

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENWOOD COUNTY  
Court of General Sessions  
Hon. Donald Hocker, Circuit Court Judge

S.C. SUPREME COURT

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Appellate Case No. 2022-000571

State of South Carolina ..... Respondent,

vs.

Adam Rowell ..... Petitioner.

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BRIEF OF PETITIONER

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### **Question Presented**

Did the court of appeals err in holding the trial judge did not need to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

### **Standard of Review**

The granting of a new trial is subject to an abuse of discretion standard of review. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009). To the extent that the trial court made findings not supported by the record, the trial court erred as a matter of law and the standard of review is de novo. *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014). Further, Mr. Rowell contends the trial court erred as a matter of law in failing to conduct a hearing on juror misconduct when he had made a prima facie showing of misconduct by the juror. On this issue the trial court erred as a matter of law and therefore the standard of review is de novo.

## Statement of the Case

### *Procedural History*

Adam Martyn Rowell was formally arrested on December 16, 2014, upon his release from the hospital, and charged with one count of felony driving under the influence resulting in death and one count of felony driving under the influence resulting in great bodily injury.<sup>1</sup> He was indicted on March 27, 2015. He was tried before the Honorable Donald R. Hocker and a jury on February 13 to 27, 2017. The jury convicted him of the two charges. Judge Hocker sentenced him to 13 years in prison and a fine of \$10,100 on the felony driving under the influence resulting in death. He was sentenced to eight years and a fine of \$5,100 on the felony driving under the influence resulting in great bodily injury. The two sentences are to run concurrent with each other. App. at 1343, 118 to 1344, 16.

Mr. Rowell filed a Motion for a New Trial on March 7, 2017 and a supplemental motion on March 29, 2017. A post trial hearing on the Motion was held on November 27, 2017. Judge Hocker denied the post trial motions by an order dated December 27, 2017. The Notice of Appeal was filed on January 3, 2018.

On July 7, 2021, the South Carolina Court of Appeals filed an Order holding that the SLED blood draw, Sample B, was improperly admitted into evidence, but affirmed the conviction of Mr. Rowell, holding the SLED blood draw was harmless error. On July 20, 2021, the State filed a petition for rehearing. After obtaining an extension, Mr. Rowell filed his petition

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<sup>1</sup> The trial judge made a finding that Mr. Rowell was arrested at the time of the reading of *Miranda* rights on November 16, 2014. App. at 1207, 121 to 1208, 13.

for rehearing and rehearing *en banc* on August 2, 2021.

On August 25, 2021, the court of appeals filed a new opinion addressing the rehearing petition filed by the state, again affirming the conviction and denying the rehearing petition of Mr. Rowell. On September 2, 2021, Mr. Rowell again filed a second petition for rehearing and a rehearing *en banc*. On March 2, 2022, the court of appeals issued a third opinion granting the petition for rehearing but again affirming the conviction of Mr. Rowell in the third opinion.

On March 15, 2022, Mr. Rowell filed his third petition for rehearing and rehearing *en banc*. On April 1, 2022, the court of appeals denied the petition for rehearing and rehearing *en banc*.

On May 17, 2023, this Court granted the petition for writ of certiorari on the issue of whether the South Carolina Court of Appeals erred in failing to reverse the case because of the failure of the trial judge to conduct a hearing with the juror as to the juror's failure to disclose his pending charges that were being prosecuted by the solicitor's office that was prosecuting this case.

#### *Factual History*

Adam Martyn Rowell was involved in a serious automobile accident on November 15, 2014. The accident resulted in the death of Jeremy Cockrell and serious injuries to Matthew Sanders. Mr. Rowell also received massive injuries resulting in transfusions of blood, blood products and saline solutions. He was airlifted to Greenville Memorial Hospital where he remained until December 16, 2014. App. at 1175, ll 15-18.

The exact cause of the crash was in dispute, but the record established the collision occurred in the lane of traffic of Mr. Cockrell. The theory of the State was that Mr. Rowell

crossed the center line and collided with the truck being driven by Mr. Cockrell. App. at 491, ll 6-17. Mr. Rowell presented the testimony of Justin Pennington, an eye witness, that the truck driven by Mr. Cockrell had crossed the center line toward Mr. Rowell and Mr. Rowell then veered left to avoid the collision. App. at 1014, ll 1-15.

The testimony from Mr. Rowell was that he had spent the day running errands for his family. He had anticipated going to a family dinner that night. He had spent the afternoon making trips between the residence of his parents and Walmart. He was seen at Walmart about 2 p.m. by a friend who testified he was sober and gave no indications of being under the influence. App. at 931, ll 1 to 932, ll 19. He was seen again at Walmart at about 7 p.m. on a store video. He again gave no appearance of being intoxicated. Mr. Rowell stated that at the time of the collision he was heading to dinner to celebrate the birthday of his grandmother.

He further testified that he observed the truck being driven by Mr. Cockrell cross the center line and appeared to be coming at him. He then swerved left to avoid the collision but Mr. Cockrell then turned back to the right. They collided in Mr. Cockrell's lane of traffic.

The injuries to Mr. Rowell were so severe that he had to be airlifted to Greenville Memorial Hospital. App. at 525, ll 13-24. The hospital records show that blood was taken from a person identified as Mr. Rowell at 8:54 p.m. (Sample A). App. at 662, ll 20-24. The records, however, also show that Mr. Rowell's Life Flight helicopter arrived at the hospital at 8:59 p.m. State's Exhibit 70. At a post trial hearing, the State produced an exhibit that showed a person identified as Mr. Rowell arrived at the hospital at 8:44 p.m., some 15 minutes before the flight records show he arrived. App. at 1399, ll 6-23. Angela Waite, the flight nurse, testified the helicopter departed the accident scene at 8:31 p.m. and the flight took 24 minutes. This would

have put him at Greenville Memorial Hospital some 11 minutes after the State's exhibit showed he arrived. Before arriving at Greenville Memorial Hospital, Mr. Rowell had received 2,540 milliliters of fluids and blood products. This would have been approximately half of the amount of blood in Mr. Rowell. App. at 353, ll 7-22.

Angela Waites, the flight nurse, testified she observed Amanda Baker, an emergency room nurse, draw the blood from Mr. Rowell. App. at 579, ll 21-24. She testified it was taken from the right arm. App. at 583, ll 10-12. Ms. Baker did not remember taking blood from Mr. Rowell. App. at 588, ll 21-23. Ms. Baker stated the hospital documents stated the blood was taken from a central line and not the arm. App. at 591, ll 16-24. The central line was put in by Dr. Bradley Snow after Mr. Rowell arrived at the emergency room. App. at 592, ll 14-15; 593, ll 15-19.

Sample A, taken in the emergency room, was sent to the lab, but, according to the hospital records, did not arrive there for approximately 30 minutes from the time it was taken. App. at 597, ll 14-20. The lab technician listed as receiving the blood was Bill Evans. App. at 671, ll 18 to 672, ll 19. The tubes for the blood drawn in the emergency room with their labels were destroyed after about a week. App. at 558, ll 10-17. The analysis from the Greenville Memorial Hospital showed a plasma blood alcohol level of .219. App. at 549, ll 14-19.

After Mr. Rowell had his surgery, during which many more liters of blood were given to him, the State obtained a search warrant for a blood sample, Sample B, and urine sample. App. at 155, ll 13-25. Trooper Brunson Smith, who served the search warrant, also read the implied consent forms to Mr. Rowell. App. at 154, ll 9-24. Mr. Rowell was unconscious at the time of the reading of the implied consent forms and the search warrant. A blood and urine sample were

taken at 1:05 a.m. on November 16, 2014. This was approximately five and a half hours after the wreck. The urine was never tested. App. at 796, ll 2-8. The result of this test showed a blood alcohol level of .096. App. at 902, ll 11- 12. Also found in the blood was diphenhydramine, commonly known as Benadryl, at a level of 4.9 micrograms per milliliter. App. at 1112, ll 20-25. This was on the high end of a toxic dose and .1 away from a lethal dose. App. at 1114, ll 18-25; 1115, ll 10-25. The SLED lab report also contained a level of acetone which would indicate the person was a diabetic. App. at 1107, ll 3-25. The record does not contain any evidence that Mr. Rowell was diabetic. Mr. Rowell testified he was not diabetic nor does he take Benadryl. App. at 1159, ll 6-9.

After the trial, defense counsel learned that Juror 164 had charges pending against him. The charges were being prosecuted by the same assistant solicitor that was prosecuting this case. App. at 1405, ll 5-9; 1435. Defense counsel and the State requested a hearing with the juror present. App. at 1438; 1442. The trial judge declined to conduct a hearing.

## Question

**Did the court of appeals err in holding the trial judge did not need to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8<sup>th</sup> judicial circuit when such a question was asked during jury voir dire?**

A judicial system that depends upon jurors also depends upon honest answers from honest jurors. This is basic to our system of justice. For when a juror lies in their response to a voir dire question, we seldom will know what motivates the false answer. Without a hearing in which the juror testifies, one will never know the reason for the false statement. "Where a trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question." *State v. Gullede*, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982). And this truthful answer must be so whether the responses be with an affirmative answer or through a failure to respond. A fair trial is not given the defendant if he does not have a fair jury.

This Court has established the basis upon which a new trial should be granted based upon juror misconduct in failing to properly respond to voir dire questions. The Court said "A party seeking a new trial based upon the disqualification of a juror must show: (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." *Gray v. Bryant*, 298 S.C. 285, 288, 379 S.E.2d 894, 896 (1989). In that case a juror failed to acknowledge that she was a patient of the medical doctor being sued for malpractice. A new trial was ordered. In this case, Mr. Rowell meets all three requirements.

The court of appeals, in its opinion, failed to consider that the record established that the Juror was asked about pending criminal charges and the juror was untruthful in his response. This fact is undisputed. This fact is established even without any testimony from Juror 164. The Juror did not respond to Question One, which inquired about pending charges or convictions. The failure to respond by this juror, and others, simply told the court and the lawyers, he had no pending criminal charges. As the court of appeals has previously said, “It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike.” *Long v. Norris & Associates, LTD*, 342 S.C. 561, 573, 538 S.E.2d 5, 11 (Ct. App. 2000). The record in this case establishes the response by Juror 164 was not truthful. Once the record establishes the juror’s answer was not truthful, the obligation of the moving party is over. The record at that point is sufficient to grant the moving party a new trial.

In ruling on this issue, the court of appeals said, “Nothing required the trial court or a party to hail a juror into court to testify on the issue of juror misconduct under the circumstances presented here.” *State v. Rowell*, 436 S.C. 54, 67-68, 870 S.E.2d 175, 182 (2021). The only circumstance the court of appeals discussed to justify this conclusion was that the trial judge concluded his jurors’ voir dire questions were confusing to this juror. The court held, “Because the trial court’s conclusion was based upon its own observation of voir dire, the record supports the trial court’s conclusion, and Juror 164’s testimony was not necessary.” *Rowell* at 68, 870 S.E.2d at 182. Without testimony from the juror, this conclusion was without any evidentiary support in the record when the record established many other jurors did not find the questions confusing. App. at 56, 116 to 74, 118. In making this finding, the court of appeals ignored the

record in this case. As stated above, the record established the fact the Juror was not honest in his response. The court of appeals has failed to consider that the factual finding by the trial judge that the Juror did not understand the question, is not supported by any evidence in the record. Before a trial court could make this factual determination, the trial court would be required to place the Juror under oath and hear his testimony. Only then would the trial court have known if the juror thought the question was confusing. Whether the trial court found the question confusing is simply not relevant. Thus, the finding of the trial court that the Juror's concealment was unintentional is without any evidence in the record and is, therefore, an error as a matter of law. Only testimony from the Juror could establish that the failure to disclose was unintentional. Thus, there is nothing in the record to establish that the question was confusing. As this court has said, "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). With no factual basis to conclude, "[T]he Juror 164's concealment was unintentional," (App. at 1426) the trial court erred as a matter of law in making such a conclusion.

The court of appeals erred in failing to acknowledge that *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001) involved an actual hearing where the juror testified.<sup>2</sup> As such, the case could not be used as support for the conclusion of the court of appeals, "We find the trial court did not abuse its discretion in failing to conduct an evidentiary hearing with Juror 164." *Rowell* at 67, 870 S.E.2d at 182.

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<sup>2</sup> Interestingly, while the juror testified, the court on the appeal did not find the testimony of the juror credible.

Other states have required a trial judge to conduct a hearing on the issue of juror misconduct during voir dire. “Considering the nature of this case and the questions and answers on Voir Dire, we are of the opinion that the refusal of the court to grant the request for a hearing constituted error necessitating a new trial.” *W. Virginia Hum. Rts. Comm'n v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 358, 211 S.E.2d 349, 355 (1975). Minnesota has established a rule that a hearing is always required once a defendant makes a prima facie showing of juror misconduct during the voir dire. The Court held:

Cases may and do arise where a juror's untruthful answering of questions propounded upon a voir dire examination will prevent a litigant from having a fair trial. Where such cases arise, and the facts come to light after the rendition of a verdict, some method of obtaining relief obviously should be available. However, rather than permit or encourage the promiscuous interrogation of jurors by the defeated litigant, we think that the better practice would be to bring the matter to the attention of the trial court, and, if it appears that the facts justify so doing, the trial court may then summon the juror before him and permit an examination in the presence of counsel for all interested parties and the trial judge under proper safeguards. If that were done, a situation such as we have here could not arise. A record then could be made which could be presented to this court if any doubt existed about the correctness of the trial court's ruling after such hearing. *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960)

Mr. Rowell urges this Court to adopt such a rule in our state. Once a losing party has established a prima facie case that a juror has not been fully truthful in their responses to questions, a hearing needs to be held to determine why. A trial judge is not entitled to speculate as to why the questions were answered improperly. In addition, as noted by the Minnesota court, such a procedure protects jurors from what could be perceived as unnecessary harassment by the losing party. The hearing would promote efficiency in our judicial system. No downside can exist to the requirement of conducting a hearing under these circumstances.

The court of appeals concluded, “Nothing required the trial court or a party to hail a juror into court to testify on the issue of juror misconduct under the circumstances presented here.” *Rowell*, at 68, 870 S.E.2d at 182. This statement is made without consideration of the record. The record establishes that Juror 164 had pending criminal charges and did not acknowledge that fact to the trial judge or the lawyers. No lawyer would want a juror who needs the help of the same prosecutor’s office in disposing of the juror’s case. In this case the record establishes that the juror’s case had actually been assigned to one of the attorneys prosecuting Mr. Rowell. App. at 1405, ll 2-21.<sup>3</sup> This was an important fact for the attorneys to know. A hearing was required to determine why the juror withheld important information during the voir dire. The question as to why the juror withheld information cannot be answered without a hearing. What required the trial judge to conduct a hearing is the requirement of the due process clause that a defendant have a fair juror and not a juror that would need a favor from the prosecutor at a later date. “But it gives [Juror 164] a - - a - - an incentive to help the solicitor.” App. at 1413. Article I, § 3 of the Constitution of the State of South Carolina; 14<sup>th</sup> Amendment to the Constitution of the United States of America. As the United States Supreme Court has said, “The necessity of truthful answers by prospective jurors if the process is to serve its purpose is obvious.” *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Likewise, the necessity of a hearing to determine why a juror did not respond to a question the juror should have responded to is equally obvious.

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<sup>3</sup> At the hearing, the assistant solicitor suggested the reason the juror did not acknowledge pending charge was because he received a blue ticket. App. at 1405, ll 16-17. A charge of possession with intent to distribute marijuana and a proximity charge cannot be issued on a blue ticket. See S. C. Code § 56-7-10.

The trial court concluded that he asked an ambiguous question. If this is true, then the case should also be reversed. A defendant is entitled to voir dire questions asked by a trial court that are not ambiguous. If a trial court determines, after the fact, that a voir dire question asked by the judge was ambiguous, the defendant has been deprived of a fair voir dire and thus a fair trial. Even if the trial judge concluded that the question was ambiguous that does not lead to the conclusion that the juror thought was question was ambiguous. Many jurors did not think the question was ambiguous.

In addition, the trial judge believing the question is ambiguous is simply not relevant to the issue. The question should be did the juror think the question was ambiguous. The trial court is not permitted to answer that question for the juror.

Near the end of the voir dire the trial judge advised the jury panel that he was about to ask a series of questions. He urged the jury panel to keep a good memory of the questions as he would speak with them privately after the questions were asked. The first question was:

Question One, any member of the jury panel or any member of your immediate family members or close personal friend ever been arrested and charged with any criminal offense through whatever state, local or federal law enforcement agency.  
App. at 56, ll 16-20<sup>4</sup>

After all the questions were asked, numerous jurors came forward in response to the questions asked. Of the ones that came forward, 12 were in response to Question One. They included jurors with pending charges or convictions. App. at 56, l 16 to 74, l 18. Juror 164 did not come forward. This demonstrates the question was not ambiguous and was understood by

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<sup>4</sup> The questions and method of having the jurors come forward later so that no other juror knows the exact question to which a juror is responding, is a standard practice with most judges.

the other jurors.

This Court should reverse the conviction of Adam Martyn Rowell based upon the untruthful answer of Juror 164 during the voir dire process. A remand for a hearing as to Juror 164 would serve no purpose as memories will have faded. In addition there is no dispute that the relevant question was asked and the Juror represented he did not have a pending charge. This representation was false.

### Conclusion

Based upon the above, this Court should reverse the conviction of Adam Rowell and remand for a new trial. In addition, this court should adopt a rule that when a prima facie case of juror misconduct during voir dire is raised by the losing party, a hearing must be held with the juror present.

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