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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Letitia Verdin, Circuit Court Judge

Appellate Case No. 2016-002335

The State, ... Respondent,

v.

Joseph Austin Carpenter, ... Appellant.

FINAL BRIEF OF APPELLANT

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Counsel for Appellant

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STATEMENT OF THE ISSUES

1. Did the Court commit reversible err in admitting evidence as to the Defendant's religious beliefs?

2. Did the Court commit reversible error in submitting written jury instructions to the jury over the objection of the defendant.

STATEMENT OF THE CASE

The Defendant was indicted for the offenses of attempted murder and criminal domestic violence of a high and aggravated nature. The Defendant proceeded to a jury trial on November 8 through November 9, 2016, the Hon. Letitia H. Verdin presiding. At trial the Appellant was represented by Symmes Culbertson of Greenville. The State was represented by Judy M. Munson, Office of the Solicitor for the Thirteenth Judicial Circuit. The petit jury returned a verdict of not guilty on the CDVHAN and guilty on the charge of attempted murder. The Appellant was sentenced to eight years incarceration in the South Carolina Department of Corrections. A timely notice of appeal was filed and the Office of Appellate Defense engaged in the representation of the Appellant. J. Falkner Wilkes substituted as counsel for the Appellant on appeal. J. Benjamin Aplin, Office of the Attorney General represents the State on appeal.

ARGUMENT

I. STATE IMPROPERLY MADE ISSUE OF THE DEFENDANT'S RELIGIOUS BELIEFS.

In this case the State made an issue with the religious beliefs of the Defendant who was Cherokee Indian. The defense objected when the state's witness Phyllis Sanders began to testify about statements between the deceased and the Defendant. The judge sent the jury out and allowed the State to proffer Sander's testimony. R. p. 145. The State's witness, Sanders, testified that the Defendant said something to the deceased that she (Sanders) did not understand. R. p. 146. Although Sanders could not understand the what the Defendant said she claimed that they were some sort of curse. R. 145-150. The defense objected initially on the ground of hearsay, and added an objection based that the testimony constituted an attack on the Defendant's character. The testimony was reviewed outside of the presence of the jury, after which the court overruled the objection and brought the jury back in. R. 150. Sander's testimony was then immediately admitted upon the jury's return. R. 151-152.

On cross-examination of the Defendant the solicitor inquired as to aspects of the Defendant's religious beliefs asking him whether he knew who Tsul Kalu was. R. 253. Defendant testified that Tsul Kalu was the Cherokee lord of the hunt. R. 253. At this point there was no doubt that the solicitor knew that she was questioning the defendant about his religious beliefs. The defense objected. R. 253. Immediately, and without discussion, the court ruled that it would allow the solicitor to continue into what was clearly the Defendant's religious beliefs. R. 253-254. The solicitor went on to have the Defendant explain his sacred beliefs, thus putting those belief's unnecessarily at issue. R. 254. Although professing not to be asking questions

about the defendant's religion, the solicitor continued, asking the Defendant if he thought the mask of Tsul Kalu, who the Cherokee believed to be sacred, looked scarey to him. R. 255. Although the Defendant testified that the Cherokee masks are considered sacred, the solicitor continued asking questions about them, eliciting the testimony that the deceased (who was Christian) had expressed his belief that the masks were idols, sacrilegious, and a form of sorcery. R. 255. Although the solicitor stated during the line of questioning that she wasn't "attacking or downgrading any of [his] religious beliefs" the solicitor asked: "Okay. So you didn't go to church with Joanie or Mr. Sanders or - - whatever they did go to church, you didn't go with them?" R. 256, l. 2-4; R. 256-257. In its case in chief the solicitor elicited testimony from Sanders that the deceased had told the Defendant that "I have God on my side." R. 146. In its case the state unnecessarily elicited testimony that would place the Defendant's religious beliefs in sharp contrast with that of the deceased, who was Christian.

The solicitor asked the Defendant what he said in the Cherokee language to the deceased:

Question: So what did you say to him in that --

Answer: I basically asked that what affliction or confusion had come over him to be dispersed.

R. p. 255.

The solicitor shortly thereafter characterized it in Christian terms: "And it's your testimony that you were sort of, for lack of a better term, praying for him?" R. p. 258, l. 19-20. Then Showing the Defendant a particular mask in the courtroom, the solicitor continued to refer to the Tsul Kalu mask. R. p. 257-258. The defense objected, as the mask was never identified by any of the state's witnesses, nor was it in evidence. R. p. 256-257. The Defendant testified that

the mask he was shown by the solicitor was not the Tsul Kalu mask, and no mask was ever admitted into evidence. R. p. 257-258. Then, later on in the state's questioning of the Defendant the solicitor just outright asks: "Okay. You don't like all that church stuff, do you?" R. p. 264, 8-10.

During closing the solicitor continued to place undue focus on the Defendant's religious beliefs. Even though it had not been introduced into evidence, the solicitor argued that the jury should infer guilt simply by the Defendant's response when she asked him to identify the mask:

> *Solicitor*: Mr. Carpenter did not want to admit that what I took up there to him was the mask that he used to damage the property in front of Joanie, scaring her further. But did you notice, when I put it up there he kept his hands to himself and just looked over. He wouldn't even touch that thing.

R. p. 288, l. 10-16.

The state then went on to ridicule the Defendant's beliefs: "The mask and the trying to pray over him or whatever he was trying to do" which the solicitor characterized as "ridiculous". R. p. 289, l. 15-17.

Here the solicitor continuously delved into the Defendant's religious beliefs as a Cherokee Indian, which were pitted against those of the deceased who had God on his side. Even if some of the testimony were relevant, the magnitude and method of its use overall was highly prejudicial. "Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

The repeated references to the Defendant's religious beliefs were an attack on the Defendant's character and constituted improper impeachment. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced. Rule 610, SCRE, *Religious Beliefs or Opinions*. South Carolina's rule tracks the federal rule: "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility." Fed. R. Evid. 610. The purpose of the federal rule is to preclude the admission of evidence of religious beliefs of witness for purpose of showing that his credibility is impaired as result of those beliefs is to guard against prejudice which may result from disclosure of a witness' faith. *See* U.S.App.D.C. 349, U.S. v. Sampol, C.A.D.C.1980, 636 F.2d 621, 204. Most importantly in the present case, the scope of prohibition includes unconventional or unusual religions. *See* U.S.App.D.C. 349, U.S. v. Sampol, C.A.D.C.1980, 636 F.2d 621, 204.

In a murder prosecution, the court of appeals held that the federal district court correctly refused to permit defense counsel to put before the jury the religious affiliation and beliefs of defendant's alibi witness. There the court held that testimony concerning a witness' religious affiliation and beliefs is not admissible when introduced for the purpose of enhancing the witness' credibility. Government of Virgin Islands v. Petersen, C.A.3 (Virgin Islands) 1977, 553 F.2d 324. Similarly, in an action to recover proceeds of fire policy following rejection of a claim, insurers should not have been permitted to impeach insureds' accountant about his religious

affiliation and that of his clients. Malek v. Federal Ins. Co., C.A.2 (N.Y.) 1993, 994 F.2d 49. Similarly, the testimony of government witness who was financial analyst involved in securities fraud conspiracy concerning his post-arrest "religious thoughts" regarding messianic thought and worshipping money and false gods or false messiahs was not probative of bias and, thus, testimony was inadmissible in securities fraud prosecution under rule governing evidence of religious beliefs or opinions of witness. See U.S. v. Teicher, C.A.2 (N.Y.) 1993, 987 F.2d 112, *certiorari denied* 114 S.Ct. 467, 510 U.S. 976, 126 L.Ed.2d 419.

The purpose of the rule precluding the admission of evidence of religious beliefs for the purpose of attacking credibility as result of those beliefs, is to guard against prejudice which may result from disclosure of a witness' faith. *See* Fed.Rules Evid. Rule 610, 28 U.S.C.A.; United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980). Here, as in Sampol, the fact that the Defendant professed adherence to a religion which is not commonly shared does not prevent the application of the rule. *See* United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980).

Evidence of religious belief is not relevant as a matter of law: Even though testimony that persons of defendant's religious affiliation believed in nonviolence and that defendant held that belief, if credible, would have been logically probative of proposition that defendant acted in conformity with his beliefs on night of alleged homicide and would thus be circumstantial evidence that defendant was not the killer, such testimony was not legally relevant and was, therefore, properly excluded in view of fact that person may or may not act in accordance with a professed belief. See Federal Rules of Evidence, Rules 404(a)(1), 405, 405(a), 28 U.S.C.A. Gov't of Virgin Islands v. Petersen, 553 F.2d 324 (3d Cir. 1977).

In the present case the state introduced evidence as to the Defendant's religious beliefs,

making them a recurring theme in the case which it concluded with closing argument that ridiculed the Defendant's actions and beliefs. The harm in raising such religious prejudice is clear and constitutes reversible error. "We find the solicitor's statements improperly evoked religious prejudice and, thus, served only to inflame the passions and prejudice of the jury. *Cf.* Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) (holding "vicious, inflammatory" closing argument that evoked racial prejudice was a flagrant case warranting a new trial). Vasquez v. State, 388 S.C. 447, 460, 698 S.E.2d 561, 567 (2010). The conviction of the Defendant should therefore be reversed.

II. THE COURT ERRED IN SENDING THE WRITTEN JURY CHARGE TO THE JURY OVER THE OBJECTION OF THE DEFENDANT.

After the court charged the jury at the end of the trial the judge inquired whether either side would object to sending a written copy of the charge back with the jury for use in deliberations. R. p. 316. The defense objected and both sides agreed it should not be given to the jury during deliberations, as it would lead to the jury's confusion. R. p. 316-317. Shortly after deliberations began the jury indicated that it had question on the law. R. p. 320-321. The defense requested that the judge recharge and objected to sending the written charge back to the jury room without the judge recharging the jury. R. p. 321. Over the defense objection, and without the solicitor having clearly changed position, the court refused to recharge the jury, sending them back into deliberations with written instructions. R. p. 321-330; R. p. 344. The defense again objected, adding that variations in the verbal and the written charge would only further confuse the jury. R. p. 325-327. Written charges were sent back with the jury in deliberations. The jury

subsequently returned a verdict of not guilty on the charge of CDVHAN, and guilty on the charge of attempted murder. The defense moved for a mistrial based on the confusing effect of submission of the written instructions evident in the split verdicts. R. p. 329. That motion was denied. R. p. 329.

"A trial court may, in its discretion, submit its instructions on the law to the jury in writing." State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). A trial court should use this practice sparingly and only when it will aid the jury and not prejudice the defendant. State v. Covert, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009). The supreme court's decision in State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), is premised on the requirement that a trial court must consider the individual circumstances of each case when determining whether to send a written copy of the jury charge into the jury room. 373 S.C. at 129, 644 S.E.2d at 697 (stating "submission of written instructions to the jury is not appropriate for every case"). *See* State v. Lemire, 406 S.C. 558, 574, 753 S.E.2d 247, 256 (Ct. App. 2013), Lockey, J., *Dissenting*.

In State v. Lemire this court held that the trial court could either recite the requested portions to the jury or send a written copy of the entire charge to the jury. However, In Lemire the defendant, unlike the present case, did not object and specifically request that the judge recharge the jury. Specifically, the court in Lemire found it important that "Lemire never advocated that the trial court should reinstruct the jury verbally on the requested written statutes. Thus, the court did not abuse its discretion when it simply chose the other valid alternative as permitted by Covert. " State v. Lemire, 406 S.C. 558, 566, 753 S.E.2d 247, 252 (Ct. App. 2013). Here, the defense expressly objected and specifically requested that the court recharge the jury verbally. Here the trial court failed to exercise restraint in "employing this practice", especially

considering the trial court had refused to re-charge the jurors orally on the relevant statutes when they made their first inquiry during the deliberation. *See* State v. Lemire, 406 S.C. 558, 566, 753 S.E.2d 247, 252 (Ct. App. 2013). The prejudice of the confusing jury instruction is evident in the split verdicts in this case. As a result, the Defendant's conviction should be reversed.

CONCLUSION

Based on the foregoing the conviction and sentence of the Appellant should be reversed and set aside.

Respectfully submitted,

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May 25, 2018.

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CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant complies with Rule 211(b). I further certify that the Brief of Appellant has been redacted in compliance with the Supreme Court's Order on redaction of private information and personal identifiers.

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