

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
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 STATE OF SOUTH CAROLINA)
)
 vs.)
)
 Wesley Ray Kyzer,)
)
)
 _____)
 DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
 FOR THE SEVENTH JUDICIAL CIRCUIT

ORDER

Indictment No. 2020-GS-42-03001

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Jan 18 2023
SC Court of Appeals

This matter was before the Court for hearing on the defendant's motion, by and through C. Rauch Wise, Esq., for a new trial on the grounds of after discovered evidence of juror misconduct. South Carolina Rules of Criminal Procedure 29(b). A hearing was held on December 9, 2022. The Defendant was present and represented by C. Rauch Wise, Esq. The State was represented by Assistant Solicitor Maressa M. Cuenca.

The defendant was found guilty by a jury on March 9, 2022, of Threatening the Life of Robert Wesley Brown, a Public Official, Teacher, or Principal from Spartanburg High School, and sentenced by the court. He appealed his conviction and sentence on March 14, 2022, which is presently pending before the South Carolina Court of Appeals. The Court of Appeals, upon motion by the defendant, has suspended the appeal and granted leave for the defendant to make this motion now before this Court for a new trial.

MOTION FOR NEW TRIAL

The defendant moves this Court to grant him a new trial on the grounds of after discovered evidence of juror misconduct, pursuant to Rule 29(b). The allegation was that the

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Defendant had been denied his constitutional right to a fair trial because Juror T.R. failed to stand when asked about relationships with potential witnesses who may be called as part of the case. The threat made against Robert Wesley Brown was witnessed by several individuals, including an individual named Christopher Miller. During the trial it was established that Mr. Miller was a coach from Spartanburg High School when the threat was witnessed by him. On or about July 2022, the defendant learned that Juror T.R. was a standout wide receiver at Byrnes High School for Mr. Miller in 2007 and 2008. Juror T.R was the first juror selected in the case.

At the hearing on the motion, the defendant testified and presented testimony of one other witness, Juror T.R. Juror T.R. appeared to be cooperative and candid with his responses and highly credible due in part to his body language, tone, overall demeanor and mannerism while on the witness stand when responding to both of the attorney's questions.

APPLICABLE LAW

All criminal defendants have the right to be tried by a fair and impartial jury. U.S. CONS. amens. VI and XIV; S.C. CONS. art. I, Section 14. As part of the process for determining juror impartiality, the Court must conduct *voir dire* for discovery of the existence of any bias, prejudice, or interest that a potential juror might have in the case or against a party. *State v. Kelly*, 331 S.C. 132 (1998). The process is also designed to afford the parties reasonable opportunity and ability to intelligently exercise peremptory challenges based upon reasonable and constitutional grounds. *State v. Gullede*, 277 S.C. 368 (1982).

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"A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of bailiffs." SCRC, 29(b). A party seeking a new trial

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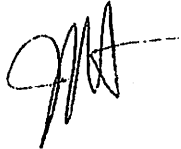


based upon the disqualification of a juror must demonstrate: “(1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict.” *Long v. Norris & Assocs., Ltd.*, 342 S.C. 561, 570, 538 S.E.2d 5, 10 (Ct. App. 2000).

“When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn.” *State v. Woods*, 345 S.C. 583, 587–88 (2001) (internal citation omitted). “[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances. Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.” *Id* at 588. “If the court finds no intentional concealment occurred, the inquiry ends there.” *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 155 (Ct. App. 2014) (internal citation omitted).

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DISCUSSION

Prior to jury selection, the Court conducted *voir dire* of the jury panel. The State presented a list of potential witness, which included, but was not limited to, eye witnesses to the threat and investigating police officers. The list of witnesses, to include Mr. Miller, was read to the venire as presented to the Court without objection.

The question at issue in this motion presented to the venire was the following; “if you have a close personal, social relationship with any of those individuals [list of potential witnesses previously announced by the Court], or if you’ve shared any type of employment or work relationship or professional relationship with any of those individuals, I would ask that you please stand at this time.”

Juror T.R. did not stand in response to the question.

The Court’s first inquiry is whether or not Juror T.R. intentionally concealed the information—namely, that he knew Mr. Miller and that he was a standout wide receiver at Byrnes High School for Mr. Miller in 2007 and 2008.

First, the Court did not find that Juror T.R. concealed information. From the present motion hearing it was established that while in high school in 2007 and 2008, Juror T.R. was a member of the Byrnes High School football team. In 2007 and 2008, Mr. Miller was the head coach of the Byrnes High School football team when Juror T.R. was a member. Fourteen (14) years had passed since Juror T.R. was a member of the football team and the name Christopher Miller was read to the venire. After high school, Juror T.R. and Mr. Miller did not maintain a

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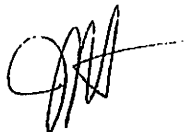
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social or professional relationship, and they had never shared a work or employment relationship. Mr. Miller did not help in securing Juror T.R.'s college football scholarship. Eleven (11) years had passed since he last saw Mr. Miller. Juror T.R. did recognize Mr. Miller in the courtroom (although the record is unclear as to when he first saw Mr. Miller in the courtroom). Juror T.R. testified that he did not stand in response to the *voir dire* question because he did not think the question applied to him. The Defendant testified he would have struck T.R. as a juror from the case if he had known that Juror T.R. had been a player on Mr. Miller's football team. Juror T.R. testified that he did not mean to conceal the fact that he knew Mr. Miller.

In *Smith v. State*, the Supreme Court affirmed the lower court's holding that the petitioner did not suffer *per se* violation of the due process right to a fair and impartial jury when a juror remained silent during *voir dire*. 375 S.C. 507 (2007) (abrogated on separate grounds). The petitioner filed a PCR petition that included the "allegation that after-discovered evidence revealed one of the jurors knew him from being incarcerated in the same facility and shared this information with the other members of the jury." *Id.* at 514. In that case, the *voir dire* question posed was whether any member of the jury pool was "related by blood or marriage or a close personal friend" of the petitioner. *Id.* at 519 (internal quotation marks omitted). The juror testified at the hearing that he was not a close friend of the petitioner, and even the petitioner corroborated that he did not know the juror very well, although they had prior interactions during their period of incarceration. *Id.* at 516, 519. Thus, the Court believed the juror "did not intentionally conceal the existence of his prior relationship with Petitioner." *Id.* at 519. The juror further testified that he did tell other jurors he had been incarcerated with the petitioner, but "he did not have any bias or prejudice against the petitioner, and he and other members of the jury held

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the State to its burden of proof[.]” *Id.* at 517, 519. Based on the testimony presented at the hearing, the Court found the PCR judge properly denied the petitioner’s relief.

Similarly to *Smith v. State*, Juror T.R.’s silence in response to the question was not meant to conceal information under the facts presented to this Court. Based on the wording of the question, Juror T.R.’s lack of response to the question was truthful. When asked if he had a close personal, social relationship with Mr. Miller at the time of the trial, Juror T.R. testified that he did not, as in *Smith*. When asked if he shared any type of employment or work relationship or professional relationship with Mr. Miller in the past, Juror T.R. testified that he did not. The fact that Juror T.R. was an athlete when Mr. Miller was coaching at Byrnes High School does not establish a work or professional relationship between both individuals. Further, any relationship between Juror T.R. and Mr. Miller was fourteen (14) years in the past and they had maintained no relationship in those years. In fact, given the question asked and the relationship (or lack thereof) between Juror T.R. and Mr. Miller by the time the trial occurred, Juror T.R. acted reasonably under the present circumstances in not standing after the question was asked.

Second, the Court found that even if there was concealment, it was not intentional. The defendant has failed to establish that even if there was a failure by Juror T.R. to disclose the information complained of, the failure to disclose was intentional. Juror T.R.’s silence cannot be held as unreasonable given the presentation made to this Court. The question was arguably ambiguous. The defendant argued that a close personal relationship existed between player and coach. However, Juror T.R. testified to the contrary. In *State v. Woods*, the Court defined unintentional concealment in situations “where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror’s failure to respond is reasonable under the circumstances.” *Id.*

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at 588. The *voir dire* was arguably ambiguous and any athlete/coach relationship between Mr. Miller and Juror T.R. was far removed in time, although not close or personal, that Juror T.R.'s silence was reasonable under the circumstances.

Based on case law, the Court's inquiry ends after finding that there was no intentional concealment. *See Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 155 (Ct. App. 2014).

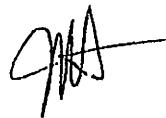
CONCLUSION

The foundation of the present motion is that the defendant was denied his constitutional right to a fair trial and impartial jury. "When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Woods*, 345 S.C. 583, 587–88 (2001). The Court finds that the defendant has failed to establish his entitlement to a new trial, in that Juror T.R. did not conceal information, but at the very least it was unintentional concealment. During the arguments, this Court was reminded of other questions related to bias and prejudice of potential juror's presented to the venire. Nothing is contained in the present record to infer that Juror T.R. acted impartial manner.

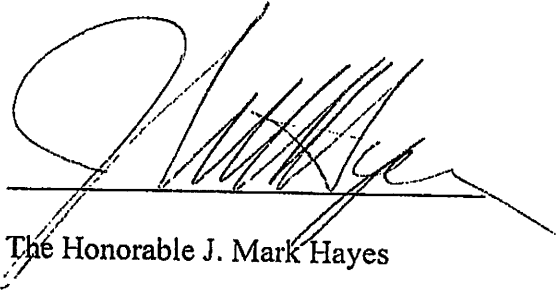
The defendant's motion for a new trial on the grounds of after discovered evidence of juror misconduct should be and is therefore DENIED.

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IT IS SO ORDERED.



The Honorable J. Mark Hayes

Seventh Judicial Circuit

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Spartanburg, South Carolina

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