STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2011-198747

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

RETURN TO PETITION FOR REHEARING

On July 10, 2013 this Court issued published opinion in which it affirmed Appellant's convictions and sentences. State v. Jakes, Op. No. 5158 (S.C. Ct. App. filed July 10, 2013). Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing. This Court requested a return. The State ("Respondent") respectfully submits that this Court correctly affirmed Appellant's convictions and sentences. Appellant has failed to demonstrate any argument overlooked or disregarded by the Court. Accordingly, Appellant's petition for rehearing should be denied.

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 (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)

A. The trial judge properly found that the juror could be fair and impartial.

The State maintains that the ultimate test in cases such as this is whether the juror can be fair and impartial. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury . . . .").[1]

One of the ways our courts determine if a juror can be fair and impartial is by applying the State v. Woods[2] test. In Woods, our Supreme Court held: "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. at 587, 550 S.E.2d at 284 (emphasis added).

Appellant conceded in its brief and during oral argument that the juror did not intentionally conceal any information; therefore, the inquiry is over. 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.") (emphasis

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[1] Notably, the fact the juror's husband was a reserved deputy did not automatically disqualify that juror from serving on the jury. See generally State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2011) ("[T]he fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror."); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness . . ."). Furthermore, Appellant admits that the fact that the juror was married to a reserve deputy sheriff did not disqualify her from serving as a juror. (App. Br. 11.)

[2] 345 S.C. 583, 550 S.E.2d 282 (2001).

added); Smith v. State, 3775 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284)).

Further, the trial judge acted within his discretion in finding the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge's broad discretion to determine whether a juror is qualified). The juror in this case voluntarily gave the information regarding the status of her husband's employment even though she was never asked for the information during voir dire. Moreover, the juror told the trial judge that she could be fair and impartial despite the fact that her husband was a reserve deputy and former active deputy.

Thus, the only test this Court needed to apply in this case was the Woods test, which is essentially a test to determine whether or not a juror can be fair and impartial. The State agrees with the concurrence in this case and believes that the Woods test resolves this matter on appeal.[3]

B. The test Appellant advocates on appeal has never been approved by our Supreme Court.

Appellant argues that this Court should focus on the fact the omitted information would have been a material factor in the use of Appellant's preemptory strikes. But the test Appellant sets forth is not a test recognized by our appellate courts. Rather, Appellant

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[3] Notably, this Court and our Supreme Court have applied the Woods test in cases involving no concealment on behalf of the juror. See State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 107 (1998) (holding that the juror did not intentionally conceal any information because he was never asked if he had ever participated in death penalty activities in the past); Burgess, 391 S.C. at 19, 703 S.E.2d at 514-15 (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"); State v. Bell, 374 S.C. 136, 148, 646 S.E.2d 888, 894-95 (Ct. App. 2007) (finding that the trial court did not abuse its discretion in refusing to remove the juror because there was no concealment on behalf of the juror).

is picking the favorable part of the Woods test and ignoring the unfavorable part. Although our Supreme Court provided our trial courts with the two part test mentioned above, Appellant wants this Court to only apply the second part of the two part test, which deals with whether or not the information concealed would have been a material factor in the use of the party's peremptory challenges. Appellant blatantly ignores the first part of the Woods test, which deals with whether or not the juror intentionally concealed the information. As a matter of policy, a juror who does not conceal any information whatsoever should not be subject to stricter rules than a juror who intentionally conceals information. Accordingly, Appellant's argument on appeal is without merit.

C. The Clerk's omission of the information is irrelevant.

The State maintains that the Clerk's omission of the juror information is irrelevant. Appellant was not entitled to the juror information in the first place. See State v. Childs, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989) (holding that there is no right to discovery in criminal cases absent a statute or court rule and there is no statute or court rule requiring the state to provide defense counsel with prospective juror information). The clerk of court's office provided the juror information out of the convenience to the parties, and the fact the clerk provided the information out of convenience does not give the parties the right to rely solely on the jury summary sheet.

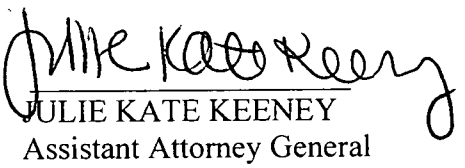
CONCLUSION

Based on the foregoing coupled with the arguments raised in the Final Brief of Respondent and arguments raised during oral argument, the State respectfully requests that Appellant's petition for rehearing be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General



JULIE KATE KEENEY
Assistant Attorney General
Bar No. 100145

August 26, 2013

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PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by the rules to be served have been served. This 26th day of August, 2013.

Ellen DuBois

Ellen DUBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727