THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Jakes, Appellant.

Appellate Case No. 2011-198747

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 5158
Heard April 3, 2013 – Filed July 10, 2013

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Julie Kate Keeney, both of Columbia, for Respondent.

GEATHERS, J.: David Jakes appeals his convictions for assault and battery, attempted armed robbery, and possession of a weapon while committing a violent crime, arguing the trial court erred in refusing to excuse Juror 102 and to replace this juror with an alternate. Finding no error, we affirm.

FACTS/PROCEDURAL HISTORY

On the evening of June 3, 2010, a Husband and Wife drove through Colleton County on I-95, as the family moved to Florida; Wife's mother (Mother-in-law) accompanied the couple, but drove behind them in another vehicle pulling a U-Haul trailer. When Mother-in-law's truck overheated, both vehicles exited the interstate and stopped where the off-ramp intersected a country road. Once alongside that road's shoulder and in anticipation of the tow truck's arrival, Husband relocated the trailer to his operable vehicle. While Husband was reconnecting the trailer, he was somewhat out-of-view; Wife and Mother-in-law, however, stood and were more visible to passing traffic.

While the family waited for the tow truck, Antwan McMillan, who was driving by in another vehicle, as well as his passenger, Appellant David Jakes, noticed the stranded motorists. McMillan said the family was an "easy lick" and thereafter stopped his vehicle near the two standing women. Jakes, whose face was largely concealed, jumped out of the backseat of McMillan's vehicle, brandished a stolen firearm, and yelled at the women to "Get up, pretty lady." Husband, who was carrying a handgun pursuant to a concealed weapons permit, appeared from behind his vehicle, drew his firearm, and ordered Jakes multiple times to "[g]et back in your car and leave us alone." When Jakes did not retreat and instead aimed his weapon, Husband discharged his compact pistol, striking Jakes multiple times; a weapon was also indiscriminately discharged by McMillan from his car. The injured Jakes crawled back to McMillan's waiting vehicle, which then sped away. Husband, Wife, and Mother-in-law were physically uninjured.

A Colleton County grand jury indicted Jakes for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime, for his conduct toward the stranded motorists.[1] During the subsequent trial's *voir dire*, the trial judge asked, *inter alia*, whether any potential juror: (1) was a member of a law enforcement agency; (2) was related to, or had a close relationship with, any of the named witnesses; or (3) was biased, prejudiced, or otherwise unable to give either party a fair trial. Based upon the responses to these questions, the trial judge excused a few panel members and the parties next selected a jury from the remaining panel members. Jakes

[1] The State tried Jakes and McMillan together. McMillan was indicted for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime.

utilized three of his five allocated strikes and his co-defendant, McMillan, utilized four of his five allocated strikes. Among the seated jurors was Juror 102 (Juror).

The trial judge subsequently called in the empaneled jury, gave initial instructions, and allowed trial to begin. After three witnesses testified, however, the trial judge informed counsel for both parties, *in camera*, about a note he received from Juror expressing concern about her own qualification due to her husband's status as a Colleton County reserve deputy. The trial judge then called in Juror and confirmed Juror's husband was a reserve deputy and that Juror had not discussed the case with her husband. The trial judge also asked Juror if her husband's status affected her ability to give either party a fair and impartial trial. Juror responded, "No, it wouldn't" and the trial judge allowed Juror to return to the jury room.

Subsequently, the trial judge continued to discuss the course of events with counsel. While defense counsel made no objections to the trial judge's questioning of Juror or to making Juror's note an exhibit, defense counsel objected to Juror's continued service. Defense counsel also noted that the juror information sheet, which the Clerk's Office prepared, listed Juror's husband's occupation as "Environmental Health Management, but never said anything about any reserve deputy status." Defense counsel argued that had Juror's husband's full employment status been known, he would have utilized Jakes' strikes differently.

An off-the-record conference then followed, during which a key realization developed. Specifically, Juror did fully disclose her husband's employment on her *juror questionnaire* as including both "Environmental Health Management" and "reserve deputy." However, "the Clerk's Office didn't transmit everything" that Juror filled out on her *juror questionnaire* when the Clerk's Office provided counsel with the *juror information sheet*. Thus, the pertinent information existed within the compiled *juror questionnaires* that defense counsel could have obtained from the Clerk's Office upon request, but this information did not exist within "the typed[-]up list which the lawyers" received from the Clerk's Office (*juror information sheet*).

The trial judge subsequently declined to excuse Juror due to this "Scri[ve]ner's error," despite defense counsel's prior unawareness of the juror information sheet's deficiencies. The trial judge also referenced the fact that defense counsel did not request any *voir dire* question about spousal employment and that a compilation of information from the completed juror questionnaires was available, upon request, from the Clerk's Office.

Thereafter, trial resumed and the jury ultimately found Jakes guilty of three counts of assault and battery in the first degree (a lesser-included offense of attempted murder), three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime. Based upon these convictions, the trial judge sentenced Jakes to thirty-five years' incarceration. This appeal followed.

ISSUE ON APPEAL

Did the trial court err by not excusing Juror where: Juror's husband was a reserve deputy; Juror disclosed her husband's status on her *juror questionnaire*; the *juror information list* provided to counsel by the Clerk's Office did not list husband's status as a law enforcement officer; neither party requested the court to ask during *voir dire* whether any juror's spouse was in law enforcement; Juror disclosed her husband's status after trial began; Juror confirmed she could be fair and impartial; Defense counsel requested seating an alternate juror; and Defense counsel could have, through the exercise of due diligence, learned of Juror's husband's employment status?

STANDARD OF REVIEW

"A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion." *State v. Bell*, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

The trial judge's refusal to excuse Juror and to substitute her with an alternate was not an abuse of discretion because: (A) Juror was impartial, despite her husband's reserve deputy status; (B) Juror did not conceal her spouse's employment; and (C) Jakes' counsel, through the exercise of due diligence, could have learned of Juror's husband's employment status.

A. The Trial Judge Did Not Err in Finding that Juror Appeared Impartial.

Section 14-7-1020 of the South Carolina Code (Supp. 2012) requires a trial judge, upon motion of either party, to determine whether a juror is indifferent:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . If it appears to the court that the juror is not indifferent in the cause, he must be placed aside . . . and another must be called.

S.C. Code Ann. § 14-7-1020; *accord State v. Cochran*, 369 S.C. 308, 321, 631 S.E.2d 294, 301 (2006) (citing section 14-7-1020). While such determinations are within the sound discretion of the trial judge, "[t]here is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." *State v. Burgess*, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (quoting *State v. Hilton*, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1911)); *accord State v. Mercer*, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009).

Accordingly, the mere fact that a juror's spouse is a law enforcement officer, who is not involved in the case, does not, in and of itself, render a juror biased and, thus, unable to serve on a jury; rather, the crux of that determination is whether it "appears to the court that the juror is not indifferent in the cause." *See* § 14-7-1020 (stating the trial judge must determine whether a proposed juror is related to either party or is otherwise interested in, formed an opinion about, or is biased or prejudiced toward a party); *id.* (requiring the trial judge to set aside jurors who do not appear "indifferent in the cause"). Moreover, even jurors related by affinity or consanguinity to an actual testifying witness or those who closely knew the putative victim of a crime are not, absent an inability to maintain impartiality, unqualified. *See State v. Wells*, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (finding a juror, who directly employed victim, qualified); *Burgess*, 391 S.C. at 18, 703 S.E.2d at 514 (holding a trial court need not excuse a juror simply because the juror has some relationship to the victim); *id.* ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his

relationship to a witness, either by affinity or consanguinity, within any degree." (quoting *Hilton*, 87 S.C. at 439, 69 S.E.2d at 1078)).

In the instant matter, Juror was unrelated to the defendants and the potential witnesses, and she did not know the victims; she was merely related to a non-testifying law enforcement officer. Furthermore, once the trial judge learned Juror's husband was a reserve deputy, he asked Juror whether her husband's employment would "in any way affect [her] ability to give the [State] or [Jakes] . . . a fair and an impartial trial." Juror confirmed "it wouldn't." Because Juror appeared neither biased nor partial, the trial court was not only within its discretion in finding Juror qualified, the court would have erred had it made a contrary finding.

B. Juror Did Not Conceal Her Husband's Reserve Deputy Status.

We find that *voir dire* does not, absent an appropriate motion, require a trial judge to inquire into the employment status of any potential juror's spouse. Moreover, we hold Juror did not conceal any information that would have required the trial judge to replace her with an alternate.

Voir dire serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). Accordingly, a trial judge must ascertain the qualifications of the jurors and, on motion, examine any potential juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein. *See* S.C. Code Ann. § 14-7-1010 (Supp. 2012) (requiring the trial judge to determine juror qualification); § 14-7-1020 (requiring the trial judge to determine, upon motion, whether a juror is related to either party or is otherwise not impartial); *Wise*, 359 S.C. at 22-23, 596 S.E.2d at 479 (discussing a trial judge's responsibility to determine juror qualifications in view of sections 14-7-1010 to -1020). While the parties may submit areas for inquiry, the manner of such *voir dire* examinations is left to the sound discretion of the trial judge. *Wise*, 359 S.C. at 23, 596 S.E.2d at 479. Thus, the law does not, absent an appropriate motion, require a trial court to determine whether any potential jurors are related to law enforcement officers.

It may be inferred that a juror who *intentionally* conceals information inquired into is not impartial. *State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002) (quoting *State v. Woods*, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001)).

"[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." *Woods*, 345 S.C. at 588, 550 S.E.2d at 284. Thus, a *Woods* analysis applies "when a juror conceals information"; in conducting this analysis the first factor for determination is whether the identified concealment was intentional or unintentional. *Id.* at 587, 550 S.E.2d at 284; *accord Stone*, 350 S.C. at 448, 567 S.E.2d at 247 (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284).

At the outset, Juror fully disclosed her husband's status as a law enforcement officer on her submitted *juror questionnaire*, which specifically inquired into the topic. Thus, Juror unquestionably revealed her husband's status at this early phase of the jury selection process.

Further, Juror did not conceal her husband's employment status at *voir dire*. During *voir dire*, the trial judge asked no question requiring Juror to respond that her husband was a law enforcement officer. While the trial judge did ask whether any potential juror was a member of law enforcement and whether any potential juror was related to or a close personal friend of the named potential witnesses, which did include some law enforcement officers, neither inquiry required Juror to disclose the employment status of her non-testifying husband. Additionally, while Jakes could have requested the trial judge to ask whether any panel members were related to law enforcement officers, Jakes concedes he made no such request. Thus, no *voir dire* questions required Juror to respond with her husband's employment status and, as a result, no concealment occurred.[2]

Despite the absence of any concealment, much less intentional concealment that would satisfy the first requirement for relief under *Woods*, Jakes nonetheless argues he is entitled to relief because the omitted information satisfied the second requirement under *Woods*, *i.e.*, it would have been a material factor in the use of his peremptory challenges. *See Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (requiring a new trial when an identified concealment of information (a) was intentional and (b) would have supported a challenge for cause or would have been

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[2] Both parties conceded in their briefs that juror concealment, a precondition necessary to trigger analysis under *Woods*, did not exist. *See* 345 S.C. at 587, 550 S.E.2d at 284 (holding "[*w*]*hen a juror conceals information*", the court must determine whether two factors exist, and if they do, afford relief) (emphasis added).

a material factor in the use of peremptory challenges). However, because Juror did not conceal her husband's employment status, intentionally or otherwise, no juror concealment occurred and, thus, no further analysis under *Woods* is warranted. *Id.* (holding the analysis applies "[w]hen a juror conceals information").

Consequently, Jakes' contention, that he would have used his peremptory strikes differently if he had known of Juror's husband's employment status, is unavailing. *Cf. State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) ("[A] determination that a juror did not intentionally conceal the information ends the court's inquiry."); *id.* at 276, 607 S.E.2d at 102 ("As we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of . . . peremptory strikes.").

While we fully recognize that *Woods* and *Stone* are the controlling authorities for determining whether *juror concealment* requires juror removal, the issue before this court does not even approach potential juror concealment, intentional or unintentional; as a result, a *Woods* analysis does not resolve this non-concealment matter. *See Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (stating the analysis applies "[w]hen a juror conceals information inquired into"); *Stone*, 350 S.C. at 448, 567 S.E.2d at 247 (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284). Rather, the issue involves the trial judge's refusal to excuse a juror where the Clerk's Office omitted potentially objectionable juror information from the juror information sheet and where defense counsel could have discovered the omitted juror data through the exercise of due diligence. Thus, *Woods* does not determine the merits of Jakes' non-concealment-based appeal that but for the omission within the juror information sheet provided by the clerk of court, Jakes would have used his peremptory strikes differently. *Wilson v. Childs*, however, is instructive in this regard and, therefore, pertinent to a fair appraisal of Jakes' allegation of prejudicial error. *See* 315 S.C. 431, 436, 434 S.E.2d 286, 289-90 (Ct. App. 1993) (finding no error where an omission within a juror information sheet could have been discovered through the exercise of due diligence and where no prejudice was demonstrated).[3]

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[3] Both *Woods* and *Wilson* cite to *Thompson v. O'Rourke* as support for each case's key holding. *See Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (citing *Thompson*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)); *Wilson*, 315 S.C. at 436, 434 S.E.2d at 431 (citing *Thompson*, 288 S.C. at 14, 339 S.E.2d at 506). Although *Thompson* involved an issue of juror concealment and *Woods* later refined *Thompson* in

C. The Absence of Due Diligence and Demonstrated Prejudice.

We find the trial judge did not err in refusing to replace Juror; Jakes' counsel could have learned of Juror's Husband's employment status through the exercise of due diligence and Jakes did not demonstrate Juror's service prejudiced him. It should be stated from the outset, our analysis does not consider whether the clerk of court committed a "legal error." Rather, the focus of this section is whether the trial court erred in not replacing the Juror, where the clerk of court's mistake allegedly resulted in prejudice.

Restrictions upon a party's right to object to a particular juror's seating exist. Objections "not made prior to [e]mpanelment are waived," unless the objecting party "demonstrate[s] he could not have discovered the ground for the objection *through due diligence*" and also *shows resulting prejudice*. *Wilson*, 315 S.C. at 436, 434 S.E.2d at 289-90 (applying S.C. Code Ann. §§ 14-7-1030 (1976) and 14-7-1140 (1976), as amended) (emphasis added); *see* § 14-7-1140 (Supp. 2012) ("No irregularity . . . in the drawing, summoning, returning, or *impaneling* of jurors is sufficient to set aside the verdict, unless the objecting party is injured by the irregularity or unless the objection is made before there returning of the verdict.") (emphasis added). Accordingly, where a party did not submit a *voir dire* question that would have revealed the objectionable information and where that party could have obtained juror questionnaire data upon request to the clerk of court through the exercise of due diligence, but instead elected not to make such requests, that party cannot make a post-empanelment objection to a particular juror's service, despite the fact that the provided juror information sheet omitted potentially objectionable juror questionnaire data and was relied upon by counsel. *Wilson*, 315 S.C. at 436, 434 S.E.2d at 289-90.

In *Wilson*, this court previously considered the implications of the Clerk's Office providing an irregular juror information sheet. *See generally* 315 S.C. at 431, 434

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fashioning the current juror concealment test, *Woods* does not negate the applicability of the general due diligence standard expressed in *Thompson* to non-concealment-based challenges, such as an omission by the clerk of court within a juror information sheet. *See Thompson*, 288 S.C. at 14, 339 S.E.2d at 506 (considering whether "the moving party was not negligent in failing" to learn of the potentially objectionable, omitted information). In fact, the *Wilson* court specifically relied upon *Thompson's* due diligence standard in resolving an issue stemming from an omission by the clerk of court. 315 S.C. at 436, 434 S.E.2d at 431 (citing *Thompson*, 288 S.C. at 14, 339 S.E.2d at 506).

S.E.2d at 286. In that case, a juror completed his pre-trial *juror questionnaire* and returned it to the court; the juror "stated his place of birth was 'Aleppo, Syria.'" *Id.* at 436, 434 S.E.2d at 289. The *juror information sheet*, however, which was prepared by the Clerk's Office and made available to both parties, did not indicate the juror's race or nationality, despite the fact that the *juror questionnaire* contained this pertinent information. Notably, because both parties relied upon the *juror information sheet* provided by the Clerk's Office, neither party was aware, during *voir dire*, that the juror was a noncitizen and, thus, unqualified. In finding the juror's service, and indirectly, that the omission by the Clerk's Office (*i.e.*, the irregular juror information sheet) did not constitute reversible error, the court noted the following key findings: (1) the complete juror questionnaire responses were available to the parties; (2) the appellant did not submit to the trial judge any *voir dire* question regarding the omitted information; (3) the appellant could have discovered the omitted information through the exercise of due diligence; (4) the challenged juror stated he could give both parties an impartial trial; and (5) the appellant did not demonstrate any resulting prejudice. Although the omission by the Clerk's Office in *Wilson* related to a *per se* disqualification (non-citizenship), *Wilson* is equally instructive when an omission involves a matter that is not alone dispositive as to juror qualification.

Remarkably, the record in the case at bar supports findings analogous to each of the key findings in *Wilson*. First, the complete juror questionnaire data, which showed Juror's husband was employed in both environmental health management and law enforcement, were available to both parties prior to *voir dire* upon request to the Clerk's Office. Therefore, just as in *Wilson*, the omitted information was available to the parties. Second, Jakes, like *Wilson*, did not submit any *voir dire* questions regarding the disputed juror's qualification (*i.e.*, in Jakes' case, whether any potential juror's spouse was a law enforcement officer). Third, Jakes similarly could have discovered the occupation of Juror's husband (the disputed status), *through the exercise of due diligence, by requesting a copy of the available compiled juror questionnaire data.* Fourth, Juror assured the trial court she could give both parties a fair and impartial trial. Finally, Jakes has not shown Juror's empanelment prejudiced him. Thus, evidence to support findings analogous to each of the key findings in *Wilson* exists in the present case.

Accordingly, we hold the trial court did not err by allowing Juror to continue to serve on the jury. *See Wilson*, 315 S.C. at 436, 434 S.E.2d at 289-90 (finding no error where an omission within a juror information sheet could have been

discovered through the exercise of due diligence and where no prejudice was demonstrated).

CONCLUSION

Based on the foregoing, the decision of the circuit court is

AFFIRMED.

LOCKEMY, J., concurs.

FEW, C.J., concurring: I agree with the majority's analysis in sections A and B of the opinion, except (1) I would hold the *Woods* test alone resolves the merits of Jakes' concealment argument, and (2) I believe *Wilson v. Childs* is inapplicable to the resolution of this appeal. I would restrict our analysis to whether the trial court's rulings that the juror could be fair and impartial and did not conceal any information during voir dire are supported by the evidence. I agree with the majority that the evidence does support those two rulings. *See State v. Burgess*, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (finding "no error in the judge's decision not to remove the juror" where "the juror did not conceal any information requested during voir dire" and "the judge acted within his discretion in finding the juror could be fair and impartial"). The majority's analysis of these two issues resolves this appeal and we need go no further.

I believe the majority's analysis in section C of its opinion is incorrect. In *Wilson*, this court analyzed whether the trial court should have granted a new trial after the parties discovered a Syrian national had served on the jury. 315 S.C. 431, 434, 434 S.E.2d 286, 288 (Ct. App. 1993). Section 14-7-130 of the South Carolina Code (Supp. 2012) requires that only United States citizens be placed on the list of potential jurors for a term of court. Thus, placing a Syrian national on a jury list is an "irregularity . . . in the drawing, summoning, returning, or impaneling of jurors," S.C. Code Ann. § 14-7-1140 (Supp. 2012), and we correctly relied on section 14-7-1140 to determine whether the trial court properly refused to grant a new trial. This appeal is significantly different from *Wilson* because here we do not face a statutory disqualification for jury service. Thus, in my opinion, *Wilson* and the section upon which it relies—14-7-1140—are inapplicable.

By analyzing the omission of the juror's husband's job as an "irregularity" in the empanelling of a jury, the majority has essentially cast the issue in this appeal as whether the clerk of court committed legal error. In my opinion, however, whether the clerk of court made a mistake in summarizing the jurors' answers on their questionnaires is irrelevant. A trial lawyer who relies on a clerk of court to accurately summarize the information provided by jurors, rather than looking directly at the jurors' answers, does so at the risk the lawyer may miss key information that might affect the lawyer's use of peremptory challenges. In my opinion, the clerk of court's mistake in this case could never be legal error on which a trial court may base a decision to remove a juror, or on which we could grant a new trial for the trial court's refusal to do so. The trial court properly analyzed Jakes' request to remove the juror by considering whether the juror could be fair and impartial, and by applying the *Woods* test.