THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

Trial Court Case No. 2019-GS-16-0996

The State of South Carolina, Respondent,

v.

Marc Yasin Mckeiver, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On March 12, 2020, the Dillon County Grand Jury indicted Appellant, Marc Yasin McKeiver, for Trafficking Methamphetamine, 100 grams or more, but less than 200 grams, first offense (Indictment 2019-GS-17-0996). (R. 427).

On January 10, 2022, Appellant proceeded to trial before the Honorable Paul M. Burch and a jury. (R. 1). Thurmond Brooker represented Appellant, and Assistant Solicitor Shipp Daniel prosecuted the case on behalf of the State. (R. 1). The jury returned a verdict of guilty on January 12, 2022. (R. 352, line 20 – 353, line 1). The Trial Court sentenced Appellant to twenty-five (25) years imprisonment. (R. 368, lines 19-25).

On January 20, 2022, Appellant filed a Motion for a New Trial. (R. 384). The parties appeared before Trial Court and presented their arguments on March 10, 2022. (R. 397). The Trial Court denied the motion at the conclusion of the hearing. (R. 423, lines 18-25). Appellant timely filed a Notice of Appeal on March 16, 2022.

This appeal follows.

RELEVANT FACTS

During opening statement, the Prosecutor outlined the State's case and addressed the unique factual issue of the State's key witness being deceased prior to trial:

> You're gonna hear from three witnesses. That's it. This ain't gonna [sic] be a long one. Three witnesses. They're all law enforcement agents. You're going to hear from J.T. Martin of [the South Carolina Law Enforcement Division (SLED)], who was overseeing a task force that was investigating the drug trade in Dillon County back in 2019.
>
> . . .
>
> You're going to hear from Alex Blake, who used to be with [SLED], now, works for the FBI. You're going to hear about what they did. How they targeted this defendant. You're going to hear how they used a confidential informant, we call them CI's. He was a confidential informant. To go to where [Appellant] was and buy a bunch of pills from him.
>
> . . .
>
> You're not going to hear from the confidential informant himself because, unfortunately, he died a while back, a while, a while ago, in a completely unrelated situation having nothing to do with this defendant. So you can't hear from him. But you will hear from, from these three sled agents. That's it. Plain and simple, straightforward, but very important.

(R. 134, line 25 – 135, line 23).

During pre-trial, the Prosecutor provided a more detailed explanation of the State's case to the Trial Court in anticipation of Defense Counsel's motions in limine:

> This [CI] is now dead. He was murdered in an unrelated situation a while ago. The [CI] met with law enforcement on September 9 at whatever meeting location they had. The [CI] was searched by [SLED] agents. He had to make sure he didn't have any drugs, money, weapons, anything on him. He did not. They outfitted him with a camera. They get in the car. An undercover [SLED] agent drove the under, drove the [CI] to Mr. [Appellant's] house.
>
> . . .
>
> [A]t least two phone calls were placed from [CI's] phone to [Appellant's] phone. [Appellant] answers. They have a conversation that was on speaker phone and the [SLED] agent heard the conversation where the CI was setting up the buy that was to take place shortly, thereafter. [SLED] agent drives confidential informant to the house. Broad daylight. Let's

> [CI] out in the front yard. [CI] walks up - and you see all this on video - walks up to the door and [Appellant] answers the door. [Appellant] takes the [CI] back to a back bedroom. You see in the, in the video, it's a little blurry, this particular part of it, but you see something that looks like a plastic bag in [Appellant's] hand to CI, has some sort of conversation. The only - - there's only one other person that is visible in the video and that is the defendant's girlfriend, Winter Bennett . . . [.]
>
> . . .
>
> [The CI] returns to the [SLED] agent's car. He's only in the house for, I mean, not even two minutes. When he returns to [SLED] agent's car he gives the [SLED] agent, two bags of pastel colored oddly shaped pills. These pills were sent to [SLED] and they turned out to be methamphetamine, 134, 136 grams of methamphetamine.

(R. 31, line 2 – 32, line 14).

Motion to Suppress Deceased CI's Statements

Defense Counsel moved to suppress "any statements that were made, that was made by the CI whether written or either record[ed] statements, that would include statements that was made by the CI on the video[.]" (R. 38, line 24 – 39, line 3).

In response, the Prosecutor agreed to mute the audio of the CI's video recording. (R. 39). Defense Counsel provided no additional argument on this issue.

Motion to Suppress Deceased CI's Video Recording

Defense Counsel also moved to suppress the video recording made by the deceased CI, arguing the "South Carolina [Constitution] provides also the additional protection against invasion of privacy". (R. 44, lines 1-3). Specifically, Defense Counsel explained that the CI is an agent of the State who has entered a private citizen's residence wearing a live recording device, which allowed the State (law enforcement) to view inside the home without the owner's consent, and more importantly, without a warrant. (R. 40 – 44). Defense Counsel noted that the distinguishing factor is when there is a "controlled buy" (drug deal) done by a CI *inside* of a residence: "So the question then

becomes . . . whether or not law enforcement can do something through technology that they would not be able to otherwise physically do." (R. 43, lines 4-6). In response, the Prosecutor argued that "[n]o warrant is required for a confidential informant to go inside a house whether there's a live feed or not." (R. 45, lines 12-13).

The Trial Court denied the motion and stated, "What flies in the face of your argument . . . is the fact that if you had to get a warrant for a CI to go in and make a buy, you got to serve that warrant and no supplier of drugs is gonna sell somebody drugs or give them drugs after a warrant has been served on them". (R. 45, lines 18-24). Defense Counsel replied, "[T]he question is . . . whether or not [law enforcement] can outfit a [CI] with a live feed wire with law enforcement on the other end and walk into a private residence." (R. 46, lines 9-13). The Prosecutor injected that the CI had two cameras and claimed that the live feed camera did not work but needed to check with law enforcement for confirmation. (R. 46, line 23 – 47, line 8).

On cross-examination during the pre-trial hearing, Special Agent Alex Blake of the Federal Bureau of Investigation (FBI) testified that he had never spoken to or met with Appellant prior to the alleged drug deal with the CI. (R. 99, line 12 – 100, line 1). Agent Blake also admitted that the only information of illegal activity he had regarding Appellant was provided to him by the deceased CI and the other Special Agent. (R. 101, lines 15). Notably, Special Agent James Martin of SLED maintained that he did not recall whether the video feed was live when the deceased CI went into Appellant's residence but conceded to the "audio being transmitted live". (R. 113, lines 13-23).

Motion to Suppress Photographs from Snapchat: Invalid Search Warrant

Furthermore, Defense Counsel moved to suppress photographs that were

allegedly posted on the social media platform Snapchat and obtained by law enforcement due to a search warrant signed by a Dillon County Magistrate Judge. (R. 66 – 77). Specifically, Defense Counsel argued that "magistrate judges only have the authority to issue search warrants within their jurisdictional boundaries." (R. 67, lines 1-3). Defense Counsel noted that Snapchat Incorporated was not located in Dillon County and that "a magistrate's judges jurisdiction is [in] the county in which that judge sit." (R. 68, lines 11-12). The Trial Court replied, "If a magistrate issued that on Snapchat that warrant is not gonna hold water, solicitor." (R. 68, lines 22-23). The Prosecutor disagreed, and the Trial Court stated:

> Y'all are both wrong there. They way I understand that we've been instructed by federal precedent, the magistrates the jurisdiction ends at their county lines. If the legislature were to come in and declare and force the issue the magistrate's are a court of record, it won't be an issue anymore. But any circuit judge in this state operates a court of record, therefore, the circuit court judges can issue warrants in the matters of these cell phones and these computer records. A magistrate cannot, unless, that specific servers is located in that county. Now, if the Attorney General disagrees with that they're sure different from what I've been instructed.

(R. 69, lines 5-17).

In response, the Prosecutor cited a recent oral argument in *State v. Warner*, 436 S.C. 395, 872 S.E.2d 638 (2022) and maintained that the photographs were obtained by law enforcement in good faith and were "created in the jurisdiction of this magistrate." (R. 69, line 18 – 70, line 24). The Trial Court ultimately held, "I'm trying to apply a common sense approach to this whole thing since there's not much precent . . . I'm gonna have to deny the motion in limine or to suppress that particular Snapchat evidence. (R. 91, lines 2-6).

During a subsequent pre-trial hearing, Special Agent James Martin of SLED

testified that he presented a search warrant for Snapchat and that the magistrate judge signed the warrant. (R. 108, lines 12-25). Agent Martin conceded on cross-examination that he did not subpoena any records from a cell phone provider to identify the account owner of the specific number provided by the deceased CI. (R. 110, lines 12-23). Agent Martin further admitted he had no knowledge that the cell phone number was assigned to Appellant. (R. 110, line 23 – 111, line 2). Notably, the State never subpoenaed any phone records to substantiate the allegation that the phone number was associated with Appellant. (R. 106, lines 7-15).

Motion to Suppress Photographs from Snapchat: Authentication

Defense Counsel also moved to suppress the photographs allegedly posted on Snapchat based on the State's inability to properly authenticate the messages. (R. 47 – 4). Specifically, Defense Counsel argued that the State did not have a custodian of records for Snapchat available to testify: "[O]ur first argument is, is that if these [photographs] come from, comes from Snapchats servers, Snapchat has to authenticate these records and they have to have a records custodian to come here and testify and authenticate where these records are coming from." (R. 48, line 23 – 49, line 4).

In response, the Prosecutor noted Snapchat provided a letter stating, "this is the certificate of authenticity from Snapchat" and argued the letter is sufficient to authenticate the photographs pursuant to Rule 902(8) of the South Carolina Rules of Evidence. (R. 50, line 25 – 51, line 14). Defense Counsel replied that the controlling authority on the issue is Rule 901, SCRE, and *State v. Benton*, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021). (R. 53 – 57; R. 60 – 61). The Trial Court interjected and refused to rule on the issue: "[T]hat's for y'all to argue with the jury." (R. 57, lines 22-23). Both

lawyers continued to reiterate their arguments on this issue. (R. 58 – 66).

The following day, Defense Counsel moved to admit the search warrant for Snapchat into evidence, and the Trial Court admitted the document without objection from the State. (R. 81 – 82).

Post-Trial Motion for a New Trial: Juror Misconduct

On March 10, 2022, Defense Counsel argued that the Trial Court should grant a new trial, or in the alternative to grant an evidentiary hearing because of two jurors intentionally concealed information in response to the Court's voir dire questions when Defense Counsel would have struck them had the jurors not concealed the information. (R. 397-425).

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS PHOTOGRAPHS OBTAINED FROM SNAPCHAT BECAUSE THE COUNTY MAGISTRATE JUDGE DID NOT HAVE THE AUTHORITY TO ISSUE A SEARCH WARRANT TO THAT OUT-OF-STATE ENTITY FOR RECORDS THAT WERE NOT PHYSICALLY LOCATED IN THIS STATE.

In *State v. Warner*, our Supreme Court held that a county magistrate judge had the authority to issue a search warrant to an out-of-state entity for cell phone records that are not physically located in this State. *State v. Warner*, 436 S.C. 395, 872 S.E.2d 638 (2022). Specifically, the Court found that the cell phone provider "clearly does business in South Carolina, in particular, in [that particular] County" and "therefore, is subject to the jurisdiction of [that] County magistrate." *Id.* at 403, 872 S.E.2d at 643. The Court further noted that "[t]he warrant sought records reflecting information generated in South Carolina through the interaction of [the defendant's] cell phone and [the providers] cell towers in [that] County." *Id.* Therefore, the Court held that the cell phone provider "is in possession and control of property that section 17-13-140 permits to be seized." *Id.* at 404, 872 S.E.2d at 643. Section 17-13-140 of the South Carolina Code of Laws provides, in pertinent part:

> Any magistrate ... may issue a search warrant to search for and seize ... property constituting evidence of crime or tending to show that a particular person committed a criminal offense .... The property described in this section, or any part thereof, may be seized from any place where such property may be located, or from the person, possession or control of any person who shall be found to have such property in his possession or under his control.

S.C. Code § 17-13-140.

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Discussion

In this case, the Trial Court erred in refusing to suppress photographs obtained from snapchat because the Dillon County Magistrate Judge did not have the authority to issue a search warrant to that out-of-state entity for records that were not physically located in this State. Specifically, the facts presented here are distinct from *State v. Warner* for the following reasons: (1) the State failed to present any evidence that Snapchat does business in South Carolina or in Dillon County; (2) the State failed to present sufficient evidence that the records sought were generated in South Carolina; (3) the State failed to subpoena or request a search warrant for cell phone provider records to corroborate that the phone number associated with the Snapchat account belonged to Appellant; (4) the State could not prove that Appellant posted those pictures on Snapchat; and (5) the State's key witness who allegedly had this personal knowledge regarding Appellant died prior to trial. *Cf. Warner*, 436 S.C. 395, 872 S.E.2d 638.

Agent Martin conceded on cross-examination that he did not subpoena any records from a cell phone provider to identify the account owner of the specific number provided by the deceased CI. (R. 110, lines 12-23). Agent Martin further admitted he had no knowledge that the cell phone number was assigned to Appellant. (R. 110, line 23 – 111, line 2). Notably, the State never subpoenaed any phone records to substantiate the allegation that the phone number was associated with Appellant. (R. 106, lines 7-15). Therefore, the State did not provide sufficient evidence to prove Snapchat was in possession and control of property that section 17-13-140 permits to be seized.

II. THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS OBTAINED FROM SNAPCHAT BECAUSE THIS EVIDENCE WAS NOT PROPERLY AUTHENTICATED PURSUANT TO RULE 901, SCRE, BY PERSONAL KNOWLEDGE, DISTINCTIVE CHARACTERISTICS, OR RECORDS CUSTODIAN.

"[E]vidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). "The authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) (citation omitted), *aff'd as modified*, 432 S.C. 97, 851 S.E.2d 440 (2020). "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims." *Id.*

The following are examples of authentication or identification conforming with the requirements of this rule:

> (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.
>
> . . .
>
> (4) Distinctive Characteristics ad the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Rule 901(b), SCRE. Notably, "'the burden to authenticate ... is not high' and requires only that the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015) (citing *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

"Social media messages and content are writings, and evidence law has always viewed the authorship of writings with a skeptical eye." *Green*, 427 S.C. at 230, 830 S.E.2d at 714. "*The requirement of authentication cannot be met by merely offering the*

writing on its own. Something more must be set forth connecting the writing to the person the proponent claims the author to be." *Id.* at 231, 830 S.E.2d at 714 (citation omitted) (emphasis added). "Rule 901(b), SCRE, lists ten non-exclusive methods of authentication." *Id.* at 231, 830 S.E.2d at 715. "Rule 901, SCRE, does not care what form the writing takes, ... [a]ll that matters is whether it can be authenticated, for the rule was put in place to deter fraud." *Id.* at 231, 830 S.E.2d at 714.

Under Rule 901(b)(1), SCRE, evidence may be authenticated by "having someone with personal knowledge about the writing testify the matter is what it is claimed to be." Id. at 231, 830 S.E.2d at 715. "This method may be accomplished by testimony from a person who sent or received the writing." *Id.* Additionally, "[o]ne who witnessed the creation or signing of the writing also has the personal knowledge Rule 901(b)(1), SCRE, demands." *Id.* "As long as a witness with personal knowledge testifies that an exhibit accurately portrays what it depicts, that should be sufficient to establish its authenticity." 3 Barbara E. Bergman et al., *Wharton's Criminal Evidence* § 14:2 (15th ed. 2021).

In *Green*, the defendant asserted the trial court erred by admitting into evidence Facebook messages allegedly between his codefendant and the victim because they were not properly authenticated. 427 S.C. at 227, 229, 830 S.E.2d at 712, 714. First, this Court noted social media's seemingly unique authentication problems "dissolve against the framework of Rule 901, SCRE." *Id.* at 230, 830 S.E.2d at 714. Applying that framework, this Court determined the messages could not be authenticated by personal knowledge under Rule 901(b)(1), SCRE, because the testifying witness did not send or receive the messages, nor witness their creation. *Id.* at 231, 830 S.E.2d at 715.

However, this Court then applied Rule 901(b)(4), SCRE, and determined the messages had been authenticated because their content "was distinctive enough that a reasonable jury could find [his codefendant] wrote them." *Id.* at 233, 830 S.E.2d at 715. This court noted several facts linked the messages to the defendant via his codefendant and ruled that "[t]aken together, th[o]se circumstances serve[d] as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets." *Id.* at 233, 830 S.E.2d at 715-16. This Court concluded it was "persuaded the [fraud] risk [surrounding social media] is one Rule 901, SCRE, contemplates and can contain. Lawyers can always argue case-specific facts bearing on this risk and attempt to convince the jury the writing is not genuine." *Id.* at 234, 830 S.E.2d at 716.

Discussion

In this case, the Trial Court erred in admitting photographs obtained from Snapchat because this evidence was not properly authenticated pursuant to Rule 901, SCRE, by personal knowledge, distinctive characteristics, or records custodian. The Prosecutor maintained that the "certificate of authenticity" from Snapchat was sufficient to authenticate the photographs pursuant to Rule 902(8) of the South Carolina Rules of Evidence. (R. 50, line 25 – 51, line 14). The State did not properly authenticate the Snapchat records by (1) failing to present any witness who had personal knowledge that Appellant posted those photographs on Snapchat; (2) failing to provide evidence that the photographs of Appellant were distinctive enough that a reasonable juror could find Appellant had ownership or control over that Snapchat account; and (3) failing to subpoena a Records Custodian from Snapchat to authenticate the records. Accordingly, the Trial Court erred in admitting this evidence for the jury's consideration.

III. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE DECEASED CI'S VIDEO RECORDING OF INSIDE APPELLANT'S HOME IN VIOLATION OF ARTICLE 1, SECTION 10'S PROHIBITION AGAINST UNREASONABLE INVASIONS OF PRIVACY.

The South Carolina Constitution grants citizens an express right to privacy. S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated ....") (emphasis added). Our Supreme Court has held, "[T]he privacy interests in one's home are the most sacrosanct, [and] there must be some threshold evidentiary basis for law enforcement to *approach* a private residence." (emphasis added). *State v. Counts*, 413 S.C. 153, 172, 776 S.E.2d 59, 69 (2015). The Court further held that "[Officers] must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." *Id.* at 172, 776 S.E.2d at 70 (emphasis added).

"In establishing this threshold requirement, our Supreme Court reaffirmed that the South Carolina Constitution's privacy protection against unreasonable searches and seizures 'favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.'" *State v. Boston*, 433 S.C. 177, 183, 857 S.E.2d 27, 30 (Ct. App. 2021) (quoting *Counts*, 413 S.C. at 168, 776 S.E.2d at 68), cert. granted, S.C. Sup. Ct. Order Dated Jan. 13, 2022. The Court explained its ruling in *Counts* as follows:

> For our state constitutional right to privacy to have any significance, we believe there must be some minimum evidentiary standard met before law enforcement conduct a warrantless search of a South Carolina citizen's home. Therefore, we hold that law enforcement must have reasonable suspicion of illegal activity before approaching the targeted residence and conducting the "knock and talk" investigative technique.

Id. at 174, 776 S.E.2d at 70–71.

In *Boston*, this Court determined that officers had reasonable suspicion to approach and knock on the door of an apartment where the defendant was visiting. 433 S.C. at 186, 857 S.E.2d at 32. After responding to a call, an officer proceeded to patrol a nearby apartment community known for high volumes of narcotic activity and because "vulnerable" adults lived there. *Id.* at 179, 857 S.E.2d at 28. While surveilling the apartments, the officer observed two men that he knew were associated with drug activity enter an apartment. *Id.* at 180, 857 S.E.2d at 28. The officer knew the apartment to be the residence of an individual with mental disabilities that used narcotics. *Id.* Based on concerns for the resident's safety and the nature of the activities that might take place inside the apartment, the officer decided to conduct a knock and talk. *Id.* at 180, 857 S.E.2d at 28–29.

In response to a knock, the resident opened her door and allowed the officers to enter the apartment. *Id.* at 180, 857 S.E.2d at 29. Once inside, officers saw two men in the kitchen huddled around a microwave, two plastic bags with white residue on them, and a scale. *Id.* When the men noticed the officers, they opened the microwave, hid their hands, and ran to the bathroom. *Id.* Concerned for their safety, the officers conducted a protective sweep of the apartment and ordered the men out of the bathroom. *Id.* at 180–181, 857 S.E.2d at 29. The officers found a glass measuring cup filled with a steaming substance suspected to be crack cocaine. *Id.*

This Court reasoned that the officers had reasonable suspicion to conduct the knock and talk because of the investigating officer's knowledge of (1) the two men in the apartment, (2) criminal drug investigation, and (3) the apartment community he surveilled. *Id.* at 185, 857 S.E.2d at 31. Specifically, the officer testified to his objective

knowledge of the apartment community and the three people inside the apartment, stating he knew all three and that he had previous encounters with the two men that entered the apartment. *Id.* The officer also had eleven years of criminal drug investigation experience and knew the apartment community was a hot spot for drug activity. *Id.*

Discussion

In this case, the Trial Court erred in refusing to suppress the deceased CI's video recording of inside Appellant's home in violation of Article I, Section 10's prohibition against unreasonable invasions of privacy. Defense Counsel argued that the CI is an agent of the State who has entered a private citizen's residence wearing a live recording device, which allowed the State (law enforcement) to view inside the home without the owner's consent, and more importantly, without a warrant. (R. 40 – 44). Notably, the State's key witness died prior to trial and was not previously cross-examined by Defense Counsel.

On cross-examination during the pre-trial hearing, Agent Alex Blake testified that he had never spoken to or met with Appellant prior to the alleged drug deal with the CI. (R. 99, line 12 – 100, line 1). Agent Blake also admitted that the only information of illegal activity he had regarding Appellant was provided to him by the deceased CI and the other Special Agent. (R. 101, line 15). Agent James Martin maintained that he did not recall whether the video feed was live when the deceased CI went into Appellant's residence but conceded to the "audio being transmitted live". (R. 113, lines 13-23). The primary purpose of our state constitution's heightened protection is to protect a citizen's right not to have law enforcement invade the privacy of their home. Therefore, the State violated Appellant's right against unreasonable invasions of privacy by admitting a video

from a dead CI who provided a live feed for law enforcement to invade Appellant's home.

IV. THE TRIAL COURT ERRED BY FAILING TO GRANT A NEW TRIAL, OR IN THE ALTERNATIVE, TO GRANT AN EVIDENTIARY HEARING, WHERE DEFENSE COUNSEL PRODUCED SEVEN AFFIDAVITS AT A POST-TRIAL HEARING INDICATING TWO JURORS INTENTIONALLY CONCEALED INFORMATION IN RESPONSE TO THE COURT'S VOIR DIRE QUESTIONS, AND WHERE THE DEFENSE COUNSEL WOULD HAVE STRUCK THEM HAD THE JURORS NOT CONCEALED THE INFORMATION.

Appellant' right to a trial by a fair and impartial jury pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 14 of the South Carolina Constitution was violated when two jurors—Juror Number 6, and Juror Number 53—intentionally concealed information regarding knowledge of the defendant, as well as bias and prejudice against the defendant in response to the trial court's questions during voir dire. As such, the trial court abused its discretion by denying Appellant's motion for new trial, and alternatively refusing to even hold an evidentiary hearing on what is "necessarily" a "factually intensive determination." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001).

A new trial is required when a juror intentionally conceals information that would either (a) support a challenge for cause, or (b) been a material factor in the use of a peremptory strike. *Id.*, 345 S.C. at 587, 550 S.E.2d at 284. Moreover, as our Supreme Court affirmed in *Woods*, "[w]here a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. *Id.* 345 S.C. at 587, 550 S.E.2d 282, at 288. However, "such an inference may not be drawn where there is information to the contrary or the failure to disclose is innocent." *State v. Guillebeaux*, 362 S.C. 270, 275, 607 S.E.2d 99, 102 (2004) (holding,

after a post-trial evidentiary hearing included testimony of the Juror in question and other relevant witnesses to the matter, that Juror's answers to voir dire were honest).

The initial inquiry to be made is whether the concealment by the juror was intentional. *Woods*, 345 S.C. at 587, 550 S.E.2d at 288. Specifically, "intentional 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." *Id.* On the other hand, "[u]nintentional concealment… 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 average juror's failure to respond is reasonable under the circumstances." *State v. Eubanks*, 878 S.E.2d 335 (Ct. App. 2022) (quoting State v. *Coaxum*, 410 S.C. 320, 325 n.4, 764 S.E2d 242, 244 n.4) *Id.* Further, "whether a juror's failure to respond is intentional *is a fact intensive determination* which must be made on a case by case basis." *Woods*, 345 S.C. at 587, 550 S.E.2d at 288 (emphasis added). Such determinations should be made after an evidentiary hearing. *Porter v. Zook*, 898 F.3d 408, 428 (4th Cir. 2018).

Discussion

In the present case, the Trial Court asked the jury panel several voir dire questions pertaining to relationships, biases, and prejudices toward the parties. Specifically, the Trial Court asked the following question:

> Is anybody on the panel related by blood or by marriage or have any business, social, religious, or fraternal relationship with Marc McKeiver? And with that said, I'm gonna ask Mr. McKeiver, if he would, to stand and let the jury take a look and make sure you, we covered the question about relationship.

(R. 6, ln. 16-21). Although two jurors in the panel raised their hands, neither included Juror Number 6, or Juror Number 53. Further, the Trial Court also asked the following pertinent questions:

> THE COURT: Winter Bennett. Anybody on the panel connected by blood or by marriage or have any business, social, religious or fraternal relationship with any of these potential witnesses? If so, we need you to raise your right hand.
> (Whereupon, no one raises their hand)
>
> THE COURT: Anybody on the panel have any personal knowledge or have developed an opinion about this case, if so, we need you to raise your right hand but don't make any comment?
> (Whereupon, no one raises their hand)
>
> THE COURT: Does anybody on the panel have any opinion, any biasness, or any prejudice toward either the State or the defendant whereby you cannot be a fair and impartial juror? We need you to raise your right hand but don't say anything.
> (Whereupon, no one raises their hand)
>
> THE COURT: Does anybody on the panel know of any reason why you should not serve as a juror on this particular case, please raise your right hand?
> (Whereupon, no one raises their hand)

(R. 10, ln. 5-25).

However, as was brought to the attention of Defense Counsel after the conclusion of trial, two jurors—Juror Number 6, and Juror Number 53—were ultimately seated in Appellant's case that failed to respond to voir dire questions concealing their knowledge of the defendant, as well as bias and prejudices against him. *Id.* Defense Counsel raised the matter by way of post-trial motion based on January 20, 2022, shortly thereafter. *See* Notice and Motion for New Trial Pursuant to Rule 29(A), SCRCrimP. The matter was

heard by the trial court on March 10, 2022, seeking a new trial, or in the alternative at least an evidentiary hearing to question both the Jurors and witnesses who provided the affidavits. (R. 398, ln. 14-18; R. 411, ln. 21—412, ln. 6.

Juror Number 6

Appellant's motion and affidavits readily indicated that Juror Number 6—who was initially seated as an alternate juror but was moved to the petit jury when another could not continue due to illness—not only knew one of the witnesses in the case, but also harbored bias and prejudice against Appellant due to her relationship with the family of the deceased confidential informant involved in the case. Specifically, Juror Number 6, who was well known to the affiant Treasury Smith, not only personally knew witness Winter Bennett, but also told affiant Smith that Appellant gave Ms. Bennett a sexually transmitted disease.

Juror Number 6 further intimated to Smith that Appellant was doing a lot of bad things in Dillon and she already determined that she was going to vote guilty for Appellant. *See* Motion for New Trial, p. 3 with attached affidavits. Moreover, Smith indicated that Juror Number 6 was close to the family of the deceased confidential informant who was involved with this case, and that they too wanted her to find Appellant guilty due to their belief that Appellant had knowledge about the informant's death. Finally, the father of Juror Number 6's children was involved in an altercation with Appellant, and Juror Number 6 knew of the matter. *Id.*

All these allegations present a question of juror misconduct for intentional concealment. First, based upon the information provided, Juror Number 6 socially or fraternally knew witness Winter Bennett, and yet she failed to respond to the trial court's

question directly addressing the matter. She likewise had reasons to be biased and hold prejudice against Appellant not only for getting into a fight with the father of her children, but also for the more concerning fact that she knew the family of the deceased confidential informant in the case.

However, what is most concerning is that she told others that she was going to vote for a guilty verdict. In each instance alleged, Juror Number 6 would have a bias or prejudice against Appellant, and even developed an opinion regarding guilt or innocence—all of which were questions clearly asked by the trial court in plain language concealed by Juror Number 6. Had Juror Number 6 come forward during the voir dire process, she would have been struck—if not for cause, then certainly by the defense's use of a peremptory strike.[1] Under such circumstances, and without any evidence to the contrary from the State, the Court erred by failing to grant Appellant a new trial. *See Woods*, 345 S.C. at 587, 550 S.E.2d 282, at 288 ("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."). Further, even if the Court thought there might be other reasons for Juror Number 6's concealment, then the trial court should have ordered an evidentiary hearing. *Id.* ("whether a juror's failure to respond is intentional *is a fact intensive determination* which must be made on a case by case basis."). *See, e.g., McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 551 n.3, 104 S.Ct. 845, 848 n.3 (1984)[2] *Porter v. Zook*, 898 F.3d at 428 ("These determinations [by the trial

[1] At the time Juror Number 6 was seated as an alternate juror, Appellant had two strikes remaining to use. (R. 25, ln. 2-13).

[2] "While considerations of judicial economy might have motivated the Court of Appeals in this case to proceed directly to the issue of the effect of juror Payton's non-disclosure,

court] are not only contrary to the legal standard, but should be properly made *after an evidentiary hearing.*"); *Woods*, 345 S.C. at 587, 550 S.E.2d at 288 ("[W]hether a juror's failure to respond is intentional *is a fact intensive determination* which must be made on a case by case basis.") (emphasis added). Regardless, Appellant's right to a trial by a fair and impartial jury pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 14 of the South Carolina Constitution were violated. Accordingly, his conviction and sentence must be reversed.

Juror Number 53

As for Juror Number 53, Appellant likewise presented information to the court of potential bias and prejudice against Appellant. Specifically, Appellant's Motion included several affidavits indicating Juror Number 53 was upset with Appellant for fighting with Juror Number 53's family or friends. *See* Motion for New Trial, p. 4 with attached affidavits. Further, Juror Number 53 personally knew Appellant well enough that he apparently disliked Appellant for playing his music loudly in public.

As with Juror Number 6, Juror Number 53's concealment of information in the face of questions from the court not only about social relationships with Appellant, but also regarding bias, prejudice, and any reason why they should not be seated as a juror, indicate the concealment was intentional. Had Defense Counsel known of these biases and prejudices harbored by Juror Number 53 against Appellant, then he would have used

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in cases in which a party is asserting a ground for new trial, the normal procedure is to remand such issues to the district court for resolution. Although petitioner does not dispute respondents' version of the telephone call to juror Payton, it is foreseeable that in another such case, the parties could present the appellate court with a continuing, difficult factual dispute. Appellate tribunals are poor substitutes for trial courts *for developing a record or resolving factual controversies*." (emphasis added).

a peremptory strike. Accordingly, as with Juror Number 6, the Trial Court erred by failing to grant Appellant a new trial. *See Woods*, 345 S.C. at 587, 550 S.E.2d 282, at 288 ("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.").

Further, even if the Trial Court thought there might be other reasons for Juror Number 53's concealment, then the court should have ordered an evidentiary hearing. *Id.* ("whether a juror's failure to respond is intentional *is a fact intensive determination* which must be made on a case by case basis."). Regardless, Appellant's right to a trial by a fair and impartial jury pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 14 of the South Carolina Constitution was violated. Accordingly, his conviction and sentence must be reversed.

CONCLUSION

Based on the foregoing reasons, Appellant Marc Mckeiver respectfully requests that this Court reverse the Trial Court and remand to the Dillon County Court of General Sessions for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2022-000324

Trial Court Case No. 2019-GS-16-0996

The State of South Carolina,

Respondent,

v.

Marc Yasin Mckeiver,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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June 21, 2023