RECEIVED
Jan 29 2025
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.

---

# FINAL BRIEF OF RESPONDENT

---

ALAN WILSON
Attorney General

BRIAN H. GIBBS
Assistant Attorney General
S.C. Bar No. 104137

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Phone: 803-734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, South Carolina 29648

**Attorneys for Respondent**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**

## STATEMENT OF ISSUES ON APPEAL

### Appellant's Issue Statements

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?

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?

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

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)?

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 the jury instruction was not required but permissible?

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 to the lesser included offenses?

VII. Did the trial court err by not quashing the State's notice of intent to seek life without parole when the enhanced sentence 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?

### Respondent's Counterstatements

I. Whether the trial court abused its discretion by denying Appellant's motion to continue his case to the next term of court due to his belief that the jury panel did not reflect a cross-section of the community.

II. Whether the trial court erred in denying Appellant's *Batson*[1] motion when the State properly struck an alternate juror with a prior conviction for assault and battery, which was a charge similar to the charge for which Appellant was standing trial, when the State, after discussion with the trial court, relented and allowed the juror to be seated.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

III. Whether the trial court abused its discretion in excusing an alternate juror before trial upon learning that the alternate juror had hearing problems and informed the trial court that he had only heard some of the questions posed to the jury panel in voir dire.

IV. Whether the trial court abused its discretion in denying Appellant's mistrial motion after the trial court mentioned "true facts" in its opening instructions to the jury and gave a curative instruction at Appellant's request.

V. Whether the trial court abused its discretion in denying Appellant's request for a jury charge pursuant to *State v. King*[2] despite the trial court giving a sufficient reasonable doubt jury charge.

VI. Whether the trial court abused its discretion by denying Appellant's motion to restructure the verdict form to give "due consideration to the lesser included offenses."

VII. Whether the trial court abused its discretion in denying Appellant's motion to quash the State's Amended Notice of Intent to Seek Life without Parole because Appellant believed that his prior conviction for distribution of marijuana within half a mile of a school or playground should not count as a strike due to South Carolina "decriminalizing" marijuana and his belief that marijuana will, at some unspecified and undeterminable point in the future, be nationally legalized.

[2] *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930).

## STATEMENT OF THE CASE

In April 2021, an Abbeville County grand jury indicted both Appellant and his uncle, Travis Arnett Lee ("Travis"),[3] for assault and battery of a high and aggravated nature ("ABHAN"). (R. 11-12, 13-14). On February 16, 2021, prior to the grand jury indicting Appellant for ABHAN, the State notified Appellant that he would be charged with attempted murder and that the State intended to seek a sentence of life imprisonment without the possibility of parole ("LWOP") due to two qualifying prior convictions.[4] (R. 15). On August 9, 2023, the State provided Appellant with an Amended Notice of Intent to Seek Life without Parole based on his indictment for ABHAN instead of attempted murder. (R. 16). On September 25-28, 2023, Appellant and Travis proceeded to a jury trial before the Honorable Frank R. Addy, Jr. (R. 25, 101, 207, 297, 538).

After a jury and two alternate jurors were selected but before they were sworn, Appellant made a *Batson* motion based on the State striking the sole Black juror—Juror 191—presented from the jury panel.[5] (R. 52-53). Appellant expressed concern that the jury panel consisted of "a solid 20 percent" Black individuals despite "roughly 25 percent" of Abbeville County consisting of Black individuals. (R. 53). The trial court noted that 41 of the 200 potential jurors summoned were Black.[6] (R. 53, 696-725). The trial court informed Appellant that of the Black potential jurors, 29 did not respond to their summonses, 4 returned their juror information but did not appear in court, 3 were excused, and 5 appeared in court. (R. 53-55, 696-725).

---

[3] Travis did not appeal his conviction or sentence.

[4] The State did not indict Appellant for attempted murder and instead pursued and obtained an indictment for ABHAN.

[5] The trial court moved the jury and the two alternate jurors to the jury room before hearing the motion. (R. 51-52).

[6] The trial court's detailed juror listing shows 42 of the 200 potential jurors were Black. (R. 696-725).

Appellant inquired as to what the trial court and the clerk of court did regarding the 29 potential Black jurors who did not respond to their summonses. (R. 55-56). The trial court stated that 96 White and Hispanic potential jurors also either did not respond or did not appear in court. (R. 57). The clerk stated that when potential jurors are summoned and do not respond, someone from the Clerk's Office would go to the Abbeville County administration building and have the Auditor's Office check for the most up-to-date addresses. (R. 58). The clerk said that "if [the Auditor's Office does not] have anything other than what we do, we run it back." (R. 58).

The trial court then directed the conversation back to why the State struck Juror 191. (R. 59). The State informed the Court that it struck Juror 191 due to prior convictions for simple assault and battery, two instances of disorderly conduct, and criminal domestic violence, third or subsequent offense. (R. 59). The State noted that all of Juror 191's prior convictions were at least twenty years old. (R. 59).

Regarding other jurors with criminal records, the State informed the trial court that Juror 188, who was seated, had a public disorderly conduct conviction from 2011. (R. 60, 64). Additionally, Juror 186, who was stricken, had a conviction for fraudulent check from 1995. (R. 60). Both Juror 186 and Juror 188 were White. (R. 688-689, 690, 691-692, 693, 696-725).

Citing *State v. Stewart*,[7] Appellant argued that the State could not use criminal histories to strike certain jurors while simultaneously seating jurors with criminal histories deemed to be similarly situated. (R. 65). Appellant argued that Juror 191's criminal history (simple assault and battery, disorderly conduct, and criminal domestic violence) was similarly situated to Juror 188 (public disorderly conduct), but the State struck Juror 191, who was Black, and not Juror 188, who was White. (R. 65). The State contended that Juror 191's conviction for simple assault and battery

[7] 413 S.C. 308, 775 S.E.2d 416 (Ct. App. 2015).

was similar to Appellant's charge of ABHAN whereas Juror 188's conviction for public disorderly conduct was not. (R. 66-67). The trial court noted that the difference between Juror 191 and Juror 188 was that Juror 191 had two convictions for assault and battery on his record, while Juror 188 did not. (R. 68). Appellant argued that Juror 188's disorderly conduct conviction could have involved assault and that the State could not say that Juror 188's convictions did not also involve assault. (R. 72).

The trial court noted that Juror 191 would have been the second alternate juror if the State had not struck him and asked the State to reconsider allowing Juror 191 to sit as the second alternate juror. (R. 74). The State responded that if that was what was needed to move the case forward, then the State would not object. (R. 75). The State reemphasized that striking Juror 191 had nothing to do with race but was rather based on his two prior convictions for assault. (R. 75). The trial court stated:

> As a practical matter, I would prefer for juries to be racially balanced, if for no other reason—and I'm sure that we all agree with this—but if for no other reason than perception. Okay? And obviously, it's always best to have as wide a cross section of the community if at all possible.
>
> In this case[,] I'm not finding that there was anything nefarious with the selection of the jury by the clerk, or the way it was generated.

(R. 75).

When the jury and the remaining jury panel returned to the courtroom, the trial court informed Juror 191 that he would be an alternate juror. (R. 77-78). Juror 191 had trouble hearing the trial court and informed the trial court that he could only hear out of one ear. (R. 78). The trial court asked Juror 191 whether he had been able to hear everything that had been going on in the courtroom, to which he replied "[s]ome of it." (R. 78-79). The trial court instructed Juror 191 to

rejoin the jury panel and then dismissed the jury panel, including Juror 191. (R. 79-80). After the jury panel left, the trial court stated:

> The record will reflect that in conversing with [Juror 191], I think it already reflects that [Juror 191] was extremely hard of hearing, that did not come to the attention of the Court, obviously, until the Court was toying with the idea, or looking to put him on [the jury] in order to—to address the—the alleged *Batson* violation. He obviously remarked that he only heard some of what was said during the course of voir dire.
>
> [Appellant's counsel] did indicate that in other cases, judges have made accommodations to people who are hard of hearing. And I'm certainly open to such an accommodation if feasible. But based on [Juror 191's] difficulty hearing me, and based upon the fact that I could not be sure that he had heard all the voir dire, that he had heard all the names of the witnesses called, that he had been able to physically answer correctly, I went back on my initial idea of sitting him as an alternate juror.
>
> And the Court does find that the State's stated reasons for excusing the jurors that they excused were not pretext. There was no *Batson* violation, there was no discrimination. The fact that juror 191 had previously been convicted of several assaults as well as other crimes and because this is an assault case as well, that is a—the Court finds that that is a racially neutral reason to strike him.
>
> And that the seating and—or that the seating of juror 188, that that was because she had that disorderly conduct conviction that the strike against juror 191 was not pretextual. It's an apples and oranges comparison in this Court's mind.
>
> And of course[,] I've had a chance to consider the credibility of the proponents of the strike. And do find that there are reasons for excusing the jurors that they excused. I do find that those were valid and not in violation of *Batson*. Obviously fraudulent checks as we used to describe it is a crime of moral turpitude and in involves dishonesty. That's a different animal from a simple disorderly conduct where maybe somebody's had a little bit too much to drink. But obviously the defendant's objection is noted.
>
> And the Court wishes to note that as a practical matter, juror 191 was—may not be a—may not have been as deaf as a fence post, but he was darn—darn close.

(R. 82-83).

Before the jury came out on the second day of trial, Appellant moved to quash the jury and for a continuance. (R. 116). Appellant argued that the trial court previously ruled that the jury did not represent a cross section of the community, as the trial court preferred, and asserted that "the best thing to do" would be to try the case in front of a new jury that represented a "fair cross section" of the community. (R. 116). Appellant also noted that the trial court previously "expressed some concerns about this being an [a]ppellate issue that's going to get this case reversed because [the trial court] encouraged [the State] strongly to consent to letting [Juror 191] be put on the jury . . . ." (R. 116).

The trial court noted that its comments were made prior to learning that Juror 191 was deaf. (R. 116). The trial court also stated that "if [Juror 191] couldn't hear the voir dire that I posed to him, that creates a problem if he were to become an alternate." (R. 117). The trial court determined that a *Batson* issue did not exist because a random strike sheet was used, meaning that the jurors were selected in a random order. (R. 117). The trial court stated that it would have preferred a "better cross section" but "random is random." (R. 117). Appellant did not agree that Juror 191 was "deaf as a fence post" and took issue that the trial court did not entertain accommodating Juror 191's hearing issues. (R. 118-119). The trial court responded that even if Juror 191 could have been accommodated, Juror 191 had indicated that he did not hear all of the voir dire, which was a problem. (R. 119). The trial court denied Appellant's motion to quash the jury and for a continuance. (R. 119).

In its opening remarks to the jury, the trial court stated "your purpose as jurors is [to] find and determine the facts in this case." (R. 128). Later in the opening instructions when discussing why the trial court might ask the jury to step out of the court room during the trial, the trial court said, "Because you're the sole judges of the facts, I don't want any comment that I make about the

testimony or the evidence to have any effect on what you ultimately find the true facts to be." (R. 133). Subsequently, the trial court stated, "Now, in determining what the true facts are, you'll have to decide whether or not the testimony of the witnesses is believable or not. Understand that it's my job to rule whether certain testimony can be admitted. But once the testimony is admitted, whether you believe it is solely up to you." (R. 134). Immediately after the trial court's opening instructions to the jury, Appellant objected, and the trial court held a sidebar conference, which was not transcribed. (R. 135).

After the sidebar conference, the court provided the following curative instruction:

> Ladies and Gentlemen, I want to correct something—emphasize something to you in my opening instructions. Please understand [t]he State has the burden of proof in this case. The burden of proof in this case is beyond a reasonable doubt. And I'm sure that the attorneys are going to allude to that in a few moments in their opening statements, and probably during their closing arguments.
>
> So please understand that at all points and times, [t]he State has the burden of proving the defendant's guilt beyond a reasonable doubt.
>
> And to the extent that I indicated to you that you have an obligation to determine the true facts in this in this case, please disregard those comments about the true facts. Because sometimes Ladies and Gentlemen, there simply is not enough evidence to determine what the true facts are. If that were the case in this case, it would be your obligation to return a verdict of not guilty. And so sometimes again, Ladies and Gentlemen, it simply is not possible to determine what the true facts are. If that were to be the case your verdict should be not guilty. We'll address this in greater detail during closing argument.
>
> But Ladies and Gentlemen, you should not engage in any sort of speculation about the facts. And again, it is not your obligation to determine what the true facts are, but it is your obligation to attend—or attention to the witnesses, listen to the witnesses, and render a verdict under the oath that you have just taken which the clerk has administered.

(R. 135-136). Appellant renewed his objections made during the sidebar conference. (R. 136).

At the next break when the jury was out of the courtroom, the trial court noted that Appellant moved for a mistrial during the sidebar conference based on the trial court's references to "true facts." (R. 159-160). The trial court noted that its reference to "true facts" was contextually different from *State v. Beaty*,[8] where a trial court had instructed a jury that it must search for the truth. (R. 160). The trial court noted that Appellant suggested the curative instruction that the trial court gave. (R. 160-161). The trial court reiterated that the jury's function was to be the factfinder and that "true" merely modified "facts," which was a distinction the trial court found "superfluous." (R. 162). Appellant stated that the curative instruction was not exactly what he had suggested because the trial court had overlooked portions of *Beaty*. (R. 163). Appellant asserted that the curative instruction called attention to the alleged error and "you can't unring the bell." (R. 163). The trial court stated that a curative instruction may not have been required but believed the instruction to be accurate. (R. 164).

Brian Singleton, a deputy with the Abbeville County Sheriff's Department, testified that on October 6, 2020, he responded to a call from Renee Guillebeaux's residence. (R. 149-150). When he arrived, he found Tobias Hughey ("Victim") unresponsive on a couch with lacerations to his forehead. (R. 150). Deputy Singleton attempted to render aide to Victim, who was ultimately taken to a hospital by helicopter. (R. 151, 153). Deputy Singleton believed that no crimes occurred at Guillebeaux's residence. (R. 157).

Forest Crowe, an officer with the Abbeville Police Department, testified that he also responded to a call about an unconscious male on the date of the incident. (R. 165, 167). When he arrived at Guillebeaux's residence, he observed Victim unconscious on a couch with "very clear trauma to his head." (R. 168). Victim had a cut on his left eye and small cuts on his arms. (R. 168).

[8] *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).

Victim's shirt and pants were covered in blood. (R. 168). Officer Crowe testified that Victim was still breathing, making resuscitation unnecessary at that point. (R. 169). According to Officer Crowe, Guillebeaux, who was Victim's mother, did not observe what happened to Victim. (R. 182).

Elizabeth Webb, the property manager of Hickory Heights and Oakland Apartments (the "apartment complex") at the time of the incident, testified that the apartment complex had a video surveillance system. (R. 188, 191). She gave recordings from the day of the incident to law enforcement. (R. 194).

Victim testified that at the time of the incident, he lived both at his mother's house and with his girlfriend at the apartment complex. (R. 216-218). On the day of the incident, he was in the parking lot at the apartment complex when Travis approached him. (R. 221-222). He had a conversation with Travis about something that had gone missing in Appellant's apartment. (R. 223). According to Victim, the conversation turned violent. (R. 223). At this point, Appellant approached Victim and Travis with a wooden object, likely a table leg or chair leg, in his hands. (R. 225-226). Victim stated that both Travis and Appellant hit him with the wooden object, but Appellant hit him more than Travis did. (R. 226-228). He believed Travis and Appellant collectively made "[a]bout 20 swings" at him with the wooden object. (R. 226). Travis grabbed and held Victim while Appellant swung at him. (R. 227-228). When Travis and Appellant were done, they "just left." (R. 230). Victim went to a friend's apartment in the apartment complex and asked his friend to call his mother, Guillebeaux. (R. 231-232). Guillebeaux came to the apartment complex and took him back to her house, where he passed out. (R. 232-233). The next thing he remembered after that was hearing helicopter blades. (R. 233).

According to Victim, he suffered brain trauma, a dislocated hip, a broken arm, and gashes on his arm. (R. 235-236). Due to the incident, he suffered kidney and liver problems and underwent abdominal surgery. (R. 235-236). Victim denied stealing anything from Appellant or Travis. (R. 238). He confirmed that video evidence showed Appellant carrying a wooden table leg while approaching him and Travis. (R. 239).

Eric Phillips, a resident of the apartment complex, testified that he observed the incident and saw Travis and Appellant beating Victim with a stick. (R. 277, 280-282). After Travis and Appellant finished beating Victim, they walked away and Victim came to his porch. (R. 282). Phillips stated that Victim was "drenched in blood coming down his face." (R. 282).

Renee Guillebeaux, Victim's mother, testified that Victim lived with her at the time of the incident, while the mother of Victim's child lived in the apartment complex. (R. 304-305). Guillebeaux had gone to school with Appellant. (R. 307). Prior to the incident, she had a conversation with Travis and learned that Travis was looking for Victim due to a burglary at Appellant's girlfriend's apartment. (R. 308-309). Guillebeaux told Travis to "do what [you] got to do," but did not tell him to injure Victim. (R. 309). She testified that because Victim was Travis's cousin, Travis should have talked to Victim or "smack him around, handle him a little rough, but not leave him dead." (R. 309-310). When she arrived to pick up Victim, he was sitting up but looked "horrible" and was "leaking" blood from his head. (R. 311-312). According to Guillebeaux, after she took Victim back to her house, his condition deteriorated, which prompted her to call EMS. (R. 310, 315). EMS took Victim to Abbeville High School, from where he was transported to the hospital via helicopter. (R. 316). Guillebeaux testified that Victim stayed in the hospital for about a month. (R. 317).

Michael Shane Floyd, a friend of Victim that lived in the apartment complex, testified that on the day of the incident, he was at home when the door flew open and Victim came in covered in blood and yelling. (R. 341-343). Floyd wanted to call an ambulance, but Victim refused. (R. 344). Before he could call anyone, Guillebeaux and Victim's brother arrived at his apartment. (R. 344-345).

Dr. Kristen Spoor, a trauma and general surgeon at Prisma Health in Greenville and an expert in emergency medicine, critical care medicine, and trauma medicine, testified that she treated Victim after he arrived at Prisma Health following the incident. (R. 432-434). According to Dr. Spoor, Victim's heart stopped twice during the helicopter transport, and upon first seeing Victim, she noticed that "he was bleeding profusely from his head." (R. 435-438). Victim had life threatening injuries, including large injuries to his scalp and forehead that caused significant blood loss, subdural and epidural hematomas, a midline shift in his brain due to a subdural hematoma, and a fractured ulna. (R. 438-441).

According to Dr. Spoor, the midline shift in Victim's brain could have caused difficulty with breathing, issues with continued cardiovascular function, and even death. (R. 441). Victim's head injuries were caused by blunt force trauma. (R. 441). Due to significant blood loss, Victim's liver and kidneys began to shut down. (R. 442-443). Dr. Spoor testified that while he was in the intensive care unit ("ICU"), Victim had trouble breathing and had issues with several internal organs—his lungs, liver, heart, and kidneys—starting to shut down. (R. 444). While in the ICU, Victim developed pneumonia. (R. 445). Dr. Spoor agreed that Victim suffered great bodily injury. (R. 455).

Dr. Martin Andrew Donlan III, a medical doctor and expert in trauma, brain injury, and patient management, testified that Victim suffered from short term memory recovery problems. (R. 460-465).

Ricky Duane Balchin, a former lead investigator with the Abbeville Police Department, testified that after seeing Victim off in the helicopter, he began his investigation by going to the apartment complex. (R. 477-478, 481). He was initially unsure of where the incident occurred but was able to determine that the incident occurred in the parking lot of the apartment complex after viewing surveillance camera footage. (R. 481-484). He testified that Travis and Appellant were involved in the incident. (R. 483-484). Appellant had a wooden object in his possession as he approached Victim and Travis. (R. 490).

After the State rested and both Appellant and Travis informed the court that they did not plan to call any witnesses, Appellant asked the court to explain the concept of lesser included charges to the jury and to give an instruction pursuant to *State v. King*,[9] which would inform the jury that if they were to have any doubt between the higher charge and the lesser included charge, then they should resolve that doubt in favor of the lesser included charge. (R. 570-574). Appellant acknowledged that in *Brightman v. State*,[10] the Supreme Court ruled that when a proper reasonable doubt instruction is given, failure to give a *King* charge is not subject to automatic reversal. (R. 574). However, Appellant asserted that the Supreme Court did not indicate that a *King* charge "would never be appropriate if requested." (R. 574).

[9] 158 S.C. 251, 155 S.E. 409 (1930).
[10] 336 S.C. 348, 520 S.E.2d 614 (1999).

Citing to *Brightman*, the State argued that a *King* charge was not necessary due to the modern reasonable doubt charge, which tells the jury to resolve any doubt in favor of the defendant. (R. 576).

The trial court determined that its reasonable doubt charge would be sufficient and declined to give a *King* charge. (R. 578). The trial court stated:

> I do feel that the [*King*] charge is unnecessary in this particular case in light of the reasonable doubt charge as well as the way I've kind of created a cascading consideration for the jury between A and B first and then A and B second.

(R. 579). Appellant stated that the cascading verdict form was why he believed a *King* charge was necessary because the jury was supposed to consider the charge in the totality, which they would not be able to do if they "strictly" followed the cascading approach. (R. 579). Appellant requested a jury form listing ABHAN, first degree assault and battery, second degree assault and battery, and not guilty. (R. 584). The State argued that the usual form that the trial court intended to use followed the jury charge and allowed the jury to work their way through lesser included offenses if they found Appellant not guilty of the greater offenses. (R. 585). The trial court denied Appellant's request to change the verdict form. (R. 585).

During the jury charge, the trial court gave a detailed and sufficient reasonable doubt charge. (R. 652-653).

The jury found both Appellant and Travis guilty of ABHAN. (R. 669-670).

After the jury delivered its verdict, the trial court noted that counsel had previously discussed Appellant's prior convictions and believed they should not count as two strikes against him for the purposes of section 17-25-45 of the South Carolina Code (the "Three Strikes Rule"). (R. 679). The State informed the trial court that Appellant had two prior convictions that had been classified as serious offenses: one for trafficking crack cocaine, 10 to 28 grams, and one for

distribution of marijuana within half a mile of a school or playground. (R. 680). The State noted that while Appellant had pleaded guilty to both on the same day, the crimes occurred approximately two years apart. (R. 680). The State indicated that it initially served its Notice of Intent to Seek Life without Parole on February 16, 2021, and served an Amended Notice on August 19, 2023, when it decided to move forward on Appellant's ABHAN indictment instead of seeking an attempted murder indictment. (R. 680). Appellant and Travis moved to defer sentencing, which the trial court granted. (R. 682).

On October 19, 2023, the trial court conducted a sentencing hearing for Appellant and Travis. (R. 726). The trial court marked several exhibits related to Appellant and Travis's previous convictions, including Appellant's indictments and sentencing sheets for distribution of marijuana within half a mile of a school or playground and trafficking crack cocaine, 10 to 28 grams. (R. 732-733, 688-689, 690). The State noted that the proximity charge was from 2006 and the trafficking charge was from 2008, but Appellant pleaded guilty to both on the same day in 2009. (R. 736).

The State argued that Appellant's prior convictions, both of which were serious in nature and occurred at different places almost two years apart, counted as two separate convictions for the purposes of the Three Strikes Rule, which meant his conviction for ABHAN carried a mandatory LWOP sentence. (R. 739-740).

Appellant asserted that it was "fundamentally unfair" to consider his distribution of marijuana conviction as a strike because (1) "this country has had a history of particularly people of color being disproportionally affected by drug offenses"; (2) marijuana is legal in "a lot of states"; and (3) marijuana "[has] been decriminalized to a certain extent in South Carolina." (R. 754-755). Appellant argued that for his distribution of marijuana conviction to be predictive of

something that changes the mandatory sentence from a maximum of 20 years to a minimum of LWOP "seem[ed] to be fundamentally unfair." (R. 755). He confirmed that his argument was "basically a due process argument under Federal fairness." (R. 755). Appellant contended that the Three Strikes Rule, with regard to the proximity conviction, violated his Eighth Amendment and comparable South Carolina Constitutional right against cruel and unusual punishment. (R. 759).

The State argued that Appellant had two qualifying prior convictions under the Three Strikes Rule, which was then and is now good law, and that marijuana is not legal in South Carolina. (R. 755-756).

The trial court determined that Appellant's prior convictions subjected him to the provisions of the Three Strikes Rule, which mandated an LWOP sentence. (R. 762).

Before the trial court sentenced him, Appellant requested that the trial court view and consider video recordings of Victim requesting that Appellant and Travis receive only probation for this incident. (R. 775). Appellant also requested that the State withdraw its Amended Notice of Intent to Seek Life without Parole and allow the trial court to exercise its discretion in sentencing. (R. 775-776). The State did not withdraw the Amended Notice. (R. 776-777). The trial court sentenced Appellant to LWOP pursuant to the Three Strikes Rule. (R. 779).

On October 30, 2023, Appellant filed his Motion for a New Trial or, Alternatively, to Reconsider the Sentence. (R. 17-24). In his motion, Appellant renewed his arguments related to jury qualification and selection from trial, arguing that the trial court should grant a new trial based on (1) his timely motion for a "continuance to a term of court where the pool of jurors actually appearing for service reflected a cross-section of the community"; (2) his *Batson* motion based on the State "impermissibly [relying] on criminal history to strike the sole [B]lack juror while sitting

[W]hite jurors with criminal records"; and (3) the trial court failing to determine whether the sole Black juror's inability to hear could be accommodated. (R. 17-19). Appellant asserted the trial court should have granted a new trial based on the trial court's "improper opening remarks to the jurors," which he viewed as "particularly prejudicial." (R. 21). Appellant also contended that the trial court should grant a new trial for denying his request to provide an unnecessary *King* jury charge and restructure the verdict form to his liking. (R. 22). Finally, Appellant argued that he should be resentenced because (1) the solicitors were the only people who wanted Appellant to receive an LWOP sentence; (2) the trial court "did not consider" a recorded statement from Victim when sentencing Appellant; and (3) Appellant objected to his conviction for distribution of marijuana within half a mile of a school or playground counting as a strike for the purposes of the Three Strikes Rule because "South Carolina has decriminalized marijuana" and counting that conviction as a strike would be a cruel and unusual punishment under the United States Constitution and the South Carolina Constitution. (R. 22-23).

The trial court denied Appellant's motion. (R. 7-8). The trial court reiterated its determinations from trial concerning Appellant's jury qualification and selection arguments. (R. 7). The trial court stood by its opening remarks to the jury, stating that its use of the adjective "true" to modify the noun "facts" "adds little to the noun and does not rise to the level of instructing the jury to 'seek the truth' per *State v. Beaty*." (R. 7-8). Concerning Appellant's request for a *King* charge, the trial court was satisfied that a *King* charge was not warranted. (R. 8). The trial court found no prejudice in the structure of the verdict form utilized at trial. (R. 8). Regarding Appellant's sentence, the trial court noted that it had reviewed Victim's recorded statement prior to imposing Appellant's sentence and that the Three Strikes Rule left the trial court with no discretion in imposing Appellant's LWOP sentence. (R. 8).

This appeal followed.

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only, and are bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, appellate courts are limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). An appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

The trial court's denial of a motion for continuance will also not be disturbed absent a clear abuse of discretion. *State v. Patterson*, 324 S.C. 5, 12, 482 S.E.2d 760 (1997).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. White*, 371 S.C. 439, 443, 639 S.E.2d 160, 162 (Ct. App. 2006).

## ARGUMENT

### I. The trial court did not abuse its discretion by denying Appellant's motion to continue his case to the next term of court due to Appellant's belief that the jury panel did not reflect a cross section of the community.

"Whether there has been systematic racial discrimination by the jury commissioners in the selection of jurors is a question to be determined from the facts in each particular case." *State v. Stallings*, 253 S.C. 451, 454, 171 S.E.2d 588, 590 (1969). Further, "[d]iscrimination in the selection of a jury must be proved and it cannot be presumed." *Id.* A criminal defendant attacking his conviction on the ground that the State systematically excluded members of his race from the jury that convicted him has the burden of proving the existence of purposeful discrimination. *Id.* at 454-55, 171 S.E.2d at 590.

To establish a prima facie violation of the fair cross section requirement of the Sixth Amendment, a defendant must show "1) the group excluded is a 'distinctive' group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process." *State v. Patterson*, 342 S.C. 5, 21, 482 S.E.2d 760, 767-68 (1997).

First, given that Black individuals are a "distinctive" group in the community, Appellant failed to show the representation of Black individuals in the venire from which the jury in this case was selected was not fair and reasonable in relation to the number of such persons in the community. The record indicates that 42 of the 200 members of the venire[11]—or 21 percent—were Black. (R. 696-725). Including a passing reference to the 2020 United States Census without any evidentiary support, Appellant conceded during pretrial arguments that "the 200 that were

[11] A venire is "[a] panel of persons selected for jury duty and from among whom the jurors are to be chosen." *Black's Law Dictionary*, *venire* (12th ed. 2024).

summoned is not very different [or] of any significan[t difference] from the population of the county." (R. 53). Appellant's concern related entirely to the jurors who appeared in court and the number of Black individuals who were "lost" in the "whittling-down process." (R. 53). Therefore, because Appellant conceded that the venire from which the jury was chosen adequately represented the population of Abbeville County, Appellant failed to show that the representation of Black individuals in the venire was not fair and reasonable in relation to the community.

Second, assuming that Appellant can show both steps 1 and 2, he has failed to show that Black individuals were systematically excluded during the jury selection process. In *Duren*, women were routinely granted exemptions from being included in jury venires upon request both before and after jury summonses were issued and, therefore, were underrepresented in jury venires. *Duren v. Missouri*, 439 U.S. 357 (1979). There, women accounted for 54 percent of the population and only 14.5 percent of the challenged jury pool. The United States Supreme Court held the "resulting disproportionate exclusion of women from the jury wheel and at the venire stage was quite obvious due to the *system* by which juries are selected." *Id.* at 367 (emphasis in original). Here, Appellant has not shown any system of exclusion from the jury venire specifically or in the jury selection process generally.

Even construing Appellant's argument that 29 of the 42 Black individuals summoned did not appear in court as an argument of systematic exclusion, the clerk stated that when potential jurors are summoned and do not respond, someone from the Clerk's Office would go to the Abbeville County administration building and have the Auditor's Office check for the most up-to-date addresses. (R. 58). The clerk said that "if [the Auditor's Office does not] have anything other than what we do, we run it back." (R. 58). Nothing in the record indicates that the process for selecting the venire or attempting to serve jury summonses systematically excluded Black

individuals, as opposed to the case with women in *Duren*. This was explicitly reflected in the trial court's ruling, where the court stated, "And obviously, it's always best to have as wide a cross section of the community if at all possible. In this case[,] I'm not finding that there was anything nefarious with the selection of the jury by the clerk, or in the way it was generated." (R. 75). Therefore, the trial court did not abuse its discretion in denying Appellant's motion for a continuance because Appellant failed to make a prima facie showing that the fair cross section requirement of the Sixth Amendment had been violated.

**II. The trial court properly denied Appellant's *Batson* motion after the State appropriately struck a potential alternate juror with a prior conviction similar to the crime charged against Appellant where the State, after discussion with the trial court, relented and agreed to allow the potential alternate juror to be seated.**

Initially, this issue is moot because the State agreed to allow the potential alternate juror—Juror 191—to be seated, which thereby achieved the purpose of Appellant's *Batson* motion without need for the trial court to rule on the motion. *See State v. Green*, 337 S.C. 67, 71, 522 S.E.2d 602, 604 (Ct. App. 1999) ("When judgment on an issue can have no practical effect upon an existing case or controversy, the issue is moot."); *id.* ("A criminal case is moot only if there is no possibility that any legal consequence will be imposed." (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968))). While the trial court did ultimately rule on Appellant's motion, it did so after it excused Juror 191 for his previously undisclosed inability to hear. (R. 82-83).

However, should the Court find this issue is not moot, the trial court properly denied Appellant's *Batson* motion. In *State v. Giles*, the South Carolina Supreme Court explained the proper procedure for a *Batson* hearing:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at

> which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). The opponent of the strike must show the race neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly situated member of another race. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999). "Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *Edwards*, 384 S.C. at 509, 682 S.E.2d at 822.

In *State v. Stewart*, the State charged the defendant with the murder of his affair partner, and during the jury selection process, the defendant made a *Batson* motion due to the State striking four Black potential jurors. 413 S.C. 308, 313-15, 775 S.E.2d 416, 418-19 (Ct. App. 2015). The State explained that it dismissed the four Black potential jurors for, respectfully, (1) prior domestic issues with his spouse; (2) prior arrest for possession of cocaine that was not prosecuted; (3) unemployed and knew the victim; and (4) being late and appearing disinterested. *Id.* at 315, 775 S.E.2d at 419.

The defendant in *Stewart* argued that the State allowed two similarly situated White jurors to be seated—one with a nolle prossed charge for assault and battery with intent to kill and one with either an arrest or conviction for simple assault and bad checks. *Id.* The trial court determined that the State expressed race neutral reasons for striking the two Black potential jurors with criminal histories because case law supported dismissing jurors with previous negative relationships with law enforcement. *Id.* at 317, 775 S.E.2d at 421. However, this Court reversed

the trial court, holding that the State negated the race neutral reason by seating similarly situated White jurors. *Id.*

Here, Appellant asserted that the State struck Juror 191 on the basis of race, as he was the first and only Black potential juror presented. (R. 52). The State offered a racially neutral reason for striking Juror 191, which was that Juror 191 had two convictions for simple assault and battery. (R. 59, 66). The State asserted that simple assault and battery is a crime similar to ABHAN, for which Appellant was standing trial. (R. 66).

In this case, unlike in *Stewart*, 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. (R. 60, 64, 66-67). In *Stewart*, two of the Black potential witnesses dismissed by the State had assault and battery arrests or charges, as did two of the White jurors seated by the State. This Court determined in *Stewart* that the Black potential jurors and the White seated jurors were similarly situated because the State's reasoning for striking the Black potential jurors applied just as well to otherwise similarly situated non-Black jurors. *Stewart*, 413 S.C. at 317, 775 at 421. This reasoning does not apply in this case because the State's expressed reasoning for striking Juror 191—his simple assault and battery conviction was similar to Appellant's ABHAN charge—does not apply to the two White jurors seated by the State. Disorderly conduct and check fraud are not similar to ABHAN. Therefore, the two White jurors with criminal records were not similarly situated to Juror 191.

Thus, the trial court did not err in denying Appellant's *Batson* motion, despite not needing to rule on it due to Juror 191's undisclosed inability to hear, because the State articulated a race

neutral reason for striking the only Black potential juror presented and Appellant failed to show that the reason was mere pretext.

## III. The trial court properly exercised its discretion in excusing an alternate juror before trial upon learning that the alternate juror had hearing problems and that the alternate juror only heard some of the questions posed to potential jurors during voir dire.

Section 14-7-810 of the South Carolina Code sets forth: "[N]o person is qualified to serve as a juror in any court in this State if: . . . (3) He is incapable by reason of . . . physical infirmities to render efficient jury service." Section 14-7-810 goes on to state, "The trial judge must make the final determination of the qualifications of a juror as set out in this section and his decision must not be disturbed on appeal."

Here, when the trial court went to inform Juror 191 that he would be seated as the second alternate juror after the State conceded to have him seated, Juror 191 informed the trial court that he had trouble hearing due to a "growth in the ear." (R. 78-79). The trial court determined that Juror 191 was "extremely hard of hearing" and "darn close" to being "deaf as a fence post." (R. 82-83). Further, Juror 191 only heard some of the voir dire, and the trial court noted that not hearing all of voir dire was problematic. (R. 78-79, 117). *See Skilling v. United States*, 561 U.S. 358, 386-87 (2010) ("In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service.").

The trial court stated that some judges had previously made accommodations for individuals who were hard of hearing but determined that such accommodation was not feasible for Juror 191. (R. 82). When Appellant argued that the trial court had not entertained such accommodation, the trial court responded that even if Juror 191 could be accommodated, the issue of Juror 191 not hearing all of the voir dire remained problematic. (R. 118-119).

Therefore, because the trial court determined that Juror 191 was unable to render efficient jury service due to his inability to hear, which impaired his ability to meaningfully participate in voir dire, the trial court properly exercised its discretion in finding Juror 191 not qualified to sit on the jury in this case.

## IV. The trial court properly denied Appellant's mistrial motion after the trial court mentioned "true facts" in its opening remarks to the jury because a view of the entirety of the trial court's opening remarks and the entire trial record indicate that Appellant suffered no prejudice sufficient to warrant reversal, especially considering the curative instruction given by the trial court at Appellant's request.

The trial court made two references to "true facts" in its opening remarks to the jury. (R. 133-134). "Because you're the sole judges of the facts, I don't want any comment that I make about the testimony or the evidence to have any effect on what you ultimately find the true facts to be." (R. 133). "Now, in determining what the true facts are, you'll have to decide whether or not the testimony of the witnesses is believable or not." (R. 134).

In *State v. Beaty*, the South Carolina Supreme Court determined that a trial court's use of phrases such as "search[ing] for the truth," "true facts," and "just verdict" in a trial court's opening remarks "could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best served its perception of justice." 423 S.C. 26, 33-34, 813 S.E.2d 502, 505-06 (2018). The trial court in *Beaty* denied the defendant's request for a curative instruction because his opening comments were not jury instructions. *Id.* at 33, 813 S.E.2d at 506. The Supreme Court determined, based on the trial court's entire opening remarks and the entire record on appeal, that Appellant failed to show prejudice sufficient to warrant reversal. *Id.* at 34, 813 S.E.2d at 506.

Here, much like in *Beaty*, the trial court's references to "true facts" were (1) a mere statement to the jury; (2) not linked to a reasonable doubt charge; and (3) not linked to a

circumstantial evidence charge. *Id.* Additionally, much like in *Beaty*, a review of the trial court's full opening remarks and the entire trial record, which is replete with references and instructions regarding the beyond a reasonable doubt standard after the trial court's opening remarks, reveals that Appellant failed to show he suffered prejudice from the trial court's "true facts" references that would warrant a reversal. *Id.* (R. 135-136, 140-148, 589-590, 603, 630-633, 639-649, 652-653). These references and instructions on the reasonable doubt standard entirely negate Appellant's argument that the jury "likely viewed their role as determining the 'true' charge rather than resolving doubt in favor of" Appellant. (Initial App. Br. 16). Instead, the jury heard the trial court instruct them *not* to consider its remarks on "true facts" and then repeatedly heard that the State had to prove Appellant's guilt, as well as Travis's guilt, beyond a reasonable doubt.

Moreover, the trial court gave a curative instruction *at Appellant's request*. (R. 133-134, 160-161). *See State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("Generally, a curative instruction is deemed to have cured any alleged error." (quoting *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005))). The extensive nature of the curative instruction, in addition to subsequent reiterations of the reasonable doubt standard throughout the record, cured any possible error and eliminated any conceivable prejudice. *See State v. Patterson*, 337 S.C. 215, 227, 552 S.E.2d 845, 851 (Ct. App. 1999) ("The extensive curative instruction given by the trial [court] cured any possible error and eliminated any conceivable prejudice.").

Therefore, because a trial court should exhaust other methods to cure possible prejudice before granting a mistrial and because the curative instruction in this case is deemed to have cured any error from the trial court's references to "true facts," the trial court did not abuse its discretion in denying Appellant's mistrial motion. *See White*, 371 S.C. at 444, 639 S.E.2d at 162 ("The trial [court] should first exhaust all other methods to cure possible prejudice before aborting a trial.");

*id.* at 445, 639 S.E.2d at 165 ("If the trial [court] sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction."); *State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) ("The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.").

## V. The trial court properly denied Appellant's request for a jury charge pursuant to *State v. King* because the trial court gave an appropriate and sufficient reasonable doubt jury charge.

In *Brightman v. State*, the South Carolina Supreme Court revisited the "continued propriety of the *King* charge." 336 S.C. 348, 351-52, 520 S.E.2d 614, 615-16 (1999). In doing so, the Supreme Court noted that in *King*, the trial court's jury charge implied that the defendant was guilty of murder while eliminating any potential for the jury to convict of the lesser included offense that was also charged. *Id.* The Supreme Court's holding in *King* was:

> The charge did not clearly and correctly instruct the jury, that if they had a reasonable doubt as to whether the appellant was guilty of murder or manslaughter, it was their duty to resolve the doubt in his favor, and find him guilty of the lesser offense. It is plain that the rule of reasonable doubt requires that a defendant charged with murder, be extended the benefit of that doubt, when it is questionable that the crime committed by him was murder or manslaughter.

*State v. King*, 158 S.C. 251, 155 S.E. 409, 426 (1930).

In *Brightman*, after discussing the holding from *King*, the Supreme Court recalled its notation in *Gilmore v. State* that the language of the *King* opinion was based on the 1930 definition of "reasonable doubt," which had gone through "significant modification and revision" in the decades since 1930. *Brightman*, 336 S.C. at 352, 520 S.E.2d at 616; *see also Victor v. Nebraska*, 511 U.S. 1 (1994); *Gilmore v. State*, 314 S.C. 453, 456 n.1, 445 S.E.2d 454, 456 n.1 (1994) (noting that "an argument could now be made that the *King* charge is unnecessary and archaic"). The

Supreme Court then reiterated that it had adopted the definition of reasonable doubt as set forth by Justice Ginsburg in *Victor v. Nebraska*, and overruled *King*. *Brightman*, 336 S.C. at 352, 520 S.E.2d at 616. The Supreme Court expressly stated:

> The *King* charge is unnecessary in light of the modern general reasonable doubt charge which instructs the jury to resolve doubts in favor of the defendant.

*Id.* Additionally, the Supreme Court, in a footnote, overruled a set of cases "to the extent that they hold it is reversable error to fail to give the *King* charge when there is evidence to support a charge on a lesser included offense." *Id.* at 325 n.5, 520 S.E.2d at 616 n.5.

Here, Appellant requested a *King* charge when the trial court determined that it would charge the jury on ABHAN as well as the lesser included offenses of first-degree assault and battery and second-degree assault and battery. (R. 574). The trial court denied Appellant's request, finding that a reasonable doubt jury charge would be sufficient. (R. 578).

Based on *Brightman*, the trial court properly determined that it did not need to give a *King* charge because its reasonable doubt jury charge was sufficient. *See Brightman*, 336 S.C. at 325, 520 S.E.2d at 616 ("The *King* charge is unnecessary in light of the modern general reasonable doubt charge which instructs the jury to resolve doubts in favor of the defendant."). To the extent that the trial court did err in denying Appellant's request for a *King* charge, the Supreme Court has confirmed that the failure to give a *King* charge is not reversible error. *Id.* at 325 n.5, 520 S.E.2d at 616 n.5 (overruling a set of cases "to the extent that they hold it is reversable error to fail to give the *King* charge when there is evidence to support a charge on a lesser included offense.").

## VI. The trial court properly denied Appellant's motion to restructure the verdict form because the verdict form that was used allowed the jury to consider the indicted offense as well as lesser included offenses.

Initially, Appellant abandoned this issue on appeal. *See State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Here, the only legal authority Appellant cited in support of his argument that the verdict form utilized by the trial court in some way prejudiced him is a civil case[12] concerning a special verdict form permitted under Rule 49 of the South Carolina Rules of Civil Procedure. Therefore, because the only authority cited by Appellant is a civil case interpreting rules of civil procedure which are not generally applicable in criminal matters, Appellant's *only* citation does not support his argument regarding a verdict form in a criminal matter.

Should the court find this issue is not abandoned on appeal, the trial court properly determined that the verdict form was appropriate and allowed proper consideration of lesser included offenses. By definition, a greater offense includes all elements of lesser included offenses. *See State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011) ("A [lesser included] offense is one whose elements are wholly contained within the crime charged.").

In this case, Appellant agreed that first-degree and second-degree assault and battery are lesser included offenses of ABHAN. (R. 584, 644-646). Therefore, by definition, when the jury considered whether Appellant committed ABHAN, it necessarily also considered whether Appellant committed the lesser included offenses of first- and second-degree assault and battery. Additionally, the trial court charged the jury to resolve all doubts in favor of Appellant. (R.

---

[12] *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 300-01, 641 S.E.2d 903, 906-07 (2007) (discussing the use of a special verdict form as provided in Rule 49 of the South Carolina Rules of Civil Procedure).

652-653). Thus, if the jury believed that each and every element of ABHAN was not proven by the State beyond a reasonable doubt, only then could the jury separately consider whether Appellant was guilty of the lesser included offense of first-degree assault and battery.

To the extent that Appellant argues that the jury form did not allow the jury to consider the entirety of the trial court's charge, the State notes that the jury charges relating to the lesser included charges of first- and second-degree assault and battery were conditional on the jury finding that the State failed to prove ABHAN beyond a reasonable doubt. (R. 659-660). Therefore, these two jury charges did not need to be specifically considered separately from ABHAN unless and until the jury specifically found that the State failed to prove ABHAN beyond a reasonable doubt.

## VII. The trial court properly denied Appellant's motion to quash the State's Amended Notice of Intent to Seek Life without Parole because Appellant's prior convictions qualified as two serious offenses for the purposes of the Three Strikes Rule despite Appellant's mistaken belief that marijuana has been "decriminalized" in South Carolina.

Initially, South Carolina has not "decriminalized" marijuana. *See* S.C. Code Ann. § 44-53-190(D)(11) (stating that marijuana is a controlled substance). Section 44-53-470 of the South Carolina Code defines "[s]econd or subsequent offense" in the context of offenses involving controlled substances. In this section, the General Assembly set forth that a prior marijuana offense would not count as a first offense for a subsequent controlled substance offense when the subsequent offense related to a controlled substance other than marijuana. *See* S.C. Code Ann. § 44-53-470(A)(3) & (4). However, a prior trafficking in marijuana violation would count as a first offense for all subsequent controlled substances offenses. *See* S.C. Code Ann. § 44-53-470(B). The General Assembly specifically set forth that a prior marijuana offense does enhance a subsequent marijuana offense to a second or subsequent offense. *See* S.C. Code Ann. § 44-53-470(A)(1) & (2). Ultimately, however, section 44-53-470 does not factor into an analysis

of whether prior controlled substance violations are considered strikes under the Three Strikes Rule.

The Three Strikes Rule specifically states which prior offenses are considered serious and most serious offenses, and thus considered strikes for the purpose of the rule. *See generally* S.C. Code Ann. § 17-25-45. Both of Appellant's prior convictions—one for trafficking crack cocaine and one for distribution of marijuana within half a mile of a school or playground—are listed as serious offenses under the Three Strikes Rule. *See* S.C. Code Ann. § 17-25-45(C)(2)(b) (defining "Trafficking in controlled substances" and "Distribut[ion of] controlled substances within proximity of a school" as serious offenses); S.C. Code Ann. § 44-53-190(D)(11) (defining marijuana as a controlled substance).

Therefore, after the jury found Appellant guilty of ABHAN, which itself is listed as a serious offense under the Three Strikes Rule, the trial court was statutorily required to sentence Appellant to LWOP. *See* S.C. Code Ann. § 17-25-45(B) ("[U]pon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of life imprisonment without the possibility of parole if that person has two or more prior convictions for: (1) a serious offense . . . ."); S.C. Code Ann. § 17-25-45(C)(2)(b) (defining ABHAN as a serious offense).

To the extent that Appellant argues that the trial court erred in refusing to find that the penalty portion of the Three Strikes Rule, and his LWOP sentence imposed pursuant to the rule, violates the Eighth Amendment, Appellant has failed to show that the Three Strikes Rule is repugnant to the Constitution beyond a reasonable doubt. *See Joytime Distrib. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 651 (1999) (stating that appellate courts have a very limited scope of review in cases involving a constitutional challenge to a statute); *Davis v. County of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996) (holding that all statutes are presumed

constitutional and will, if possible, be construed so as to render them valid); *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995) (stating that a legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt).

The Eighth Amendment to the United States Constitution, which applies to the states by virtue of the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment prohibits not only barbaric punishments but also sentences that are not proportionate to the crime. *Solem v. Helm*, 463 U.S. 277, 284 (1983). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

"[I]n analyzing proportionality under the Eight[h] 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." *State v. Harrison*, 402 S.C. 288, 299–300, 741 S.E.2d 727, 733 (2013).

Here, Appellant's only argument that his LWOP sentence under the Three Strike Rule is not proportionate to his ABHAN conviction is that his prior conviction for distribution of marijuana within half a mile of a school should not be counted as a strike because South Carolina had "decriminalized" marijuana. (Initial App. Br. 20). *See State v. Williams*, 380 S.C. 336, 349, 669 S.E.2d 640, 647 (Ct. App. 2008) ("Under recidivist sentencing schemes, the enhanced punishment imposed for a present offense is not to be viewed as an additional penalty for the earlier

crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.").

As discussed above, this argument is entirely without merit, and marijuana remains illegal in South Carolina. *See* S.C. Code Ann. § 44-53-190(D)(11) (stating that marijuana is a controlled substance). Moreover, the South Carolina courts have "determined stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment." *Williams*, 380 S.C. at 347-48, 669 S.E.2d at 646. "[T]he United States Supreme Court has also held a state is justified in punishing a recidivist more severely than it does a first offender." *Id.* at 348, 669 S.E.2d at 647.

Appellant's remaining arguments all fall into an interjurisdictional analysis, which is only appropriate when the comparison between a sentence and the crime committed gives rise to an inference of gross disproportionality, which is far from the case here. *See Harrison*, 402 S.C. at 300, 741 S.E.2d at 733 (stating that a comparative interjurisdictional analysis is only appropriate after a court determines that an inference of gross disproportionality exists and courts should not use an interjurisdictional analysis to "develop an inference when one did not initially exist").

Therefore, the trial court did not abuse its discretion in denying Appellant's request to quash the State's Amended Notice because Appellant's LWOP sentence pursuant to the Three Strikes Rule does not raise an inference of gross disproportionality to his conviction for ABHAN given his prior convictions for distribution of crack cocaine and distribution of marijuana within half a mile of a school.

[*conclusion and signature block on following page*]

## CONCLUSION

Based on the foregoing, the State requests that this Court affirm Appellant's conviction for assault and battery of a high and aggravated nature, as well as his associated sentence.

ALAN WILSON
Attorney General

BRIAN H. GIBBS
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

By: 
Brian H. Gibbs
S.C. Bar No. 104137

**Attorneys for Respondent**

January 29, 2025
Columbia, South Carolina

RECEIVED
Jan 29 2025
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.

---

**PROOF OF SERVICE**

---

I, Grace Sommer, certify that I have served this Final Brief of Respondent on E. Charles Grose, Jr., Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

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

This 29th day of January, 2025.

Grace Sommer
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

## Grace Sommer

**From:** Grace Sommer
**Sent:** Wednesday, January 29, 2025 4:43 PM
**To:** charles@groselawfirm.com
**Cc:** Brian Gibbs
**Subject:** The State v. Kendrick Montrez Lee (2023-001843)
**Attachments:** LEE Kendrick - FBOR.pdf

Good Afternoon Mr. Grose,

Attached please find a Final Brief of Respondent in The State v. Kendrick Montrez Lee (2023-001843). This Brief will be filed today with the South Carolina Court of Appeals via the AIS OneDrive System.

If you will, please confirm receipt of this email.

Thank you!

**Grace Sommer**, Legal Assistant
South Carolina Attorney General's Office
Criminal Appeals | Office 803-734-3835 | gracesommer@scag.gov
P.O. Box 11549 | Columbia, SC 29211
scag.gov