-3-600(B) and (E). Simple assault and battery is an expungable 30-day misdemeanor, just like disorderly conduct and check fraud. Second, the general public loses confidence in the legal profession when lawyers make transparent arguments to mask reality. 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?

The State implies Juror 191 was "deaf as a fence post." Brief of Respondent, pp. 7. The trial judge actually stated the juror "may not have been as deaf as a fence post, but he was darn – darn close." Tr. 59. Neither the State's implication nor the trial judge's comment is supported by the record as the trial judge was able to carry one a dialogue with Juror 191 but chose not to complete the dialogue. *State v. Hawes*, 423 S.C. 118, 126, 813 S.E.2d 513, 517 (Ct. App. 2018) ("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."). Because the trial court did not even inquire into whether Juror 191 could be

[1] *State v. Stewart,* 413 SC 308, 775 S.E.2nd 416 (Ct. App. 2015).

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)?

The State centers its argument around *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) but never addresses *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012).[2] Brief of Respondent, pp. 26-28. Nor did the State respond to Mr. Lee's objection that 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)).

The State seemingly argues, Mr. Lee's case is not as egregious as *Beatty*, so this Court should not find error.; however, *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. This Court should reverse the trial court. Twelve years after *Daniels* and six years after *Beatty*, trial courts are still giving this instruction. Unless this Court intervenes and reverses cases because of this improper instruction, there is no deterrent to this practice.

[2] The State's only reference to *Daniels* occurs in the State's listing of Mr. Lee's Questions on Appeal. Brief of Respondent, p. 1.

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 State overstates the holding in *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) by implying *Brightman* held the *King* charge was no longer proper. In reality, although *Brightman* overruled *King*, to the extent *King* mandated the instruction, *Brightman* did not prohibit the instruction. In this case, the error in not giving the *King* charge must be considered in conjunction with the verdict form utilized by the trial judge. Strictly following the "cascading approach" of the verdict form prohibited 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 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?

The State initially argues Mr. Lee abandoned this argument because "the only legal authority Appellate cited in support of his argument that the verdict form utilized be the trial court in some way prejudiced him is a civil case." Brief of Respondent, p. 30. The State is wrong for two reasons. First, civil precedent is still precedent. Second, the case cited by Mr. Lee quoted two criminal cases—*State v. Covert,* 368 S.C. 188, 214, 628 S.E.2d 482, 496 (Ct.App.2006) and *State v. Myers,* 344 S.C. 532, 536, 544 S.E.2d 851, 853

(Ct.App.2001)—for the proposition, "The prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions." Brief of Appellant, p. 17.

As argued in Mr. Lee's opening brief, the trial judge had two options to cure the defective instruction: (1) the trial court could have provided a *King* charge or (2) 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. 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?

The United States government is taking action to reschedule marijuana from a Schedule I drug to a Schedule III drug. https://www.justice.gov/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana (last viewed Oct. 21, 2024). *Compare* S.C. Code Ann. § 44-53-190 *with* S.C. Code Ann. § 44-53-230. A Schedule I drug has "[a] high potential for abuse, [n]o accepted medical use in treatment in the United States; and [a] lack of accepted safety for use in treatment under medical supervision." S.C. Code Ann. § 44-53-180. A Schedule III drug has an "accepted medical use in treatment in the United States." S.C. Code Ann. § 44-53-220. As argued in Mr. Lee's opening brief, this nation

trend militates in favor of not using a marijuana conviction to enhance a sentence to life imprisonment without the possibility of parole.

CONCLUSION

For the reasons stated in the Brief of Appellant and this Reply, 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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Certificate of Service

I certify that I served the Initial Reply Brief of Appellant on the State of South Carolina, by email, using counsel's primary email address listed in the Attorney Information System (AIS), as reflected below, on the date reflected below:

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