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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Kershaw County
Casey Manning, Trial Judge
G. Thomas Cooper, Jr., PCR Judge

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MITCHELL LOGAN HINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE NO. 2018-001643

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# BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

DANIELLE DIXON
Assistant Attorney General
S.C. Bar No. 73999

Post Office Box 11549
Columbia, SC 29211
803-734-2875

ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## STATEMENT OF ISSUE ON APPEAL

### Petitioner's Issue on Appeal

Did the trial judge err in refusing to conduct a hearing on Petitioner's motion for a new trial based on an allegation that the jury foreman failed to disclose his relationship with both the victim and Petitioner?

### Respondent's Counterstatement of Issue on Appeal

The trial court did not abuse its discretion in denying without a hearing Petitioner's motion for a new trial based on his allegation that the jury foreman failed to disclose his relationship with Petitioner and the victim when Petitioner waived this issue by not bringing it to the court's attention until after trial, and Petitioner did not submit sufficient evidence to warrant an evidentiary hearing.

## STATEMENT OF THE CASE

Petitioner Mitchell Logan Hinson is presently confined in the South Carolina Department of Corrections serving a fifteen-year sentence. In January of 2011, he was arrested after a home video surveillance captured him entering the home of his schoolmate and removing several items. In March of 2011, the Kershaw County Grand Jury indicted Petitioner for first-degree burglary. Petitioner proceeded to a jury trial before the Honorable L. Casey Manning on June 27-29, 2011. Public Defender Cornelius J. Riley represented Petitioner and Assistant Solicitor Ron Moak prosecuted the case. The jury convicted Petitioner as indicted, and Petitioner was sentenced on June 29, 2011.

On July 8, 2011, trial counsel filed a motion to reconsider the sentence or, in the alternative, a motion for a new trial. On November 3, 2015, Petitioner filed an application for post-conviction relief (PCR). Because his post-trial motions were still pending, the State moved to summarily dismiss his PCR application without prejudice. On January 12, 2016, the Honorable Alison Renee Lee dismissed Petitioner's first PCR application without prejudice.

On April 4, 2016, the trial court denied Petitioner's post-trial motions. Petitioner did not appeal. Petitioner commenced this current PCR action on November 4, 2016. On July 19, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Kristy Goldberg represented Petitioner and Assistant Attorney General Jessica E. Kinard represented the State. On April 12, 2018, Judge Cooper issued an order denying relief and dismissing the application. Petitioner filed a motion to alter or amend, which was denied on September 5, 2018.

Petitioner filed a notice of intent to appeal on September 10, 2018. On April 26, 2019, he filed a petition for writ of certiorari. The South Carolina Supreme Court transferred this case to the South Carolina Court of Appeals on September 24, 2019, pursuant to Rule 243(l), SCACR.

On December 10, 2021, the South Carolina Court of Appeals granted the petition for writ of certiorari as to issues three and four. In issue four, Petitioner alleged the PCR court erred not granting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

In a motion dated April 5, 2022, Respondent conceded the PCR court erred in finding Petitioner did not knowingly and intelligently waive his right to a direct appeal and moved to hold the time for filing Respondent's brief in abeyance until Petitioner filed his White v. State brief. On April 19, 2022, this Court issued an order denying the abeyance motion and directing the parties to file briefs pursuant to White v. State.

## STANDARD OF REVIEW

"A denial of a new trial [motion] based on alleged jury misconduct is reviewed for an abuse of discretion." State v. Galbreath, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct. App. 2004). "Likewise, where the motion is based upon allegations that a juror gave misleading or incomplete answers during voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion." Id.

## ARGUMENT

**The trial court did not abuse its discretion in denying without a hearing Petitioner's motion for a new trial based on his allegation that the jury foreman failed to disclose his relationship with Petitioner and the victim when Petitioner waived this issue by not bringing it to the court's attention until after trial, and Petitioner did not submit sufficient evidence to warrant an evidentiary hearing.**

Petitioner argues the jury foreman intentionally concealed information during voir dire about his relationship with Petitioner and the victims, and the concealed information would have been a material factor in Petitioner's use of preemptory strikes. (App. Br. 8). He contends the trial court abused its discretion in not conducting a hearing on Petitioner's motion for a new trial. (App. Br. 8-9). However, the trial court did not abuse its discretion in denying Petitioner's motion without a hearing when Petitioner did not timely bring this issue to the trial court's attention and failed to submit sufficient evidence to support an evidentiary hearing.

A new trial based on juror concealment is required when the court finds a juror *intentionally* concealed information that would have supported a challenge for cause or been a material factor in the other party's use of peremptory challenges. State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 245 (2014). In contrast, when a juror's nondisclosure is unintentional, the moving party has a heightened burden to show the concealed information (1) indicates the juror is potentially biased and (2) would have been a material factor in the party's exercise of peremptory strikes. Id. at 329, 764 S.E.2d at 246.

"Whether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis." State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004). However, a party must raise this issue to the trial court's attention at the earliest opportunity to preserve it for appeal. See State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (finding defendant procedurally barred from raising issue of alleged juror misconduct when he did

not raise it to the trial court at the earliest opportunity and waited until after the jury verdict to bring it to the court's attention). Further, an evidentiary hearing is not required if the party neglects to submit sufficient information to warrant such a hearing. See Lynch v. Carolina Self Storage Ctrs, Inc., 409 S.C. 146, 158-61, 760 S.E.2d 111, 118-20 (Ct. App. 2014) (finding affidavit alleging juror misconduct was properly excluded under Rule 606(b), SCRE, and "without this affidavit, there was no basis for the court to conduct an evidentiary hearing").

Before trial, the court posed the following voir dire questions to the jury:

> [I]s any juror related by blood or connected by marriage or employment, or a close personal acquaintance of the Defendant, Mr. Mitchell Logan Hinson? If so, please stand.
>
> If any member of the jury panel knows Mr. Hinson or knows his family, grew up with him, went to church with him, or knows him and his family in any way[,] now stand.
>
> Any member of the jury panel who knows Mr. Hinson, please stand.

(App. 7-8). No one stood. (App. 9).

Prior to reading a list of witnesses that included the victims, the court stated, "As I read these names out, if you know anybody, in any way, shape or form, you need to stand up or raise your hand and let me know." (App. 8-9). After the court read the list, three members of the jury panel—Debbie Bowers, Linda McCaskill, and Grace Koon—indicated they knew the victims. (App. 12-14). None of them were seated on the jury.[1] (App. 29-31). Petitioner exercised ten strikes during jury selection, and one juror, Thomas Webb, was seated after Petitioner exhausted his strikes. (App. 30-31). Petitioner did not raise any issues to the trial court following voir dire questioning or the selection of the jury. (App. 28, 31). Likewise, Petitioner did not raise any issues regarding the jury at any point during trial.

[1] Koon was called but Petitioner struck her. (App. 30).

After the jury convicted Petitioner and the trial court sentenced him, Petitioner filed a motion for a new trial raising four issues. In Issue 1, Petitioner asserted:

> The jury foreman is a ROTC teacher at the defendant's most recent school. According to the defendant he and the foreman have communicated and interacted with each other many times at school, and the foreman also knows the victims and their son. The foreman failed to reveal this information during voir dire, and that omission constitutes juror misconduct prejudicial to the defendant.

(App. 205). Thereafter, the trial court issued an order denying Petitioner's motion. (App. 208).

**a. Petitioner did not timely raise this issue to the trial court.**

"[A] party must object at the first opportunity to preserve an issue for review." Aldret, 333 S.C. at 312, 509 S.E.2d 811 at 813. "A contemporaneous objection is required to preserve an issue for appellate review." Id.

In Aldret, the defendant's attorney learned prior to the jury verdict that the jury had allegedly engaged in premature deliberations. Id. After the jury returned a verdict of guilty, Aldret moved for a new trial, arguing the jury engaged in premature deliberations. Id. at 310, 509 S.E.2d at 812. Aldret submitted an affidavit of an alternate juror to support his motion, but the trial court denied it without a hearing. Id.

On appeal, the Court of Appeals remanded for an evidentiary hearing on the issue of whether the jury had engaged in premature deliberations that prejudiced Aldret. Id. However, the South Carolina Supreme Court reversed the remand, finding Aldret did not preserve the issue of juror misconduct. Id. at 312, 509 S.E.2d at 813. The Supreme Court noted, "Although Aldret's brief indicate[d] this information was made known to the trial judge and the [S]tate prior to the verdict," nothing in the transcript indicated the trial court was made aware of this allegation or asked to question the jurors about premature deliberations prior to the verdict. Id. The Supreme Court thus found Aldret was procedurally barred from raising the issue of juror misconduct in a

motion for a new trial when he failed to raise it at his first opportunity to do so. Id.

Like Aldret, Petitioner failed to raise this issue to the trial court at his first opportunity to do so. Petitioner's motion for a new trial alleges,

> The jury foreman is a ROTC teacher at the defendant's most recent school. *According to the defendant* he and the foreman have communicated and interacted with each other many times at school, and the foreman also knows the victims and their son. The foreman failed to reveal this information during voir dire, and that omission constitutes juror misconduct prejudicial to the defendant.

(App. 205, emphasis added). Notably, Petitioner's motion alleges the information came from Petitioner himself, and nothing in the motion alleges Petitioner learned this information *after* trial. The only reasonable inference to draw from Petitioner's allegation that the foreman was a teacher at his school and Petitioner had communicated with him many times at school is that Petitioner had information about this alleged relationship prior to trial. Petitioner's first opportunity to raise this issue to the trial court came after voir dire, when the foreman did not respond to the question. Because Petitioner did not raise this issue at his first opportunity to do so, Petitioner did not preserve it for appeal.

Likewise, the only reasonable inference to draw from Petitioner's mere allegation that "the foreman also knows the victims and their son" is that Petitioner had this information prior to trial. The State presented evidence during trial that Petitioner and the victim's son grew up together and attended the same school, Petitioner had been to the victims' home, and the victims frequently gave Petitioner rides to baseball practice. (App. 49-52, 74-75). Due to the nature of Petitioner's relationship with the victims and his knowledge that he attended the same school as the victim's son, Petitioner would have been aware during trial of the possibility that a teacher at Petitioner's school may also know the victim and his family. Thus, the proper time to raise any concerns regarding the foreman's failure to respond to the voir dire questions was after the trial court

completed voir dire—not after the trial ended. See Aldret, 333 S.C. at 312, 509 S.E.2d at 813 (finding the Court of Appeals erred in remanding for an evidentiary hearing the issue of whether the jury engaged in premature deliberations when the defendant did not raise this issue to the trial court upon learning of it but waited until after trial).

Petitioner relies on several cases to support his assertion that an evidentiary hearing was required notwithstanding his failure to timely raise this issue. (App. Br. 8). However, these cases involved situations where either the defendant raised the issue during trial or did not learn the information until after the trial had concluded. See Smith v. Phillips, 455 U.S. 209 (1982) (reversing habeas corpus based on alleged juror concealment that was brought to court's attention when defense counsel learned about it during trial); Remmer v. United States, 347 U.S. 227 (1954) (remanding for an evidentiary hearing on petitioner's motion for new trial when petitioner learned for the first time after the jury had returned its verdict that unnamed person improperly communicated with the foreman); McCoy v. State, 401 S.C. 363, 366-67, 737 S.E.2d 623, 625-26 (2013) (finding evidentiary hearing warranted in PCR action when petitioner alleged he did not discover that juror's relative worked for solicitor's office until four years after trial); Sparkman, 358 S.C. 491, 494-95, 596 S.E.2d 375, 376 (2004) (affirming denial of mistrial motion based on juror misconduct that was discovered and raised to trial court prior to sentencing); State v. Bryant. 354 S.C. 390, 581 S.E.2d 157 (2003) (noting evidentiary hearing was held on issue of alleged improper conduct with member of jury pool in capital case when defendant learned about alleged improper conduct after jury returned with recommended sentence). These cases are thus distinguishable in that the defendants raised the issue to the court upon becoming aware of it. Here, because Petitioner did not raise this issue to the trial court at his first opportunity, the trial court did not abuse its discretion in denying his motion for a new trial without a hearing.

Had Petitioner timely raised this issue, the trial court could have questioned the foreman prior to trial to ascertain the extent of his alleged relationship with Petitioner and whether he intentionally withheld information. The trial court could have analyzed whether the foreman intentionally withheld the information or, if the concealment was unintentional, whether Petitioner suffered prejudice. The trial court likewise could have replaced the juror with an alternate if necessary, avoiding the time and expense of a new trial. Petitioner's post-trial objection is simply too late. Allowing a new trial on this basis would permit criminal defendants to withhold their personal knowledge of relationships with jurors as an ace up their sleeve to use in the event they are found guilty. Further, allowing a new trial based on information a defendant had before trial but neglected to raise to the court would be costly to the State and cause undue hardship on victims. Petitioner failed to timely raise this issue to the trial court, and the Court of Appeals should find it is not preserved.

**b. Petitioner did not submit sufficient evidence for an evidentiary hearing.**

Even if this issue is preserved (which the State disputes), Petitioner failed to submit sufficient evidence to warrant an evidentiary hearing. In Lynch, the Court of Appeals considered whether the trial court erred in not holding an evidentiary hearing on Lynch's post-trial motion for a new trial based on allegations of juror misconduct and intentional concealment. 409 S.C. at 146, 760 S.E.2d at 111. There, Lynch submitted an affidavit from the foreperson raising various allegations of juror bias and misconduct. Id. at 150-51, 760 S.E.2d at 114. The trial court excluded the affidavit pursuant to Rule 606(b), SCRE,[2] and denied the motion for a new trial. Id. at 151,

[2] This rule prohibits a court from considering testimony or an affidavit from a juror "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial

760 S.E.2d at 114. The trial court also denied Lynch's request to take juror testimony. Id.

On appeal, the Court of Appeals first determined the trial court properly excluded the affidavit. Id. at 153-54, 409 S.E.2d at 115. In analyzing whether the trial court erred in not holding an evidentiary hearing on the issue of intentional concealment, the Court initially referenced its prior finding that none of the voir dire questions unambiguously required the juror to disclose the attenuated relationship, making further inquiry unnecessary. Id. at 159, 760 S.E.2d at 118. The Court then considered whether a statement in the affidavit warranted an evidentiary hearing. Id. at 159-61, 760 S.E.2d at 118-20. The Court concluded that "[t]he trial court correctly determined the foreperson's affidavit was inadmissible, and *without this affidavit, there was no basis for the court to conduct an evidentiary hearing*." Id. at 161, 760 S.E.2d at 120 (emphasis added).

As Lynch illustrates, a party must submit *something* to the court to support his allegations before he is entitled to an evidentiary hearing. Here, however, Petitioner did not submit any evidence to support his allegation and warrant an evidentiary hearing. The motion for a new trial was not verified and thus does not constitute evidence. (App. 205-07). C.f. State v. Hill, 394 S.C. 280, 715 S.E.2d 368, (Ct. App. 2011) (finding defendant failed to introduce evidence to support motion for a new jury pool when the challenge "was made solely on the basis of [trial counsel's] unsworn statements to the trial judge, unsupported by any proof or offer of proof"), overruled on other grounds by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Further, the appendix does not contain any supporting affidavits.[3] In the absence of any evidence to support this allegation,

information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon the juror." However, this Rule does not prohibit the introduction of evidence when misconduct affects the fundamental fairness of trial. Ethier v. North Farifield Memorial Hospital, 2020 WL 1163968 (2020).

[3] Although Rule 606(b) would exclude a *juror's* affidavit about deliberations, it does not preclude an affidavit from another party, such as Petitioner himself, concerning the nature of his alleged

the trial court did not err in denying the motion for a new trial without conducting an evidentiary hearing. See Lynch, 409 S.C. at 161, 760 S.E.2d at 120 ("The trial court correctly determined the foreperson's affidavit was inadmissible, and *without this affidavit, there was no basis for the court to conduct an evidentiary hearing*." (emphasis added)); Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (establishing procedure for post-trial motion for new trial based on alleged premature deliberations that includes considering admissible affidavits and, "[i]f the trial court finds the affidavits credible[] and indicative of premature deliberations," holding an evidentiary hearing).

**c. A new trial is not the appropriate remedy.**

Should this Court determine the trial court abused its discretion in not holding an evidentiary hearing, the proper remedy is a remand for an evidentiary hearing—not a new trial. South Carolina, like most jurisdictions, requires a defendant to demonstrate prejudice from jury misconduct to be entitled to a new trial. Aldret, 333 S.C. at 314, 509 S.E.2d at 814.

Although Petitioner has the burden to establish prejudice, his allegation does not conclusively show prejudice. Notably, Petitioner did not allege he was a student in the foreman's class, nor did he allege the victim's son was a student in the foreman's class. The mere allegation that the foreman was a teacher at Petitioner's school and Petitioner had previously interacted with him does not conclusively show the foreman intentionally withheld information. It is conceivable that a teacher would not know every student at his school or even every student the teacher had interacted with. Thus, although the foreman may have known Petitioner or the victims, it is equally possible the foreman did *not* know or recall Petitioner or the victims, and his failure to disclose any relationship was innocent. C.f. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (finding trial

relationship with the juror. Petitioner simply failed to submit—or even attempt to submit—*anything* to support this allegation; thus, an evidentiary hearing was not warranted.

court erred in removing juror that failed to disclose during voir dire her "scant acquaintance" with State's witness, a former neighbor whose name the juror did not know, because the failure to disclose was innocent and would not have supported a challenge for cause or been a material factor in exercising peremptory challenges); State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) ("[T]he fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror.").

In the absence of an evidentiary hearing, any finding of intentional concealment or prejudice would be speculative. Thus, should the Court find this issue is preserved and Petitioner submitted sufficient information to warrant an evidentiary hearing, the proper remedy is an evidentiary hearing—not a new trial. See Remmer, 347 U.S. at 230 (remanding to district court for hearing to determine whether unnamed person's communication with foreman harmed petitioner "and if after hearing it is found to have been harmful, to grant a new trial"); Aldret, 333 S.C. at 314, 509 S.E.2d at 814 ("[A] defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial.").

## CONCLUSION

Based on the foregoing, this Court should affirm the trial court's denial of Petitioner's motion for a new trial.

Respectfully Submitted,

s/Danielle Dixon
Assistant Attorney General

ATTORNEY FOR THE RESPONDENT

This 20th day of June, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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CERTIORARI TO KERSHAW COUNTY

Casey Manning, Trial Judge
G. Thomas Cooper, Jr., PCR Judge
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MITCHELL LOGAN HINSON,

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PROOF OF SERVICE

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Pursuant to Rule 262, SCACR, as amended on May 6, 2022, the undersigned hereby certifies a true copy of the Brief of Respondent Pursuant to White v. State in the above-referenced case has been served upon opposing counsel's primary e-mail address as listed in the Attorney Information System:

**Kathrine Haggard Hudgins**
**khudgins@sccid.sc.gov**

This 20th day of June, 2022.

s/Danielle Dixon
Danielle Dixon
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
803-734-3737
DanielleDixon@scag.gov